


**GENERAL STATUTES
OF
NORTH CAROLINA**

1986 INTERIM SUPPLEMENT



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1986 INTERIM SUPPLEMENT

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UNDER THE DIRECTION OF
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To Be Used With the 1985 Cumulative Supplement

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Scope of Volume

Statutes:

Permanent portions of the general laws enacted at the 1986 Extra Session, held on February 18, 1986, and the 1985 (Regular Session, 1986) Session of the General Assembly affecting Chapters 1 through 168 of the General Statutes.

Annotations:

Sources of the annotations to the General Statutes appearing in this volume are:

North Carolina Reports through Volume 316, p. 202.
North Carolina Court of Appeals Reports through Volume 79, p. 755.
South Eastern Reporter 2nd Series through Volume 343, p. 395.
Federal Reporter 2nd Series through Volume 790, p. 902.
Federal Supplement through Volume 633, p. 728.
Federal Rules Decisions through Volume 109, p. 439.
Bankruptcy Reports through Volume 60, p. 37.
Supreme Court Reporter through Volume 106, p. 2008.
North Carolina Law Review through Volume 64, p. 708.
Wake Forest Law Review through Volume 20, p. 1058.
Campbell Law Review through Volume 8, p. 166.
Duke Law Journal through 1985, p. 1255.
North Carolina Central Law Journal through Volume 16, p. 83.
Opinions of the Attorney General.

Preface

This 1986 Interim Supplement to the General Statutes of North Carolina contains the general and permanent laws enacted at the 1986 Extra Session, which was held on February 18, 1986, and the 1985 (Regular Session, 1986) Session, which was held in June and July, 1986. In addition, this Supplement contains annotations from cases decided since the preparation of the 1985 Cumulative Supplement and available in advance sheets on or before July 1, 1986, and references to opinions of the Attorney General.

The General Statutes of North Carolina 1986 Interim Supplement

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For article, "The American Medical Association vs. The American Tort System," see 8 Campbell L. Rev. 241 (1986).

CASE NOTES

I. IN GENERAL.

Section 1-50(5) and this section are not unconstitutional as being violative of the open courts provision of the State Constitution and the equal protection clauses of the state and federal Constitutions. *Square D Co. v. C.J. Kern Contractors*, 314 N.C. 423, 334 S.E.2d 63 (1985).

In general a cause of action, etc. —

In accord with 1st paragraph in original. See *Penley v. Penley*, 314 N.C. 1, 332 S.E.2d 51 (1985).

As to the effect of former subsection (b), etc. —

Former subsection (b) of this section, providing that except where otherwise provided, a cause of action, other than one for wrongful death or one for malpractice, having as an essential element bodily injury to the person or a defect in or damage to property which originated under circumstances making the injury, defect or damage not readily apparent to the claimant at the time of its origin, would be deemed to have accrued at the time the injury was discovered by the claimant, or ought reasonably to have been discovered by him, pro-

vided that in such cases the period shall not exceed 10 years from the last act of the defendant giving rise to the claim for relief, was not applicable to claims arising out of a disease. *Wilder v. Amatex Corp.*, 314 N.C. 550, 336 S.E.2d 66 (1985).

Former § 1-15(b) had no application to claims arising out of disease. *Leonard v. Johns-Manville Sales Corp.*, — N.C. —, 340 S.E.2d 338 (1986).

Applied in *Long v. Fink*, — N.C. App. —, 342 S.E.2d 557 (1986).

Cited in *Estrada v. Burnham*, — N.C. —, 341 S.E.2d 538 (1986).

II. MALPRACTICE.

Plaintiff's claim against health care provider for unauthorized disclosure of communications was one for malpractice, and the applicable statute of limitations was subsection (c) of this section, rather than § 1-52. The cause of action accrued at the time of the last unauthorized discussion of the patient's case with another doctor. *Watts v. Cumberland County Hosp. Sys.*, 75 N.C. App. 1, 330 S.E.2d 242, cert. denied as to additional issues, 314 N.C. 548, 335 S.E.2d 27 (1985).

§ 1-17. Disabilities.

CASE NOTES

Test of Disability. — Although the disability statute which operates to toll the statute of limitations, subsection (a) of this section, provides for tolling for persons who are "insane" when their "cause of action" accrues, under the decisional and statutory law of this state, the appropriate test is one of mental competence to manage one's own affairs. *Cox v. Jefferson-*

Pilot Fire & Cas. Co., — N.C. App. —, 341 S.E.2d 608 (1986).

A cause of action to set aside a deed executed by a person who is non compos mentis must be brought within seven years from the date of execution, or within three years next after the removal of the disability, whichever period expires later. *Emanuel v.*

Emanuel, 78 N.C. App. 799, 338 S.E.2d 620 (1986).

§ 1-31. Action upon a mutual, open and current account.

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Section Inapplicable to Oral Agreement for Rent. — Even if the cause of action to enforce an oral agreement for rent was not barred by the statute of frauds, this section did not

apply to it, because the agreement was not a mutual account. *Simon v. Mock*, 75 N.C. App. 564, 331 S.E.2d 300 (1985).

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Limitations, Real Property.

§ 1-35. Title against State.

Legal Periodicals. — For comment, "Taking Without Compensation: Measure of Permanent Damages Modified by Application of Limitation of Actions for Trespass," see 20 Wake Forest L. Rev. 671 (1984).

For article, "The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislation, Private Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

§ 1-38. Seven years' possession under color of title.

CASE NOTES

I. IN GENERAL.

Limitations for Ejectment Actions. — This section and § 1-40 are the applicable statutes of limitation for ejectment actions. These statutes prescribe the period of time beyond which the owner of land is not privileged to bring an action for the recovery of his land from a person in possession thereof. *Poore v. Swan Quarter Farms, Inc.*, — N.C. App. —, 338 S.E.2d 817 (1986).

Actions to remove a cloud upon title are in essence ejectment actions and are properly reviewed as such where defendants are in actual possession and plaintiffs seek to recover possession. *Poore v. Swan Quarter Farms, Inc.*, — N.C. App. —, 338 S.E.2d 817 (1986).

Where plaintiffs made no specific allegation that defendants were in actual possession at the time of the filing of their action, and did not seek specifically to recover possession in their demand for relief, but merely prayed for rents and profits and removal of certain deeds as a cloud upon their title, plaintiffs' action was not in essence one for ejectment, controlled by this section and § 1-40; rather, plaintiffs' action was one to remove a cloud upon title, which was not barred by any statute of limitations. *Poore v. Swan Quarter Farms, Inc.*, — N.C. App. —, 338 S.E.2d 817 (1986).

A cause of action to set aside a deed executed by a person who is non compos mentis must be brought within seven years from the date of execution, or within three years next after the removal of the disability, whichever period expires later. *Emanuel v. Emanuel*, 78 N.C. App. 799, 338 S.E.2d 620 (1986).

V. BOUNDARIES OF LAND POSSESSED.

Editor's Note. — The case of *Walls v. Grohman*, 315 N.C. 239, 337 S.E.2d 556 (1985), annotated below, overrules *Price v. Whismant*, 236 N.C. 381, 72 S.E.2d 851 (1952); *Gibson v. Dudley*, 233 N.C. 255, 63 S.E.2d 630 (1951); *Sipe v. Blankenship*, 37 N.C. App. 499, 246 S.E.2d 527 (1978), cert. denied, 296 N.C. 411, 251 S.E.2d 470 (1979); and *Garris v. Butler*, 15 N.C. App. 268, 189 S.E.2d 809 (1972) to the extent that they apply a different rule.

When a landowner, acting under a mistake as to the true boundary between his property and that of another, takes possession of land believing it to be his own and claims title thereto, his possession and claim of title is adverse. If such adverse possession meets all other requirements and continues for

the requisite statutory period, the claimant acquires title by adverse possession even though the claim of title is founded on a mistake. *Walls v. Grohman*, 315 N.C. 239, 337 S.E.2d 556 (1985).

The case of *Walls v. Grohman*, 315 N.C. 239, 337 S.E.2d 556 (1985), holding that when one, acting under a mistake as to the true boundary between his property and that of another, takes possession of the land believing it to be his own, his possession is adverse, would be applied to a case which was pending on appeal when the decision was announced. *Fauchette v. Zimmerman*, — N.C. App. —, 338 S.E.2d 804 (1986).

VI. COLOR OF TITLE.

A. In General.

Adverse possession, to ripen into title after seven years, etc. —

In accord with original. See *Taylor v. Brittain*, 76 N.C. App. 574, 334 S.E.2d 242 (1985).

Color of Title Affords No Protection Where, etc. —

A deed which is color of title without adverse possession does not afford the grantee protection of the statute. *Taylor v. Brittain*, 76 N.C. App. 574, 334 S.E.2d 242 (1985).

Actual Possession of Part of Land. — When a person claims ownership through color of title, as long as that person has some actual possession of a part of the land, he or she is deemed the constructive possessor of the remainder of the land described in the instrument constituting color of title. *Taylor v. Brittain*, 76 N.C. App. 574, 334 S.E.2d 242 (1985).

B. Documents Held to Be Color of Title.

Deed When Person Does Not Have Title.

— A color-of-title situation can arise when the person executing the writing does not actually have title. A deed may constitute color of title for the land therein described. *Taylor v. Brittain*, 76 N.C. App. 574, 334 S.E.2d 242 (1985).

§ 1-40. Twenty years adverse possession.

Legal Periodicals. — For comment, "Taking Without Compensation: Measure of Permanent Damages Modified by Application of Lim-

itation of Actions for Trespass," see 20 Wake Forest L. Rev. 671 (1984).

CASE NOTES

I. IN GENERAL.

Editor's Note. — The case of *Walls v. Grohman*, 315 N.C. 239, 337 S.E.2d 556 (1985), annotated below, overruled *Price v. Whismant*, 236 N.C. 381, 72 S.E.2d 851 (1952); *Gibson v. Dudley*, 233 N.C. 255, 63 S.E.2d 630 (1951); *Sipe v. Blankenship*, 37 N.C. App. 499, 246 S.E.2d 527 (1978), cert. denied, 296 N.C. 411, 251 S.E.2d 470 (1979); and *Garris v. Butler*, 15 N.C. App. 268, 189 S.E.2d 809 (1972) to the extent that they apply a different rule.

When a landowner, acting under a mistake as to the true boundary between his property and that of another, takes possession of land believing it to be his own and claims title thereto, his possession and claim of title is adverse. If such adverse possession meets all other requirements and continues for the requisite statutory period, the claimant acquires title by adverse possession even though the claim of title is founded on a mistake. *Walls v. Grohman*, 315 N.C. 239, 337 S.E.2d 556 (1985).

For case applying the holding of *Walls v. Grohman*, 315 N.C. 239, 337 S.E.2d 556 (1985) to a case which was pending on appeal when the decision was announced, see *Fauchette v.*

Zimmerman, — N.C. App. —, 338 S.E.2d 804 (1986).

Limitations for Ejectment Actions. — This section and § 1-38 are the applicable statutes of limitation for ejectment actions. These statutes prescribe the period of time beyond which the owner of land is not privileged to bring an action for the recovery of his land from a person in possession thereof. *Poore v. Swan Quarter Farms, Inc.*, — N.C. App. —, 338 S.E.2d 817 (1986).

Actions to remove a cloud upon title are in essence ejectment actions and are properly reviewed as such where defendants are in actual possession and plaintiffs seek to recover possession. *Poore v. Swan Quarter Farms, Inc.*, — N.C. App. —, 338 S.E.2d 817 (1986).

Where plaintiffs made no specific allegation that defendants were in actual possession at the time of the filing of their action, and did not seek specifically to recover possession in their demand for relief, but merely prayed for rents and profits and removal of certain deeds as a cloud upon their title, plaintiffs' actions was not in essence one for ejectment controlled by § 1-38 and this section; rather, plaintiffs' action was one to remove a cloud upon title which was not barred by any statute of limita-

tions. *Poore v. Swan Quarter Farms, Inc.*, — N.C. App. —, 338 S.E.2d 817 (1986).

III. HOSTILE OR ADVERSE NATURE OF POSSESSION.

Adverse possession, to ripen into title af-

ter seven years, must be under color of title. Otherwise, a period of 20 years is required. *Taylor v. Brittain*, 76 N.C. App. 574, 334 S.E.2d 242 (1985).

§ 1-45. No title by possession of public ways.

Legal Periodicals. — For comment, "Taking Without Compensation: Measure of Permanent Damages Modified by Application of Limitation of Actions for Trespass," see 20 *Wake Forest L. Rev.* 671 (1984).

For article, "The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislation, Private Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 *N.C.L. Rev.* 565 (1986).

§ 1-45.1. No adverse possession of property subject to public trust rights.

Legal Periodicals. — For comment, "Sunbathers Versus Property Owners: Public Access to North Carolina Beaches," see 64 *N.C.L. Rev.* 159 (1985).

For article, "The Battle to Preserve North

Carolina's Estuarine Marshes: The 1985 Legislation, Private Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 *N.C.L. Rev.* 565 (1986).

ARTICLE 5.

Limitations, Other than Real Property.

§ 1-46. Periods prescribed.

CASE NOTES

Applied in *Long v. Fink*, — N.C. App. —, 342 S.E.2d 557 (1986).

§ 1-47. Ten years.

CASE NOTES

IV. SEALED INSTRUMENTS.

A. In General.

Determination of whether an instrument is sealed instrument, commonly referred to as specialty, is question for the court. *Square D Co. v. C.J. Kern Contractors*, 314 N.C. 423, 334 S.E.2d 63 (1985).

Corporate Seal. — The fact that a corporate seal was impressed on a contract, without more, is not sufficient to convert the contract into a sealed instrument, i.e., specialty. *Square D Co. v. C.J. Kern Contractors*, 314 N.C. 423, 334 S.E.2d 63 (1985).

The question to be answered in order to de-

termine whether a corporate seal transforms a party's contract into a sealed instrument, i.e., a specialty, is whether the body of the contract contains any language that indicates that the parties intended that the instrument be a specialty or whether extrinsic evidence would demonstrate such an intention. *Square D Co. v. C.J. Kern Contractors*, 314 N.C. 423, 334 S.E.2d 63 (1985).

Absent any evidence that would tend to indicate that the parties intended that construction contract to which corporate seal of contractor had been affixed was to be a sealed instrument, the contract was not a specialty and the 10-year period of limitation contained within

subdivision (2) would be inapplicable to plaintiff's action for breach of same. *Square D Co. v.*

C.J. Kern Contractors, 314 N.C. 423, 334 S.E.2d 63 (1985).

§ 1-50. Six years.

Legal Periodicals. —

For note, "*Wilder v. Amatex Corp.: A First Step Toward Ameliorating the Effect of Stat-*

utes of Repose on Plaintiffs with Delayed Manifestation Diseases," see 64 N.C.L. Rev. 416 (1986).

CASE NOTES

I. IN GENERAL.

This section and § 1-15(c) are not unconstitutional as being violative of the open courts provision of the State Constitution and the equal protection clauses of the state and federal Constitutions. *Tetterton v. Long Mfg. Co.*, 314 N.C. 44, 332 S.E.2d 67 (1985); *Square D Co. v. C.J. Kern Contractors*, 314 N.C. 423, 334 S.E.2d 63 (1985).

Subdivision (6) does not grant "exclusive or separate emoluments or privileges" to the persons it protects in violation of Article I, § 32, of the North Carolina Constitution. *Tetterton v. Long Mfg. Co.*, 314 N.C. 44, 332 S.E.2d 67 (1985).

This section does not distinguish between manufacturers and retail sellers of products who are protected from liability beyond the six-year period of repose and does not violate the equal protection clauses of the state or federal Constitutions. *Tetterton v. Long Mfg. Co.*, 314 N.C. 44, 332 S.E.2d 67 (1985).

Applied in *Oates v. Jag, Inc.*, 314 N.C. 276, 333 S.E.2d 222 (1985).

V. DEFECTIVE CONDITION OF IMPROVEMENTS TO REAL PROPERTY.

Subdivision (5) of this section is a statute of repose and not a statute of limitation. *Olympic Prods. Co. v. Roof Systems*, — N.C. App. —, 339 S.E.2d 432 (1986).

Subdivision (5) of this section is a statute of repose which bars actions for personal injuries or property damages allegedly caused by defects in design, construction or repairs to real property unless the action is brought within six years from the completion of the work. *Little v. National Servs. Indus., Inc.*, — N.C. App. —, 340 S.E.2d 510 (1986).

Subsequent purchaser of house can maintain action against original builder for negligent construction of the house, and such an action is governed by the time limitations set forth in subdivision (5) of this section. *Evans v. Mitchell*, 77 N.C. App. 598, 335 S.E.2d 758 (1985).

Chairlift as Improvement to Real Prop-

erty. — As between owner and company which redesigned and repaired chairlift for recreational park, the chairlift would be treated as an "improvement to real property" and owner's third-party action against the company for negligence would be barred by this section. *Little v. National Servs. Indus., Inc.*, — N.C. App. —, 340 S.E.2d 510 (1986).

Claim Not Barred. — Claim which arose after the 1981 amendment to subdivision (5) of this section, which eliminated claims involving willful or wanton negligence from the operation of subdivision (5), held not barred, even though more than six years had elapsed since the building in question had been constructed. *Olympic Prods. Co. v. Roof Systems*, — N.C. App. —, 339 S.E.2d 432 (1986).

VI. DEFECTIVE PRODUCTS.

Constitutionality of subdivision (6). —

Subdivision (6) of this section is constitutional. *Davidson v. Volkswagenwerk*, 78 N.C. App. 193, 336 S.E.2d 714 (1985).

Purpose of Subdivision (6). —

Subdivision (6) excludes all actions brought after six years, whether these actions are first-party actions, cross-claims or counter-claims. *Tetterton v. Long Mfg. Co.*, 314 N.C. 44, 332 S.E.2d 67 (1985).

Legislative Intent. —

The built-in "accrual" date language in subdivision (6) "initial purchase for use or consumption" is not unconstitutionally vague; the obvious intent of the legislature was to limit manufacturers' liability after a certain period of years had elapsed from the date of initial purchase for use or consumption. *Tetterton v. Long Mfg. Co.*, 314 N.C. 44, 332 S.E.2d 67 (1985).

Subdivision (6) of this section is intended to be a substantive definition of rights which sets a fixed limit after the time of the product's manufacture beyond which the seller will not be held liable. *Davidson v. Volkswagenwerk*, 78 N.C. App. 193, 336 S.E.2d 714 (1985).

Claims Arising Out of Disease. — This section, insofar as it constitutes a statute of repose, has no application to claims arising out of a disease. *Silver v. Johns-Manville Corp.*, 789 F.2d 1078 (4th Cir. 1986).

This section did not bar plaintiff's claim for damages for asbestosis, even though the product alleged to have given rise to the injury was purchased more than six years prior to the alleged onset of the disease. *Hyer v. Pittsburgh Corning Corp.*, 790 F.2d 30 (4th Cir. 1986).

Action Held Precluded. — Where date of initial purchase of Volkswagen bus whose lack

of crashworthiness plaintiff alleged caused him serious personal injuries in an accident on March 24, 1983, was on or about September 4, 1974, by its clear language, the North Carolina statute of repose, subdivision (6) of this section, precluded plaintiff's action. *Davidson v. Volkswagenwerk*, 78 N.C. App. 193, 336 S.E.2d 714 (1985).

§ 1-51. Five years.

Legal Periodicals. — For comment, "Taking Without Compensation: Measure of Permanent Damages Modified by Application of Lim-

itation of Actions for Trespass," see 20 Wake Forest L. Rev. 671 (1984).

§ 1-52. Three years.

Legal Periodicals. — For comment, "Taking Without Compensation: Measure of Permanent Damages Modified by Application of Limitation of Actions for Trespass," see 20 Wake Forest L. Rev. 671 (1984).

For note, "Wilder v. Amatex Corp.: A First Step Toward Ameliorating the Effect of Statutes of Repose on Plaintiffs with Delayed Manifestation Diseases," see 64 N.C.L. Rev. 416 (1986).

CASE NOTES

I. IN GENERAL.

When Equitable Estoppel Applies. —

The doctrine of equitable estoppel may be invoked to prevent a defendant from relying on a statute of limitations if the defendant, by deception or a violation of duty toward the plaintiff, caused the plaintiff to allow his claim to be barred by the statute of limitations. *Blizzard Bldg. Supply, Inc. v. Smith*, 77 N.C. App. 594, 335 S.E.2d 762 (1985), cert. denied, 315 N.C. 389, 339 S.E.2d 410 (1986).

Plaintiff's claim against health care provider for unauthorized disclosure of communications was one for malpractice, and the applicable statute of limitations was § 1-15(c), rather than this section. The cause of action accrued at the time of the last unauthorized discussion of the patient's case with another doctor. *Watts v. Cumberland County Hosp. Sys.*, 75 N.C. App. 1, 330 S.E.2d 242, cert. denied as to additional issues, 314 N.C. 548, 335 S.E.2d 27 (1985).

Applied in *Oates v. Jag, Inc.*, — N.C. —, 333 S.E.2d 222 (1985); *Almond v. Boyles*, 612 F. Supp. 223 (E.D.N.C. 1985); *Long v. Fink*, — N.C. App. —, 342 S.E.2d 557 (1986).

Stated in *Coe v. Thermasol, Ltd.*, 785 F.2d 511 (4th Cir. 1986).

Cited in *Stanford v. Owens*, 76 N.C. App. 284, 332 S.E.2d 730 (1985); *Taylor v. Brittain*, 76 N.C. App. 574, 334 S.E.2d 242 (1985); *Emanuel v. Emanuel*, 78 N.C. App. 799, 338 S.E.2d 620 (1986); *Bruce v. Bruce*, — N.C. App.

—, 339 S.E.2d 855 (1986); *Estrada v. Burnham*, — N.C. —, 341 S.E.2d 538 (1986); *Cox v. Jefferson-Pilot Fire & Cas. Co.*, — N.C. App. —, 341 S.E.2d 608 (1986); *Hyer v. Pittsburgh Corning Corp.*, 790 F.2d 30 (4th Cir. 1986).

II. CONTRACTS.

A. In General.

Statute Begins to Run When, etc. —

The statute of limitations begins to run from the date that a contract is breached by failure to perform when required to do so under the contractual agreement, not from the first date when performance of the contract is possible. *Penley v. Penley*, 314 N.C. 1, 332 S.E.2d 51 (1985).

A new promise to pay fixes, etc. —

A new promise to pay fixes a new date from which the statute of limitations for a contract action runs. *Penley v. Penley*, 314 N.C. 1, 332 S.E.2d 51 (1985).

As to when breach of contract by trademark licensor occurred, see *Rothmans Tobacco Co. v. Liggett Group, Inc.*, 770 F.2d 1246 (4th Cir. 1985).

Causes of action of truck purchaser against dealer and dealer's surety under a motor vehicle dealer surety bond both arose when purchaser discovered dealer's breach of contract or fraud, and could accrue no later than the date on which purchaser filed a complaint against the dealer in the superior court. And as nothing prevented purchaser from join-

ing both defendants in one action or from instituting a separate action against the surety while the case against the dealer was pending, the three-year statute of limitations of subdivision (1) of this section was not tolled. *Bernard v. Ohio Cas. Ins. Co.*, — N.C. App. —, 339 S.E.2d 20 (1986).

B. Actions to Which Section Applies.

A claim to stock was governed by the three-year limitations period of this section where the substantive right asserted was one of contract. *American Hotel Mgt. Assocs. v. Jones*, 768 F.2d 562 (4th Cir. 1985).

Action by Former Husband Against Former Wife to Declare Ownership Interest in Business. — The three-year contract limitations period provided in subdivision (1) is the applicable statute of limitations in a former husband's suit against his former wife and her incorporated fast-food restaurant franchise seeking a declaration of his ownership interest. *Penley v. Penley*, 314 N.C. 1, 332 S.E.2d 51 (1985).

C. Actions to Which Section Not Applicable.

Contracts for the sale of "timber to be cut" are governed by Article 2 of the UCC, pursuant to § 25-2-107(2); accordingly, the controlling statute is § 25-2-725(1), which provides for a four-year period of limitation, not the three year statute of limitations in this section. *Mills v. New River Wood Corp.*, 77 N.C. App. 576, 335 S.E.2d 759 (1985).

D. Actions Held Barred.

Leaking Roof. — An action filed on June 11, 1981 against various defendants alleging breach of contract involving the construction of a defective roof was barred by the three year statute of limitations where plaintiff was aware in early 1975 that the roof had begun to leak, and made repeated complaints about leaks in many places over the next three years and thereafter. *Asheville School v. D.V. Ward Constr., Inc.*, 78 N.C. App. 594, 337 S.E.2d 659 (1985).

IV. TRESPASS UPON REALTY.

An action for the "fair rental value" of occupied property was brought upon a statutory liability (i.e., § 42-4; recovery for use and occupation) and was subject to the three-year statute of limitation provided for in subdivision (2) of this section. Such a cause of action accrued continually, for each day the property was occupied. *Simon v. Mock*, 75 N.C. App. 564, 331 S.E.2d 300 (1985).

A landowner's claim for "reasonable

compensation" for occupation of her property (§ 42-4), brought against one of the former co-tenants as administratrix of her husband's estate, was presented to the administratrix within the statutory period (§ 28A-19-3) and was therefore not barred by the three-year statute of limitations of this section as of the decedent's death. The landowner was allowed to sue the administratrix for rents not paid in the period of three years prior to the decedent's death, although the action itself was not brought until some six months after this date. *Simon v. Mock*, 75 N.C. App. 564, 331 S.E.2d 300 (1985).

V. GOODS OR CHATTELS.

In a conversion action, when the parties separated and plaintiff moved to a smaller apartment with limited storage space, and defendant retained lawful possession of the goods at the marital residence, but at the time of separation there was no evidence that plaintiff manifestly intended to abandon the property or that defendant exercised unauthorized dominion over it to her exclusion, the statute of limitations did not begin to run until defendant changed the locks on the residence after plaintiff asserted her continuing interest in the remaining property and her desire to remove it at some future time. *White v. White*, 76 N.C. App. 127, 331 S.E.2d 703 (1985).

The period of the statute of limitations begins to run when the plaintiff's right to maintain an action for the alleged wrong accrues. *White v. White*, 76 N.C. App. 127, 331 S.E.2d 703 (1985).

X. FRAUD OR MISTAKE.

A. In General.

Or From When Fraud or Mistake, etc. —

In accord with 1st paragraph in the 1985 Cumulative Supplement. See *Lynch v. Universal Life Church*, 775 F.2d 576 (4th Cir. 1985).

In accord with 2nd paragraph in the main volume. See *Lynch v. Universal Life Church*, 775 F.2d 576 (4th Cir. 1985).

Knowledge of Law Not Required, etc. —

In accord with 1st paragraph in the main volume. See *Lynch v. Universal Life Church*, 775 F.2d 576 (4th Cir. 1985).

Whether Plaintiff Should Have Discovered Facts, etc. —

In accord with 2nd paragraph in original. See *Watts v. Cumberland County Hosp. Sys.*, 75 N.C. App. 1, 330 S.E.2d 242, cert. denied as to additional issues, 314 N.C. 548, 335 S.E.2d 27 (1985).

"Discovery" means actual discovery or the time when the fraud should have been discovered in the exercise of due diligence. *United States v. Ward*, 618 F. Supp. 884 (E.D.N.C. 1985).

Action by Corporation to Impose Resulting Trust. — An action by a corporation alleging that certain of its officers and directors purchased a tract of real property with corporate funds, but title was placed in the individuals' names, was one to impose a resulting trust, which was governed by the 10-year statute of limitations (§ 1-56), and not one to reform a deed based on mistake, which is governed by the three-year statute of limitations (§ 1-52(9)). *BM & W of Fayetteville, Inc. v. Barnes*, 75 N.C. App. 600, 331 S.E.2d 308 (1985).

XII. ACCRUAL OF CAUSE OF ACTION FOR PERSONAL INJURY OR PROPERTY DAMAGE.

Personal injury claim of individual suffering asbestosis accrued on the date he was diagnosed as having the disease asbestosis, and under subdivision (16) he had three years from that date to bring suit. *Wilder v. Amatex Corp.*, 314 N.C. 550, 336 S.E.2d 66 (1985).

§ 1-54. One year.

CASE NOTES

I. IN GENERAL.

Stated in *Talbert v. Mauney*, — N.C. App. —, 343 S.E.2d 5 (1986).

ARTICLE 5A.

Limitations, Actions Not Otherwise Limited.

§ 1-56. All other actions, 10 years.

CASE NOTES

I. IN GENERAL.

Cited in *American Hotel Mgt. Assocs. v. Jones*, 768 F.2d 562 (4th Cir. 1985).

II. ACTIONS TO WHICH SECTION APPLIES.

Resulting on Constructive Trust. —

An action by a corporation alleging that certain of its officers and directors purchased a tract of real property with corporate funds, but title was placed in the individuals' names, was one to impose a resulting trust, which was governed by the 10-year statute of limitations (§ 1-56), and not one to reform a deed based on mistake, which is governed by the three-year statute of limitations (§ 1-52(9)). *BM & W of*

Fayetteville, Inc. v. Barnes, 75 N.C. App. 600, 331 S.E.2d 308 (1985).

III. ACTION TO WHICH SECTION DOES NOT APPLY.

Absolute Divorce. — Balancing the reasons for having statutes of limitations against the State's public policies of endeavoring to maintain the marital state on the one hand and not denying divorce to parties who have demonstrated a ground for divorce on the other hand, this section, the general, residuary statute of limitations, should not be applied to actions for absolute divorce under § 50-6. *Bruce v. Bruce*, — N.C. App. —, 339 S.E.2d 855 (1986).

SUBCHAPTER III. PARTIES.

ARTICLE 6.

Parties.

§ 1-57. Real party in interest; grantees and assignees.

CASE NOTES

I. IN GENERAL.

Cited in *Howard v. Smoky Mt. Enters., Inc.*,
76 N.C. App. 123, 332 S.E.2d 200 (1985).

§ 1-72. Persons jointly liable.

CASE NOTES

The doctrine of collateral estoppel is not a meritorious defense to a breach of contract action involving joint obligors. Under this section, joint obligors on a contract are jointly and severally liable. The statute permits an injured party to seek recovery against one or more joint obligors without impairing his right to proceed against the other joint obligors later. Conversely, a joint obligor who is not a party to the original action is not bound

by any judgment rendered in that action. Thus, in application, the doctrine of joint and several liability is inconsistent with the doctrine of collateral estoppel. Collateral estoppel prevents parties, and those in privity with them, from relitigating issues that were necessarily decided in a prior action. *Thomas M. McInnis & Assocs. v. Hall*, 76 N.C. App. 486, 333 S.E.2d 544 (1985), cert. granted, — N.C. —, 339 S.E.2d 413 (1986).

SUBCHAPTER IIIA. JURISDICTION.

ARTICLE 6A.

Jurisdiction.

§ 1-75.1. Legislative intent.

CASE NOTES

Cited in *B.F. Goodrich Co. v. Tire King of Greensboro, Inc.*, — N.C. App. —, 341 S.E.2d 65 (1986).

§ 1-75.4. Personal jurisdiction, grounds for generally.

Legal Periodicals. — For civil procedure note, "North Carolina Adopts the Stream of Commerce Theory of Jurisdiction: A Step in

the Right Direction," see 20 Wake Forest L. Rev. 737 (1984).

CASE NOTES

I. IN GENERAL.

This section should be liberally construed, etc. —

In accord with 1st paragraph in the main volume. See *DeSoto Trail, Inc. v. Covington Diesel, Inc.*, 77 N.C. App. 637, 335 S.E.2d 794 (1985); *Hardin v. DLF Computer Co.*, 617 F. Supp. 70 (W.D.N.C. 1985); *Monroe Hdwe. Co. v. Robinson*, 621 F. Supp. 1166 (W.D.N.C. 1985).

In accord with 2nd paragraph in 1985 Cum. Supp. See *Schofield v. Schofield*, 78 N.C. 657, 338 S.E.2d 132 (1986).

But courts cannot expand jurisdiction, etc. —

In accord with 1st paragraph in the main volume. See *Hardin v. DLF Computer Co.*, 617 F. Supp. 70 (W.D.N.C. 1985); *Monroe Hdwe. Co. v. Robinson*, 621 F. Supp. 1166 (W.D.N.C. 1985).

The resolution of the question of in personam jurisdiction, etc. —

In accord with second paragraph in the 1985 Cumulative Supplement. See *DeSoto Trail, Inc. v. Covington Diesel, Inc.*, 77 N.C. App. 637, 335 S.E.2d 794 (1985).

In order to determine whether North Carolina may properly exercise jurisdiction over the person of a foreign defendant, the court applies a two-part test: (1) Do the "long-arm" jurisdiction statutes, when liberally construed, permit the exercise of jurisdiction? (2) If so, does the exercise of jurisdiction unconstitutionally violate due process of law? *B.F. Goodrich Co. v. Tire King of Greensboro, Inc.*, — N.C. App. —, 341 S.E.2d 65 (1986).

Once plaintiff has met requirements, etc. —

In accord with 1st paragraph in the main volume. See *Hardin v. DLR Computer Co.*, 617 F. Supp. 70 (W.D.N.C. 1985).

Legislature Intended Full Jurisdictional Powers, etc. —

In accord with 1st paragraph in main volume. See *Schofield v. Schofield*, 78 N.C. App. 657, 338 S.E.2d 132 (1986).

Due process requires that defendant, etc. —

In accord with 1st paragraph in main volume. See *Schofield v. Schofield*, 78 N.C. App. 657, 338 S.E.2d 132 (1986).

Determination of whether minimum contacts are present, etc. —

The minimum contacts test is not mechanical, but requires consideration of the facts of each case. *Ciba-Geigy Corp. v. Barnett*, 76 N.C. App. 605, 334 S.E.2d 91 (1985).

Factors in Determining Minimum Contacts, etc. —

In light of modern business practices, the quantity, or even the absence, of actual physical contacts with the forum state merely constitutes a factor to be considered and is not of controlling weight in determining whether minimum contacts exist. *Ciba-Geigy Corp. v. Barnett*, 76 N.C. App. 605, 334 S.E.2d 91 (1985).

The criteria for determining whether minimum contacts exist include: (1) The quantity of contacts, (2) the nature and quality of contacts, (3) the source and connection of the cause of action with those contacts, (4) the interests of the forum state and convenience, and (5) whether the defendant invoked benefits and protections of law of the forum state. *Hardin v. DLF Computer Co.*, 617 F. Supp. 70 (W.D.N.C. 1985).

Certain primary and secondary factors are used in determining minimum contacts questions. These include three primary factors: (1) Quantity of contacts, (2) nature and quality of contacts, and (3) the source and connection of the cause of action with these contacts, and two secondary factors, interest of the forum state and convenience to the parties. No single factor controls, but they all must be weighed in light of fundamental fairness and the circumstances of the case. *B.F. Goodrich Co. v. Tire King of Greensboro, Inc.*, — N.C. App. —, 341 S.E.2d 65 (1986).

Minimum contacts do not arise ipso facto from actions of a defendant having an effect in the forum state. There must be some act or acts by which the defendant purposely availed himself of the privilege of doing business there, such that he or she should reasonably anticipate being haled into court there. *Ciba-Geigy Corp. v. Barnett*, 76 N.C. App. 605, 334 S.E.2d 91 (1985).

Mere fortuitous contact with the forum state in the course of business dealings will not suffice to meet the minimum contacts test. There must be some act or acts by which the defendant has purposefully availed itself of the privilege of doing business there. *B.F. Goodrich Co. v. Tire King of Greensboro, Inc.*, — N.C. App. —, 341 S.E.2d 65 (1986).

Single contract may be sufficient, etc. —

In accord with 1st paragraph in the main volume. See *Hardin v. DLF Computer Co.*, 617 F. Supp. 70 (W.D.N.C. 1985); *Monroe Hdwe. Co. v. Robinson*, 621 F. Supp. 1166 (W.D.N.C. 1985).

In accord with 4th paragraph in the main volume. See *Monroe Hdwe. Co. v. Robinson*, 621 F. Supp. 1166 (W.D.N.C. 1985).

A single contract may constitutionally support jurisdiction over a nonresident corporate defendant, especially when the defendant also does substantial other business in the forum state. *B.F. Goodrich Co. v. Tire King of Greensboro, Inc.*, — N.C. App. —, 341 S.E.2d 65 (1986).

The burden is on the plaintiffs to prove the existence of, etc. —

In accord with the 1985 Cumulative Supplement. See *DeSoto Trail, Inc. v. Covington Diesel, Inc.*, 77 N.C. App. 637, 335 S.E.2d 794 (1985); *Schofield v. Schofield*, 78 N.C. App. 657, 338 S.E.2d 132 (1986).

Applicability of Subdivision (12). — Subdivision (12) of this section, entitled "Marital Relationship," applies to an action under Chapter 50 only if the action for absolute divorce in the relationship was filed on or after October 1, 1981. *Schofield v. Schofield*, 78 N.C. App. 657, 338 S.E.2d 132 (1986).

Jurisdiction over Alimony Modification. — Section 50-16.9 provides only that an alimony order entered by a court of another jurisdiction may be modified by a court of this State "upon gaining jurisdiction over the person of both parties"; therefore, statutory jurisdiction arises, if at all, under this section, the North Carolina "long-arm" statute. *Schofield v. Schofield*, 78 N.C. App. 657, 338 S.E.2d 132 (1986).

Applied in *Thompson v. National Grange Mut. Ins. Co.*, 620 F. Supp. 644 (W.D.N.C. 1985).

II. CASES IN WHICH MINIMUM CONTACTS REQUIREMENT MET.

Franchise Contract. —

In action for alleged breach of franchise agreement which specifically stated that it was made and executed in North Carolina and was to be governed by North Carolina law, where defendant franchisee had not only agreed to pay for services to be performed in North Carolina by franchisor under an ongoing ten-year contract, but such services in fact were provided, and where defendant personally appeared in North Carolina to take advantage of training provided pursuant to the franchise agreement, personal jurisdiction existed over out-of-state defendant, who had sufficient minimum contacts with North Carolina to meet

the mandates of due process; fact that plaintiff was the assignee of the franchisor and was a Pennsylvania corporation with no office in North Carolina would not cause North Carolina to lose its power to entertain litigation over the franchise agreement. *Wiener King Systems v. Brooks*, 628 F. Supp. 843 (W.D.N.C. 1986).

Where defendant salesman knowingly submitted allegedly fraudulent documents to his employer, located in this state, over a period of two years, causing substantial damage to the corporation, and it was clear that the alleged tort would have its damaging effect in North Carolina, simply because defendant was able to cause the injury without physically coming to this state did not defeat the jurisdiction of this state in a tort action brought by his employer. *Ciba-Geigy Corp. v. Barnett*, 76 N.C. App. 605, 334 S.E.2d 91 (1985).

In a civil action in which plaintiff agricultural chemical company, with its home office in Greensboro, sought damages allegedly incurred as a result of tortious conduct by defendant salesman, its employee, who lived in Indiana and worked in sales territories in Indiana and Ohio, between 1980 and 1982, in submitting falsified customer complaints and refund requests, then converting the credits or replacement products to his own use, the court had jurisdiction under subdivision (5) of this section. *Ciba-Geigy Corp. v. Barnett*, 76 N.C. App. 605, 334 S.E.2d 91 (1985).

In breach of warranty action by buyer corporation domiciled in North Carolina against seller out-of-state corporation for clothing purchased in Denver, Colorado, shipped F.O.B. Denver, received by the buyer's subsidiary in North Carolina and, without being opened, shipped to Germany for resale, the court had in personam jurisdiction, both under state statute and the federal Constitution. *W. Conway Owings & Assocs. v. Karman, Inc.*, 75 N.C. App. 559, 331 S.E.2d 279 (1985).

Participation in the drafting of a North Carolina partnership agreement and the supervision of the closing of a transaction by the partnership within this State is conduct which invokes the protection of the law of this State to such an extent that traditional notions of fair play and substantial justice are not offended by requiring the defendants to defend in this State an action growing out of the partnership. *Park Ave. Partners v. Johnson*, — N.C. App. —, 342 S.E.2d 570 (1986).

West Virginia corporation whose sole business function was to process tire orders and forward them to B.F. Goodrich Co. in Ohio, and which paid a commission to the person who obtained the orders, had adequate minimum contacts with North Carolina to be sued in this state. *B.F. Goodrich Co. v. Tire*

King of Greensboro, Inc., — N.C. App. —, 341 S.E.2d 65 (1986).

III. CASES IN WHICH MINIMUM CONTACTS REQUIREMENT NOT MET.

The mere act of entering into a contract, etc. —

The courts of North Carolina did not have any statutory basis for personal jurisdiction over a nonresident defendant who made occasional purchases and related trips in this State, but did not engage in regular and systematic business in North Carolina, and who hired the resident plaintiff to sell some equipment, without any expectation of performance in North Carolina, and without any actual performance being apparently done in North Carolina. *Patrum v. Anderson*, 75 N.C. App. 165, 330 S.E.2d 55 (1985).

Alimony Reduction. — Money payments are "things of value" within the meaning of subdivision (5) (d) of this section; thus in an action brought by resident husband against nonresident wife to have alimony obligation reduced or terminated, statutory jurisdiction existed. However, under the circumstances, defendant did not have sufficient minimum contacts with North Carolina and her motion to dismiss for lack of personal jurisdiction was improperly denied. *Schofield v. Schofield*, 78 N.C. App. 657, 338 S.E.2d 132 (1986).

Check Cashed by Plaintiff. — Facts that

(1) a check drawn on a joint investment account of the defendant, a Florida resident, payable through a Pennsylvania bank, was cashed by plaintiff bank in North Carolina and then shredded by plaintiff; and that (2) defendant refused to honor plaintiff's demand that the check be replaced did not meet the minimum contacts requirement for personal jurisdiction. *First Charter Nat'l Bank v. Taylor*, — N.C. App. —, 341 S.E.2d 747 (1986).

Manufacturer's Contacts Held Not Sufficiently Continuous and Systematic. — Exercise of in personam jurisdiction over a boiler manufacturer, a New York corporation which was not authorized to do business in North Carolina, which in 1984 sold approximately \$520,000 worth of boilers to North Carolina customers, accounting for about one-half percent of its total boiler sales for the year, which sales were solicited by independent contractors who acted as sales representatives for defendant and other manufacturers, which had placed advertisements in several national magazines which reached North Carolina, and which had a wholly owned subsidiary, which was engaged in the business of greenhouse construction, and which was authorized to do business in North Carolina, was not warranted, as defendant's contacts with North Carolina were not so "continuous and systematic" as to warrant the exercise of in personam jurisdiction. *Ash v. Burnham Corp.*, — N.C. App. —, 343 S.E.2d 2 (1986).

§ 1-75.7. Personal jurisdiction — Grounds for without service of summons.

CASE NOTES

Cited in *Williams v. Jennette*, 77 N.C. App. 283, 335 S.E.2d 191 (1985).

SUBCHAPTER IV. VENUE.

ARTICLE 7.

Venue.

§ 1-76. Where subject of action situated.

CASE NOTES

I. IN GENERAL.

Venue Consideration Limited to Allega-

tion in Plaintiff's Complaint. — For purposes of determining venue, consideration is limited to the allegations in plaintiff's com-

plaint. Thus, the court could not consider defendants' allegations in their counterclaim in determining propriety of removal. *McCrary Stone Serv., Inc. v. Lyalls*, 77 N.C. App. 796, 336 S.E.2d 103 (1985).

Action for Declaratory Relief. — Since the Declaratory Judgment Act contains no provisions regarding venue, the venue statutes and principles generally applicable to civil actions should govern venue of an action for declaratory relief. *McCrary Stone Serv., Inc. v. Lyalls*, 77 N.C. App. 796, 336 S.E.2d 103 (1985).

Quoted in *M & J Leasing Corp. v. Habegger*, 77 N.C. App. 235, 334 S.E.2d 804 (1985).

II. ACTIONS RELATION TO REAL PROPERTY.

A. In General.

Title to realty must be directly affected by the judgment, etc. —

Title to realty must be directly affected by a judgment, in order to render the action local, and an action is not necessarily local because it incidentally involves the title to land or a right or interest therein. It is the principal object involved in the action which determines the question. *McCrary Stone Serv., Inc. v. Lyalls*, 77 N.C. App. 796, 336 S.E.2d 103 (1985).

Unless defendant waives proper venue, an action is local and must be tried in the county where the land lies if the judgment to which

plaintiff would be entitled upon the allegations of the complaint will affect the title to land. *McCrary Stone Serv., Inc. v. Lyalls*, 77 N.C. App. 796, 336 S.E.2d 103 (1985).

B. Local Actions.

An action for termination of a leasehold requires removal, under this section, to the county where the leased property is situated. *McCrary Stone Serv., Inc. v. Lyalls*, 77 N.C. App. 796, 336 S.E.2d 103 (1985).

C. Transitory Actions.

Judicial declaration as to whether plaintiff was obligated to make rental payments for rock quarried from land adjacent to leased premises would not directly affect title to the land, and thus did not, for venue purposes, involve the recovery of an interest in real property. *McCrary Stone Serv., Inc. v. Lyalls*, 77 N.C. App. 796, 336 S.E.2d 103 (1985).

V. RECOVERY OF PERSONAL PROPERTY.

Stock certificates, while tangible personal property, are merely tangible evidence, or symbols, of the shares they represent, and are not the kind of personal property which would require a change of venue under subdivision (4) and § 1-83(1). *Smith v. Mariner*, 77 N.C. App. 589, 335 S.E.2d 530 (1985).

§ 1-76.1. Where deficiency debtor resides or where loan was negotiated.

CASE NOTES

Quoted in *M & J Leasing Corp. v. Habegger*, 77 N.C. App. 235, 334 S.E.2d 804 (1985).

§ 1-83. Change of venue.

CASE NOTES

II. WHERE COUNTY DESIGNATED IS NOT PROPER.

The trial court has no discretion, etc. —

When the venue where the action was filed is not the proper one, the trial court does not have discretion, but must upon a timely motion and upon appropriate findings transfer the

case to the proper venue. *Cheek v. Higgins*, 76 N.C. App. 151, 331 S.E.2d 712 (1985).

Stock certificates, while tangible personal property, are merely tangible evidence, or symbols, of the shares they represent, and are not the kind of personal property which would require a change of venue under § 1-76(4) and subdivision (1). *Smith v. Mariner*, 77 N.C. App. 589, 335 S.E.2d 530 (1985).

III. WHERE CONVENIENCE OF WITNESSES AND ENDS OF JUSTICE WOULD BE PROMOTED.

And Is Not Reviewable Absent Abuse. —

In accord with 2nd paragraph in the main volume. See *Smith v. Mariner*, 77 N.C. App. 589, 335 S.E.2d 530 (1985).

When Refusal to Remove, etc. —

In accord with 1st paragraph in the main volume. See *Smith v. Mariner*, 77 N.C. App. 589, 335 S.E.2d 530 (1985).

IV. APPLICATION FOR REMOVAL.

If the motion in writing is not made within the time prescribed by statute, defendant waives his right to object to venue. *Cheek v. Higgins*, 76 N.C. App. 151, 331 S.E.2d 712 (1985).

And before Answering to Merits. —

The defendant who files answer to the merits before raising his objection to venue, waives the right. *Cheek v. Higgins*, 76 N.C. App. 151, 331 S.E.2d 712 (1985).

SUBCHAPTER V. COMMENCEMENT OF ACTIONS.

ARTICLE 9.

Prosecution Bonds.

§ 1-109. Plaintiff's, for costs.

CASE NOTES

A prosecution bond cannot be required of a caveator in an action to contest a will. In re Will of Parker, 76 N.C. App. 594, 334

S.E.2d 97, cert. denied, 315 N.C. 185, 337 S.E.2d 859 (1985).

OPINIONS OF ATTORNEY GENERAL

This section is inapplicable to actions pending in Small Claims Court. See opinion of Attorney General to Ms. Jane M. Eason,

Civil Magistrate, New Hanover County, 55 N.C.A.G. 98 (1986).

ARTICLE 11.

Lis Pendens.

§ 1-116. Filing of notice of suit.

CASE NOTES

Cited in Trustees of Garden of Prayer Baptist Church v. Geraldco Bldrs., Inc., 78 N.C. App. 108, 336 S.E.2d 694 (1985).

SUBCHAPTER VII. PRETRIAL HEARINGS; TRIAL AND ITS INCIDENTS.

ARTICLE 19.

Trial.

§ 1-181. Requests for special instructions.

CASE NOTES

Cited in *State v. Bush*, 78 N.C. App. 686, 338 S.E.2d 590 (1986); *State v. Watson*, — N.C. App. —, 341 S.E.2d 366 (1986).

SUBCHAPTER VIII. JUDGMENT.

ARTICLE 26.

Declaratory Judgments.

§ 1-253. Courts of record permitted to enter declaratory judgments of rights, status and other legal relations.

CASE NOTES

I. IN GENERAL.

The act requires liberal construction in favor of resolving uncertainties. *Sharpe v. Park Newspapers of Lumberton, Inc.*, 78 N.C. App. 275, 337 S.E.2d 174 (1985).

Cited in *Southeast Airmotive Corp. v. United States Fire Ins. Co.*, 78 N.C. App. 418, 337 S.E.2d 167 (1985).

II. SCOPE OF ARTICLE.

The Declaratory Judgment Act is restricted to declaring the rights and liabilities of parties regarding property; for the trial court to find that conveyances are void as a matter of law is beyond the scope of the act. *Town of Nags Head v. Tillett*, 314 N.C. 627, 336 S.E.2d 394 (1985).

III. ACTUAL CONTROVERSY REQUIREMENT.

And the existence of a genuine controversy, etc. —

In accord with main volume. See *State v. McNeill*, 78 N.C. App. 514, 337 S.E.2d 172 (1985).

Action for a declaratory judgment will lie, etc. —

In accord with 1st paragraph in main volume. See *State v. McNeill*, 78 N.C. App. 514, 337 S.E.2d 172 (1985).

But Mere Apprehension, etc. —

In accord with 1985 Supp. See *State v. McNeill*, 78 N.C. App. 514, 337 S.E.2d 172 (1985).

Litigation Must Appear Unavoidable. —

An actual controversy exists for purposes of the act when litigation appears unavoidable. *Sharpe v. Park Newspapers of Lumberton, Inc.*, 78 N.C. App. 275, 337 S.E.2d 174 (1985).

But where there is no doubt that litigation is forthcoming, etc. —

It is not necessary that the parties wait until lawsuit is immediately imminent or risk forfeiture to have a justiciable controversy. *Sharpe v. Park Newspapers of Lumberton, Inc.*, 78 N.C. App. 275, 337 S.E.2d 174 (1985).

There is no absolute requirement that the controversy exist at the time the pleadings are filed. — Any genuine controversy existing at any time after the pleadings are filed up to the time the motion to dismiss is ruled

upon may be considered. *Sharpe v. Park Newspapers of Lumberton, Inc.*, 78 N.C. App. 275, 337 S.E.2d 174 (1985).

However, a genuine controversy must appear from the complaint and the record. *Sharpe v. Park Newspapers of Lumberton, Inc.*, 78 N.C. App. 275, 337 S.E.2d 174 (1985).

IV. WHAT MAY BE DETERMINED BY DECLARATORY JUDGMENT.

A. In General.

And to Determine a Statute's Constitutionality. —

A party seeking to challenge the constitutionality of a section requiring a certificate of need to construct a hospital must bring an action pursuant to the Declaratory Judgment Act. *Hospital Group v. North Carolina Dep't of Human Resources*, 76 N.C. App. 265, 332 S.E.2d 748 (1985).

B. Actions in Which Declaratory Judgment Held Available.

Action to Declare Ownership Interest in Franchise. — A declaratory judgment was

held appropriate in an action by a former husband against his former wife and her incorporated fast food restaurant franchise seeking a declaration of his entitlement to an ownership interest based on an oral agreement. *Penley v. Penley*, 314 N.C. 1, 332 S.E.2d 51 (1985).

Promissory Notes Received in Distribution of Proceeds of Sale of Corporate Assets. — Record held to disclose sufficient controversy with regard to the effect of certain restrictive terms of promissory notes of defendant, which plaintiffs received in distribution of the proceeds of the sale of corporate assets to invoke the court's jurisdiction under the act. *Sharpe v. Park Newspapers of Lumberton, Inc.*, 78 N.C. App. 275, 337 S.E.2d 174 (1985).

V. PROCEDURE.

Venue. — Since the Declaratory Judgment Act contains no provisions regarding venue, the venue statutes and principles generally applicable to civil actions should govern venue of an action for declaratory relief. *McCrary Stone Serv., Inc. v. Lyalls*, 77 N.C. App. 796, 336 S.E.2d 103 (1985).

§ 1-254. Courts given power of construction of all instruments.

CASE NOTES

Promissory Notes Received in Distribution of Proceeds of Sale of Corporate Assets. — Record held to disclose sufficient controversy with regard to the effect of certain restrictive terms of promissory notes of defen-

dant, which plaintiffs received in distribution of the proceeds of the sale of corporate assets to invoke the court's jurisdiction under the act. *Sharpe v. Park Newspapers of Lumberton, Inc.*, 78 N.C. App. 275, 337 S.E.2d 174 (1985).

§ 1-255. Who may apply for a declaration.

Any person interested as or through an executor, administrator, trustee, guardian or other fiduciary, creditor, devisee, legatee, heir, next of kin, or cestui que trust, in the administration of a trust, or of the estate of a decedent, an infant, lunatic, or insolvent, may have a declaration of rights or legal relations in respect thereto:

- (4) To determine the apportionment of the federal estate tax, interest and penalties under the provisions of Article 27 of Chapter 28A. (1931, c. 102, s. 3; 1985 (Reg. Sess., 1986), c. 878, s. 2.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective October 1, 1986, added subdivision (4).

§ 1-256. Enumeration of declarations not exclusive.

CASE NOTES

Action to Declare Ownership Interest in Franchise. — A declaratory judgment was held appropriate in an action by a former husband against his former wife and her incorpo-

rated fast food restaurant franchise seeking a declaration of his entitlement to an ownership interest based on an oral agreement. *Penley v. Penley*, 314 N.C. 1, 332 S.E.2d 51 (1985).

§ 1-261. Jury trial.

CASE NOTES

Factual questions, pursuant to this section can be determined by jury and questions of law determined by the court.

Penley v. Penley, 314 N.C. 1, 332 S.E.2d 51 (1985).

§ 1-262. Hearing before judge where no issues of fact raised or jury trial waived; what judge may hear.

CASE NOTES

Jurisdiction in Easement Over Highway to Edge of Lake. — The district court had subject matter jurisdiction to determine the parties' rights in an easement over a street from a highway to the edge of a state-owned lake. *Woodlief v. Johnson*, 75 N.C. App. 49, 330 S.E.2d 265 (1985).

Original jurisdiction for a declaratory ruling as to the rights and interest of parties in a pier

and boat ramp extending over a state-owned lake rested in the Department of Natural Resources and Community Development. As the parties did not pursue such declaratory relief and failed to exhaust their administrative remedies prior to instituting their civil action, the trial court lacked subject matter jurisdiction. *Woodlief v. Johnson*, 75 N.C. App. 49, 330 S.E.2d 265 (1985).

SUBCHAPTER IX. APPEAL.

ARTICLE 27.

Appeal.

§ 1-269. Certiorari, recordari, and supersedeas.

CASE NOTES

I. IN GENERAL.

The scope of judicial review of a decision made by a town board sitting as a quasi-judicial body must include: (1) Reviewing the record for errors in law, (2) insuring that the procedures specified by law in both statute and ordinance are followed, (3) insuring that appropriate due process rights of a petitioner are

protected including the right to offer evidence, cross-examine witnesses and inspect documents, (4) insuring that decisions of town board are supported by competent, material and substantial evidence in the whole record, and (5) insuring that decisions are not arbitrary and capricious. In *re Walsh*, — N.C. App. —, 340 S.E.2d 497 (1986).

§ 1-271. Who may appeal.

CASE NOTES

I. IN GENERAL.

Meaning of "Party Aggrieved". —

In accord with 1st paragraph in the main volume. See *Absher v. Vannoy-Lankford Plumbing Co.*, 78 N.C. App. 620, 337 S.E.2d 877 (1985).

III. PARTIES HELD NOT ENTITLED TO APPEAL.

Reduction pursuant to § 97-10.2. — Plain-

tiff was not a "party aggrieved" by judgment entered in superior court reducing her ultimate recovery to the difference between jury award and workers' compensation award pursuant to § 97-10.2 so as to permit her appeal from such recovery. *Absher v. Vannoy-Lankford Plumbing Co.*, 78 N.C. App. 620, 337 S.E.2d 877 (1985).

§ 1-272. Appeal from clerk to judge.

CASE NOTES

Applicability. —

The provisions of this section apply only to appeals from the clerk in proceedings in which the clerk has original jurisdiction; taxation of

costs is not a proceeding in which the clerk has original jurisdiction. *Leary v. Nantahala Power & Light Co.*, 76 N.C. App. 165, 332 S.E.2d 703 (1985).

§ 1-273. Clerk to transfer issues of fact to civil issue docket.

CASE NOTES

Legitimation Proceedings. — The procedural statutes that apply to special proceedings are designed to fully protect the rights of all

persons interested in special proceedings, including legitimation proceedings. In *re Locklear*, 314 N.C. 412, 334 S.E.2d 46 (1985).

§ 1-276. Judge determines entire controversy; may recommend.

CASE NOTES

I. IN GENERAL.

Cited in *In re Locklear*, 314 N.C. 412, 334 S.E.2d 46 (1985).

§ 1-277. Appeal from superior or district court judge.

Legal Periodicals. —

For 1984 survey, "Double Jeopardy and Sub-

stantial Rights in North Carolina Appeals," see 63 N.C.L. Rev. 1061 (1985).

CASE NOTES

I. IN GENERAL.

The right to appeal is available through two channels. Section 1A-1, Rule 54(b) allows

appeal if there has been a final judgment as to all of the claims and parties, or if the specific action of the trial court from which appeal is taken is final and the trial judge expressly de-

termines that there is no just reason for delaying the appeal. The second channel to an appeal is by way of this section or § 7A-27; an appeal will be permitted under these statutes if a substantial right would be affected by not allowing appeal before final judgment. *Brown v. Brown*, 77 N.C. App. 206, 334 S.E.2d 506 (1985), cert. denied, 315 N.C. 389, 338 S.E.2d 878 (1986).

Cited in *Patrum v. Anderson*, 75 N.C. App. 165, 330 S.E.2d 55 (1985); *Ciba-Geigy Corp. v. Barnett*, 76 N.C. App. 605, 334 S.E.2d 91 (1985); *Grant & Hastings, P.A. v. Arlin*, 77 N.C. App. 813, 336 S.E.2d 111 (1985); *City of Winston-Salem v. Ferrell*, — N.C. App. —, 338 S.E.2d 794 (1986); *B.F. Goodrich Co. v. Tire King of Greensboro, Inc.*, — N.C. App. —, 341 S.E.2d 65 (1986); *Bowers v. Billings*, — N.C. App. —, 342 S.E.2d 58 (1986).

Applied in *Rivenbark v. Southmark Corp.*, 77 N.C. App. 225, 334 S.E.2d 451 (1985).

II. FROM WHAT DECISIONS, ETC., APPEAL LIES.

B. Interlocutory Orders.

Section Prohibits Appeal of Interlocutory Orders Unless, etc. —

In accord with first paragraph in the main volume. See *Appert v. Appert*, — N.C. App. —, 341 S.E.2d 342 (1986).

"Substantial" Defined. —

In accord with 2nd paragraph in the main volume. See *Brown v. Brown*, 77 N.C. App. 206, 334 S.E.2d 506 (1985), cert. denied, 315 N.C. 389, 338 S.E.2d 878 (1986).

The Supreme Court has adopted the definition of "substantial right" as: "A legal right affecting or involving a matter of substance as distinguished from matters of form: A right materially affecting those interests which a man is entitled to have preserved and protected by law: A material right." *LaFalce v. Wolcott*, 76 N.C. App. 565, 334 S.E.2d 236 (1985).

In determining the appealability of interlocutory orders a substantial right is a right which will be lost or irremediably adversely affected if the order is not reviewable before the final judgment. *Jenkins v. Maintenance, Inc.*, 76 N.C. App. 110, 332 S.E.2d 90 (1985).

Avoidance of Rehearing on Trial, etc. —

The mere avoidance of a rehearing on a motion or the avoidance of a trial when summary judgment is denied is not a "substantial right." *LaFalce v. Wolcott*, 76 N.C. App. 565, 334 S.E.2d 236 (1985).

If a motion to dismiss is allowed, etc. —

Grant of motion to dismiss for lack of personal jurisdiction, though interlocutory, is immediately appealable. *Schofield v. Schofield*, 78 N.C. App. 657, 338 S.E.2d 132 (1986).

C. Grant or Denial of New Trial.

Grant of Partial New Trial. —

An order granting a partial new trial is not immediately appealable, despite the language of subsection (a) of this section. *LaFalce v. Wolcott*, 76 N.C. App. 565, 334 S.E.2d 236 (1985).

A discretionary new trial order, as opposed to order granting new trial as matter of law, is not reviewable on appeal in the absence of manifest abuse. *Edge v. Metropolitan Life Ins. Co.*, 78 N.C. App. 624, 337 S.E.2d 672 (1985).

V. ILLUSTRATIVE CASES.

A. Appellant Held Entitled to Appeal.

Order which clearly affected the right of plaintiff to receive support on behalf of minor children from defendant on a monthly basis as needed and in the amount which had been found reasonably necessary for the support and maintenance of the children involved a substantial right, and therefore the order in question was immediately appealable. *Appert v. Appert*, — N.C. App. —, 341 S.E.2d 342 (1986).

In an action seeking quiet title to property which the plaintiffs, the original owners, alleged was secured by two of the defendants by fraud or by mutual mistake and conveyed to the other defendant, the current owner, by general warranty deed, summary judgment in favor of the current owner precluded the plaintiffs from obtaining reformation of the deed and reconveyance of the property, thereby affecting a substantial right; and, therefore, the interlocutory order was appealable. *Jenkins v. Maintenance, Inc.*, 76 N.C. App. 110, 332 S.E.2d 90 (1985).

In action by discharged employee seeking to recover accumulated vacation leave, a "substantial right" of the plaintiff was affected by the granting of summary judgment for the defendant, so that the order granting the motion for summary judgment was appealable, despite the defendant's pending counterclaim for wrongful conversion of company funds, and despite the absence of a determination by the trial judge under Rule 54(b), N.C.R.C.P., that "there was no just reason for delay." *Narron v. Hardee's Food Systems*, 75 N.C. App. 579, 331 S.E.2d 205, cert. denied, 314 N.C. 542, 335 S.E.2d 316 (1985).

In wrongful death action, the defendant declined to answer certain interrogatories on the grounds of self-incrimination, but was ordered to do so by the court and he appealed. Although this appeal was from an interlocutory order, it was nevertheless authorized, because if some of the interrogatories were in-

criminating and the defendant was compelled to answer them, his constitutional right could have been lost beyond recall and his appeal at the end of the trial would have been of no

value. *Shaw v. Williamson*, 75 N.C. App. 604, 331 S.E.2d 203, cert. denied, 314 N.C. 669, 335 S.E.2d 496 (1985).

§ 1-279. Manner and time for taking appeal in civil action or special proceeding.

CASE NOTES

The provisions of this section are jurisdictional. —

Failure to give timely notice of appeal in compliance with this section and Rule 3 of the North Carolina Rules of Appellate Procedure is jurisdictional, and an untimely attempt to appeal must be dismissed. *Landin Ltd. v. Sharon Luggage, Ltd., of Greensboro, Inc.*, 78 N.C. App. 558, 337 S.E.2d 685 (1985).

Withdrawal of Rule 59 motion did not entitle defendants to ten days from their withdrawal to file notice of appeal from judgment; to hold otherwise would thwart the tolling provision of Rule 3(c), N.C. Rules App. P. and circumvent Rule 58, N.C. Rules Civ. P., i.e., to give all interested parties a definite

fixed time of a judicial determination they can point to as the time of entry of judgment. *Landin Ltd. v. Sharon Luggage, Ltd., of Greensboro, Inc.*, 78 N.C. App. 558, 337 S.E.2d 685 (1985).

Cross-notice of appeal filed by defendants on October 4, 1984 supported the trial court's finding that it was not defendants' intention to give notice of appeal at the September 1984 calendar call on their Rule 59 motion. *Landin Ltd. v. Sharon Luggage, Ltd., of Greensboro, Inc.*, 78 N.C. App. 558, 337 S.E.2d 685 (1985).

Applied in *John T. Council, Inc. v. Balfour Prods. Group, Inc.*, 74 N.C. App. 668, 330 S.E.2d 6 (1985).

§ 1-288. Appeals in forma pauperis; clerk's fees.

CASE NOTES

The requirements of this section, etc. —

The requirement of this section that motions to appeal in forma pauperis be made at the latest 10 days after the expiration of the session at which judgment is rendered is mandatory. In *re Caldwell*, 75 N.C. App. 299, 330 S.E.2d 513 (1985).

The late filing of appeal entries had no bearing on the question of this section's re-

quirement that a motion to appeal in forma pauperis be made within 10 days after the expiration of the session at which judgment is rendered; appeal entries are simply a convenient means of providing a record entry of the fact that an appeal has been taken, and do not constitute the taking of the appeal itself. In *re Caldwell*, 75 N.C. App. 299, 330 S.E.2d 513 (1985).

§ 1-289. Undertaking to stay execution on money judgment.

CASE NOTES

Lessees could proceed against subtenant for possession and damages pending appeal of a judgment terminating the lease between the owner in fee and the lessees, where the lessees had been granted a stay of execution and left in possession of the property, as by maintaining possession pursuant to the

stay of execution order, lessees remained vested with a possessory and proprietary interest in the property, which interest they had a right to protect. *Backer v. Gomez*, — N.C. App. —, 341 S.E.2d 90 (1986).

Cited in *Leary v. Nantahala Power & Light Co.*, 76 N.C. App. 165, 332 S.E.2d 703 (1985).

§ 1-292. How judgment for real property stayed.

CASE NOTES

Lessees could proceed against subtenant for possession and damages pending appeal of a judgment terminating the lease between the owner in fee and the lessees, where the lessees had been granted a stay of execution and left in possession of the property,

as by maintaining possession pursuant to the stay of execution order, lessees remained vested with a possessory and proprietary interest in the property, which interest they had a right to protect. *Backer v. Gomez*, — N.C. App. —, 341 S.E.2d 90 (1986).

§ 1-294. Scope of stay; security limited for fiduciaries.

CASE NOTES

Applied in *Smith v. Barfield*, 77 N.C. App. 217, 334 S.E.2d 487 (1985).

§ 1-296. Judgment not vacated by stay.

CASE NOTES

Lessees could proceed against subtenant for possession and damages pending appeal of a judgment terminating the lease between the owner in fee and the lessees, where the lessees had been granted a stay of execution and left in possession of the property,

as by maintaining possession pursuant to the stay of execution order, lessees remained vested with a possessory and proprietary interest in the property, which interest they had a right to protect. *Backer v. Gomez*, — N.C. App. —, 341 S.E.2d 90 (1986).

SUBCHAPTER X. EXECUTION.

ARTICLE 28.

Execution.

§ 1-307. Issued from and returned to court of rendition.

CASE NOTES

To allow a party to seek construction of a will in conjunction with and pursuant to this section would overly burden that procedure and open the door to possible confusion in the administration of estates. For this reason, the trial court erred in denying defendant judgment debtor's motion to transfer matter in which judgment creditor sought to enforce

judgment against debtor's interest in property under will of his father to the county where the decedent had his domicile at the time of his death for a determination of debtor's interest under the will. *North Carolina Nat'l Bank v. C.P. Robinson Co.*, — N.C. App. —, 341 S.E.2d 362 (1986).

§ 1-311. Against the person.

CASE NOTES

Defendant's Privilege against Self-Incrimination Inapplicable, etc. —

In a wrongful death action, the defendant faced no peril being subject to execution against the person for not satisfying a judgment for punitive damages, as there was no allegation in the complaint that would support the required statutory findings under this sec-

tion for execution against the person. Therefore, there was no basis for the defendant declining to answer interrogatories on the grounds of self-incrimination. *Shaw v. Williamson*, 75 N.C. App. 604, 331 S.E.2d 203, cert. denied, 314 N.C. 669, 335 S.E.2d 496 (1985).

ARTICLE 30.

Betterments.

§ 1-340. Petition by claimant; execution suspended; issues found.

Legal Periodicals. —

For comment, "Taking Without Compensation: Measure of Permanent Damages Modified by Application of Limitation of Actions for

Trespass," see 20 Wake Forest L. Rev. 671 (1984).

For article, "Mistaken Improvers of Real Estate," see 64 N.C.L. Rev. 37 (1985).

§ 1-341. Annual value of land and waste charged against defendant.

Legal Periodicals. — For comment, "Taking Without Compensation: Measure of Permanent Damages Modified by Application of Lim-

itation of Actions for Trespass," see 20 Wake Forest L. Rev. 671 (1984).

§ 1-347. Plaintiff's election that defendant take premises.

Legal Periodicals. — For article, "Mistaken Improvers of Real Estate," see 64 N.C.L. Rev. 37 (1985).

§ 1-348. Payment made to court; land sold on default.

Legal Periodicals. — For article, "Mistaken Improvers of Real Estate," see 64 N.C.L. Rev. 37 (1985).

ARTICLE 31.

Supplemental Proceedings.

§ 1-358. Disposition of property forbidden.

CASE NOTES

Cited in North Carolina Nat'l Bank v. C.P. Robinson Co., — N.C. App. —, 341 S.E.2d 362 (1986).

§ 1-362. Debtor's property ordered sold.

CASE NOTES

Cited in North Carolina Nat'l Bank v. C.P. Robinson Co., — N.C. App. —, 341 S.E.2d 362 (1986).

SUBCHAPTER XII. SPECIAL PROCEEDINGS.

ARTICLE 33.

Special Proceedings.

§ 1-393. Chapter and Rules of Civil Procedure applicable to special proceedings.

CASE NOTES

Special Proceedings. — Even where an action is a special proceeding, the Rules of Civil Procedure are made applicable by this section, which provides that the Rules of Civil Procedure and the provisions of this chapter are applicable to special proceedings, except as otherwise provided. VEPCO v. Tillett, — N.C. —, 340 S.E.2d 62 (1986).

Private Condemnation Proceedings. — Section 40A-12, together with this section, gives trial courts clear authority to apply the Rules of Civil Procedure in private condemna-

tion proceedings, at least to the extent that those rules do not directly conflict with procedures specifically mandated by Chapter 40A. VEPCO v. Tillett, — N.C. —, 340 S.E.2d 62 (1986).

Legitimation Proceedings. — The procedural statutes that apply to special proceedings are designed to fully protect the rights of all persons interested in special proceedings, including legitimation proceedings. In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985).

§ 1-394. Contested special proceedings; commencement; summons.

CASE NOTES

Cited in In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985).

SUBCHAPTER XIII. PROVISIONAL REMEDIES.

ARTICLE 35.

Attachment.

Part 2. Procedure to Secure Attachment.

§ 1-440.10. Bond for attachment.

CASE NOTES

Applied in *State Employee's Credit Union, Inc. v. Gentry*, 75 N.C. App. 260, 330 S.E.2d 645 (1985).

§ 1-440.11. Affidavit for attachment; amendment.

CASE NOTES

I. IN GENERAL.

Inc. v. Gentry, 75 N.C. App. 260, 330 S.E.2d 645 (1985).

Applied in *State Employee's Credit Union*,

§ 1-440.12. Order of attachment; form and contents.

CASE NOTES

A "notice of levy" served upon a garnishee was insufficient process to accord the serving party the status of an attaching creditor. It was incumbent on the party, if it desired to establish a lien by attachment or an interest in the attached property, to put its claim in issue by filing a proper claim in accor-

dance with § 1-440.1 et seq. or § 1-440.43(2). Failing this, the party's contention that it could intervene as an attaching creditor under § 1-440.33(g) failed, and the garnishee's motion to join all attaching creditors was moot. *State Employee's Credit Union, Inc. v. Gentry*, 75 N.C. App. 260, 330 S.E.2d 645 (1985).

Part 3. Execution of Order of Attachment; Garnishment.

§ 1-440.25. Levy upon debt owed by, or property in possession of, the garnishee.

CASE NOTES

Applied in *State Employee's Credit Union, Inc. v. Gentry*, 75 N.C. App. 260, 330 S.E.2d 645 (1985).

§ 1-440.28. Admission by garnishee; setoff; lien.

CASE NOTES

Applied in *State Employee's Credit Union, Inc. v. Gentry*, 75 N.C. App. 260, 330 S.E.2d 645 (1985).

Part 4. Relating to Attached Property.**§ 1-440.33. When lien of attachment begins; priority of liens.**

CASE NOTES

A "notice of levy" served upon a garnishee was insufficient process to accord the serving party the status of an attaching creditor. It was incumbent on the party, if it desired to establish a lien by attachment or an interest in the attached property, to put its claim in issue by filing a proper claim in accor-

dance with § 1-440.1 et seq. or § 1-440.43(2). Failing this, the party's contention that it could intervene as an attaching creditor under this section failed, and the garnishee's motion to join all attaching creditors was moot. *State Employee's Credit Union, Inc. v. Gentry*, 75 N.C. App. 260, 330 S.E.2d 645 (1985).

Part 5. Miscellaneous Procedure Pending Final Judgment.**§ 1-440.43. Remedies of third person claiming attached property or interest therein.**

CASE NOTES

A "notice of levy" served upon a garnishee was insufficient process to accord the serving party the status of an attaching creditor. It was incumbent on the party, if it desired to establish a lien by attachment or an interest in the attached property, to put its claim in issue by filing a proper claim in accor-

dance with § 1-440.1 et seq. or this section. Failing this, the party's contention that it could intervene as an attaching creditor under § 1-440.33(g) failed, and the garnishee's motion to join all attaching creditors was moot. *State Employee's Credit Union, Inc. v. Gentry*, 75 N.C. App. 260, 330 S.E.2d 645 (1985).

ARTICLE 37.

Injunction.

§ 1-494. Before what judge returnable.

All restraining orders and injunctions granted by any of the judges of the superior court shall be made returnable before the resident judge of the district, a special judge residing in the district, or any superior court judge assigned to hold court in the district where the civil action or special proceeding is pending, within 20 days from date of order. If a judge before whom the matter is returned fails, for any reason, to hear the motion and application, on the date set or within 10 days thereafter, any regular or special judge resident in, or assigned to hold the courts of, some adjoining district may hear and determine the said motion and application, after giving 10 days' notice to the parties interested in the application or motion. This removal continues in force the motion and application or motion. This removal continues in force the motion and application theretofore granted till they can be heard and determined by the judge having jurisdiction.

All restraining orders and injunctions granted by any judge of the district court shall be made returnable before the judge granting such order or injunction or before the chief district judge or a district judge authorized to hear in-chambers matters in the district where the civil action is pending, within 20 days from the date of the order. If the judge before whom the matter is returned fails, for any reason, to hear the motion and application on the date set, or within 10 days thereafter, any district judge of the district authorized to hear in-chambers matters may hear and determine the said motion and application, after giving 10 days' notice to the parties interested in the application or motion. (1876, c. 223, s. 2; 1879, c. 63, ss. 2, 3; 1881, c. 51; Code, s. 336; Rev., s. 815; C.S., s. 852; 1963, c. 1143; 1973, c. 66, s. 3.)

Editor's Note. — The section above is set out to correct an error in the main volume.

ARTICLE 38.

Receivers.

Part 1. Receivers Generally.

§ 1-501. What judge appoints.

CASE NOTES

Temporary Receiver Held Not Liable for Failure to Honor Levy. — A temporary receiver appointed by a state superior court judge for the purpose of taking possession of all the assets of a partnership which was involved in certain legal disputes incident to its dissolution was not personally liable for failure to honor a levy for unpaid taxes of one of the part-

ners under 26 U.S.C. § 6332(c), as the property involved was subject to a prior judicial attachment or execution by being the subject of the state court supervised receivership. *United States v. McPherson*, 631 F. Supp. 269 (M.D.N.C. 1986).

For case distinguishing between a receiver appointed as a provisional remedy

in an ordinary suit, and a corporate receiver, see United States v. McPherson, 631 F. Supp. 269 (M.D.N.C. 1986).

§ 1-502. In what cases appointed.

CASE NOTES

Temporary Receiver Held Not Liable for Failure to Honor Levy. — A temporary receiver appointed by a state superior court judge for the purpose of taking possession of all the assets of a partnership which was involved in certain legal disputes incident to its dissolution was not personally liable for failure to honor a levy for unpaid taxes of one of the partners under 26 U.S.C. § 6332(c), as the property involved was subject to a prior judicial attach-

ment or execution by being the subject of the state court supervised receivership. *United States v. McPherson*, 631 F. Supp. 269 (M.D.N.C. 1986).

For case distinguishing between a receiver appointed as a provisional remedy in an ordinary suit, and a corporate receiver, see United States v. McPherson, 631 F. Supp. 269 (M.D.N.C. 1986).

§ 1-504. Receiver's bond.

CASE NOTES

Cited in United States v. McPherson, 631 F. Supp. 269 (M.D.N.C. 1986).

§ 1-507. Validation of sales made outside county of action.

CASE NOTES

Temporary Receiver Held Not Liable for Failure to Honor Levy. — A temporary receiver appointed by a state superior court judge for the purpose of taking possession of all the assets of a partnership which was involved in certain legal disputes incident to its dissolution was not personally liable for failure to honor a levy for unpaid taxes of one of the partners under 26 U.S.C. § 6332(c), as the property involved was subject to a prior judicial attach-

ment or execution by being the subject of the state court supervised receivership. *United States v. McPherson*, 631 F. Supp. 269 (M.D.N.C. 1986).

For case distinguishing between a receiver appointed as a provisional remedy in an ordinary suit, and a corporate receiver, see United States v. McPherson, 631 F. Supp. 269 (M.D.N.C. 1986).

Part 2. Receivers of Corporations.

§ 1-507.1. Appointment and removal.

CASE NOTES

For case distinguishing between a receiver appointed as a provisional remedy in an ordinary suit, and a corporate re-

ceiver, see United States v. McPherson, 631 F. Supp. 269 (M.D.N.C. 1986).

§ 1-507.3. Title and inventory.

CASE NOTES

For case distinguishing between a receiver appointed as a provisional remedy in an ordinary suit, and a corporate re-

ceiver, see *United States v. McPherson*, 631 F. Supp. 269 (M.D.N.C. 1986).

§ 1-507.7. Report on claims to court; exceptions and jury trial.

CASE NOTES

This section expressly prohibits issuance of order of discharge unless the receiver demonstrates compliance with notice requirement. *John T. Council, Inc. v. Balfour Prods. Group, Inc.*, — N.C. App. —, 341 S.E.2d 74 (1986).

Vacation of Order for Failure to Comply with Notice Procedure. — Even where defendant had actual notice of hearing and did

not show how it was prejudiced by noncompliance with the prescribed notice procedure, where there was no showing that notice was mailed to each claimant at least 20 days prior to the hearing, the order discharging the receiver would be vacated. *John T. Council, Inc. v. Balfour Prods. Group, Inc.*, — N.C. App. —, 341 S.E.2d 74 (1986).

§ 1-507.11. Reorganization.

CASE NOTES

For case distinguishing between a receiver appointed as a provisional remedy in an ordinary suit, and a corporate re-

ceiver, see *United States v. McPherson*, 631 F. Supp. 269 (M.D.N.C. 1986).

SUBCHAPTER XIV. ACTIONS IN PARTICULAR CASES.

ARTICLE 41.

Quo Warranto.

§ 1-515. Action by Attorney General.

CASE NOTES

Stated in *State v. Felts*, — N.C. —, 339 S.E.2d 99 (1986).

ARTICLE 42.

Waste.

§ 1-533. Remedy and judgment.

CASE NOTES

Waste Defined. —

Waste, at common law, was any permanent injury with respect to lands, houses, gardens, trees, or other corporeal hereditaments by the owner of an estate less than a fee. *Homeland, Inc. v. Backer*, 78 N.C. App. 477, 337 S.E.2d 114 (1985).

With reference to the lessor-lessee situation, waste has been defined as an implied obligation in every lease on the part of the lessee to use reasonable diligence to treat the premises in such a manner that no injury is done to the property. *Homeland, Inc. v. Backer*, 78 N.C. App. 477, 337 S.E.2d 114 (1985).

Where the evidence did not conclusively show that defendants, lessees under a 30 year lease, committed waste, and on the contrary, there was plenary evidence that defendants made extensive improvements to all the rental units on the property, which they would be expected to do under a 30 year lease, plaintiff failed to establish a clear and uncontradicted prima facie case on the issue of waste, and the trial court erred in entering a directed verdict for plaintiff on this issue. *Homeland, Inc. v. Backer*, 78 N.C. App. 477, 337 S.E.2d 114 (1985).

ARTICLE 43C.

Actions Pertaining to Local Units of Government.

§ 1-539.16. Notice of claims against local units of government.

Legal Periodicals. — For comment, "Municipal Tort Liability for Negligent Failure to

Provide Adequate Police Protection," see 20 Wake Forest L. Rev. 697 (1984).

ARTICLE 43D.

Abolition of Parent-Child Immunity in Motor Vehicle Cases.

§ 1-539.21. Abolition of parent-child immunity in motor vehicle cases.

CASE NOTES

This section does not violate substantive due process because it does not deny a parent seeking to bring an action against a child for personal injury a right to which she otherwise would be entitled. Before this statute was enacted, the established rule was that both children and their parents were immune from such suits by each other. This section abolished parental immunity and opened an avenue for

children to sue their parents. To hold that an established right was taken away because the statute did not open the same door for parents is incorrect. Even if one views this section as "denying" parents of such a right, such denial is within the rights of the Legislature. *Allen v. Allen*, 76 N.C. App. 504, 333 S.E.2d 530, cert. denied and appeal dismissed, 315 N.C. 182, 337 S.E.2d 855 (1985).

The class created by this section was based on a "reasonable distinction." It is rationally related to the governmental objective of promoting and protecting domestic harmony. This section is not in violation of the equal protection requirements in the North Carolina or United States Constitutions. *Allen v. Allen*, 76 N.C. App. 504, 333 S.E.2d 530, cert. denied and appeal dismissed, 315 N.C. 182, 337 S.E.2d 855 (1985).

It is the general rule in North Carolina that unemancipated minors may not maintain an action against their parents to recover damages for an unintentional tort. Since the parent cannot be held liable in a direct action against him by the injured child, a third-party may not maintain an action against the parent, based on allegations of joint negligence, to recover contribution for damages awarded to the minor. *Lee v. Mowett Sales Co.*, 76 N.C. App. 556, 334 S.E.2d 250 (1985).

By the enactment of this section, the Legislature created a limited exception to the

common-law doctrine of parent-child immunity in North Carolina. *Lee v. Mowett Sales Co.*, 76 N.C. App. 556, 334 S.E.2d 250 (1985).

This section abolishes only a parent's immunity to suit. *Allen v. Allen*, 76 N.C. App. 504, 333 S.E.2d 530, cert. denied and appeal dismissed, 315 N.C. 182, 337 S.E.2d 855 (1985).

The text of this section is very explicit and it, not the title, controls, despite the contention that the title implies total abolition of the parent-child immunity doctrine. *Allen v. Allen*, 76 N.C. App. 504, 333 S.E.2d 530, cert. denied and appeal dismissed, 315 N.C. 182, 337 S.E.2d 855 (1985).

A riding lawnmower is not a "motor vehicle" within the meaning of this section. *Lee v. Mowett Sales Co.*, 76 N.C. App. 556, 334 S.E.2d 250 (1985).

For case declining to judicially abolish the parent-child immunity doctrine in cases not involving motor vehicles, see *Lee ex rel. Schlosser v. Mowett Sales Co.*, — N.C. —, 342 S.E.2d 882 (1986).

SUBCHAPTER XV. INCIDENTAL PROCEDURE IN CIVIL ACTIONS.

ARTICLE 44.

Compromise.

§ 1-540. By agreement receipt of less sum is discharge.

CASE NOTES

I. IN GENERAL.

Elements of Accord, etc. —

An accord is an agreement in which one of the parties undertakes a performance in satisfaction of a liquidated or disputed claim, arising from tort or contract, and the other party agrees to accept the performance even though it is different from what he considered himself entitled to; satisfaction is the completion or execution of the agreed performance. *Sanyo Elec., Inc. v. Albright Distrib. Co.*, 76 N.C. App. 115, 331 S.E.2d 738, cert. denied, 314 N.C. 668, 335 S.E.2d 496 (1985).

II. ILLUSTRATIVE CASES.

Checks. —

When there is some indication on a check

that it is tendered in full payment of a disputed claim, the cashing of the check is held to be an accord and satisfaction as a matter of law. *Sanyo Elec., Inc. v. Albright Distrib. Co.*, 76 N.C. App. 115, 331 S.E.2d 738, cert. denied, 314 N.C. 668, 335 S.E.2d 496 (1985).

Where it was uncontradicted that plaintiff negotiated defendant's check which was tendered as full payment of the disputed claim, this established an accord and satisfaction as a matter of law. When the debtor tendered the check to the creditor, the creditor had to take the check on the terms offered by the creditor or not take it at all. *Sanyo Elec., Inc. v. Albright Distrib. Co.*, 76 N.C. App. 115, 331 S.E.2d 738, cert. denied, 314 N.C. 668, 335 S.E.2d 496 (1985).

ARTICLE 45A.

*Arbitration and Award.***§ 1-567.2. Arbitration agreements made valid, irrevocable and enforceable; scope.**

CASE NOTES

There is a strong public policy favoring the settlement of disputes by arbitration, and doubts concerning the scope of arbitrable issues will be resolved in favor of the party seeking arbitration. *Servomation Corp. v. Hickory Constr. Co.*, — N.C. —, 342 S.E.2d 853 (1986).

Filing of Pleadings Does Not Constitute Waiver, etc. —

Although arbitration is a contractual right which may be waived, the mere filing of a complaint or answer does not result in waiver of arbitration, absent evidence showing prejudice to the adverse party. *Servomation Corp. v. Hickory Constr. Co.*, — N.C. —, 342 S.E.2d 853 (1986).

A party waives arbitration when it engages in conduct inconsistent with arbitration which results in prejudice to the party opposing arbitration. *Servomation Corp. v. Hickory Constr. Co.*, — N.C. —, 342 S.E.2d 853 (1986).

A party may be prejudiced by his adversary's delay in seeking arbitration if (1) it is forced to bear the expense of a long trial, (2) it loses helpful evidence, (3) it takes steps in litigation to its detriment or expends significant amounts of money on the litigation, or (4) its opponent makes use of judicial discovery procedures not available in arbitration. *Servomation Corp. v. Hickory Constr. Co.*, — N.C. —, 342 S.E.2d 853 (1986).

An unfair and deceptive practices claim pursuant to § 75-1.1 is proper for arbitra-

tion. *Rodgers Bldrs., Inc. v. McQueen*, 76 N.C. App. 16, 331 S.E.2d 726 (1985).

There is no legislative bar to arbitration of claims based on tortious conduct or unfair and deceptive practices, or of claims for punitive damages, as long as they arise out of or relate to the contract or its breach. *Rodgers Bldrs., Inc. v. McQueen*, 76 N.C. App. 16, 331 S.E.2d 726 (1985).

The Legislature has not indicated that the arbitration of claims for punitive damages is against public policy as it has not exempted such claims from the Uniform Arbitration Act. In light of the strong policy in this state favoring arbitration, such claims are arbitrable. *Rodgers Bldrs., Inc. v. McQueen*, 76 N.C. App. 16, 331 S.E.2d 726 (1985).

In an action to vacate an arbitrator's award under § 301 of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. § 185, the most clearly analogous state statute of limitations was determined to be the 90-day limitation provided in § 1-567.13(b), for vacating an award, rather than the 10-day limitation set forth in § 95-36.9(c) for a stay of proceedings, notwithstanding the provision in this section that the Uniform Arbitration Act shall not apply "to arbitration agreements between employers and employees or between their respective representatives," since § 1-567.13(b) was the statute of limitations most analogous for the determination of timeliness. *In re Gencorp, Inc.*, 622 F. Supp. 216 (W.D.N.C. 1985).

§ 1-567.3. Proceedings to compel or stay arbitration.

CASE NOTES

Quoted in *Servomation Corp. v. Hickory Constr. Co.*, — N.C. —, 342 S.E.2d 853 (1986).

§ 1-567.12. Confirmation of an award.

CASE NOTES

Cited in *Turner v. Nicholson Properties, Inc.*, — N.C. App. —, 341 S.E.2d 42 (1986).

§ 1-567.13. Vacating an award.

CASE NOTES

No Right of Appeal. — If an arbitrator makes a mistake, either as to law or fact, it is the misfortune of the party. There is no right of appeal, and the court has no power to revise the decisions of judges who are of the parties' own choosing. *Turner v. Nicholson Properties, Inc.*, — N.C. App. —, 341 S.E.2d 42 (1986).

Errors of Law or Fact, etc. —

Argument that an arbitrator who errs as a matter of law exceeds his powers and that as a result the award can be vacated was without merit, as such argument was inconsistent with the general rule that errors of law or fact, or an erroneous decision of matters submitted to arbitration, are insufficient to invalidate an award fairly and honestly made. *Turner v. Nicholson Properties, Inc.*, — N.C. App. —, 341 S.E.2d 42 (1986).

And the party seeking to set it aside, etc. —

An arbitration award is presumed valid and the burden of proving specific grounds for vacating an award rests on the party attacking it. *Turner v. Nicholson Properties, Inc.*, — N.C. App. —, 341 S.E.2d 42 (1986).

Parties May Depose Arbitrators. —

A party to an arbitration may depose the arbitrator relative to alleged misconduct only

when an objective basis exists for a reasonable belief that misconduct has occurred. *Turner v. Nicholson Properties, Inc.*, — N.C. App. —, 341 S.E.2d 42 (1986).

Fact that arbitrator had appeared as an expert witness for clients of opposing counsel's former law firm was alone insufficient to establish an objective basis for believing that the arbitrator was biased. *Turner v. Nicholson Properties, Inc.*, — N.C. App. —, 341 S.E.2d 42 (1986).

In an action to vacate an arbitrator's award under § 301 of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. § 185, the most clearly analogous state statute of limitations was determined to be the 90-day limitation provided in subsection (b), for vacating an award, rather than the 10-day limitation set forth in § 95-36.9(c) for a stay of proceedings, notwithstanding the provision in § 1-567.2 that the Uniform Arbitration Act shall not apply "to arbitration agreements between employers and employees or between their respective representatives," since subsection (b) was the statute of limitations most analogous for the determination of timeliness. *In re Gencorp, Inc.*, 622 F. Supp. 216 (W.D.N.C. 1985).

§ 1-567.15. Judgment or decree on award.

CASE NOTES

The scope of an arbitration award and its res judicata effect are matters for judicial determination. *Rodgers Bldrs., Inc. v. McQueen*, 76 N.C. App. 16, 331 S.E.2d 726 (1985).

The doctrine of res judicata applies to a judgment entered on an arbitration award as it does to any other final judgment. Thus, a judgment entered on an arbitration award is conclusive of all rights, questions, and facts in issue, as to the parties and their privies, and as to them, constitutes an absolute bar to a subsequent action arising out of the same cause of action or dispute. *Rodgers Bldrs.,*

Inc. v. McQueen, 76 N.C. App. 16, 331 S.E.2d 726 (1985).

And Judgment Operates as an Estoppel. — A judgment entered on an arbitration award, like any other final judgment, operates as an estoppel not only as to all matters actually determined or litigated in the prior proceeding, but also as to all relevant and material matters within the scope of the proceeding which the parties, in the exercise of reasonable diligence, could and should have brought forward for determination. *Rodgers Bldrs., Inc. v. McQueen*, 76 N.C. App. 16, 331 S.E.2d 726 (1985).

Chapter 1A.

Rules of Civil Procedure.

Article 3. Pleadings and Motions.

Rule

8. General rules of pleadings.

11. Signing and verification of pleadings.

Article 8. Miscellaneous.

Rule

65. Injunctions.

§ 1A-1. Rules of Civil Procedure.

ARTICLE 1.

Scope of Rules — One Form of Action.

Rule 1. Scope of rules.

CASE NOTES

Private Condemnation Proceedings. — Section 40A-12, together with § 1-393, gives trial courts clear authority to apply the Rules of Civil Procedure in private condemnation proceedings, at least to the extent that those rules do not directly conflict with procedures specifically mandated by Chapter 40A. *VEPCO v. Tillett*, — N.C. —, 340 S.E.2d 62 (1986).

Special Proceedings. — Even where an action is a special proceeding, the Rules of Civil Procedure are made applicable by § 1-393,

which provides that the Rules of Civil Procedure and the provisions of Chapter 1 on civil procedure are applicable to special proceedings, except as otherwise provided. *VEPCO v. Tillett*, — N.C. —, 340 S.E.2d 62 (1986).

Rules of Civil Procedure are not strictly applicable to proceedings under Worker's Compensation Act. *Hogan v. Cone Mills Corp.*, 315 N.C. 127, 337 S.E.2d 477 (1985).

Stated in *Long v. Reeves*, 77 N.C. App. 830, 336 S.E.2d 98 (1985).

ARTICLE 2.

Commencement of Action; Service of Process, Pleadings, Motions, and Orders.

Rule 3. Commencement of action.

CASE NOTES

I. IN GENERAL.

Cited in *Williams v. Jennette*, 77 N.C. App. 283, 335 S.E.2d 191 (1985); *In re King*, — N.C. App. —, 339 S.E.2d 87 (1986).

Applied in *Harris v. Scotland Neck Rescue Squad, Inc.*, 75 N.C. App. 444, 331 S.E.2d 695 (1985); *Long v. Fink*, — N.C. App. —, 342 S.E.2d 557 (1986).

II. COMMENCEMENT BY ISSUANCE OF SUMMONS.

The intent of this rule, etc. —

The requirement that a summons be issued and served in accordance with Rule 4, along with the court's order granting permission to file a complaint within 20 days, is intended to ensure that the defendant will have notice of the commencement of an action against him. *Estrada v. Burnham*, — N.C. —, 341 S.E.2d 538 (1986).

Rule 4. Process.

Legal Periodicals. —

For article analyzing the 1983 amendments to Rules 6, 7, 11, 16, 26, 52, 53 and 67, FRCP, comparing these rules with North Carolina

practice, and suggesting changes in certain state and federal rules, see 20 Wake Forest L. Rev. 819 (1984).

CASE NOTES

I. IN GENERAL.

The purpose of service, etc. —

The Rule 3 requirement that a summons be issued and served in accordance with this rule, along with the court's order granting permission to file a complaint within 20 days, is intended to ensure that the defendant will have notice of the commencement of an action against him. *Estrada v. Burnham*, — N.C. —, 341 S.E.2d 538 (1986).

Applied in *North Carolina State Bar v. Wilson*, 74 N.C. App. 777, 330 S.E.2d 280 (1985).

Cited in *C.W. Matthews Contracting Co. v. State*, 75 N.C. App. 317, 330 S.E.2d 630 (1985).

II. PERSONAL SERVICE ON NATURAL PERSONS.

A. In General.

Separate Houses on Same Farm. — Defendant and his parents shared the same dwelling and place of abode, for purposes of Rule 4 (j)(1)a, where they lived on the same farm, owned by the parents, although they occupied separate houses, about 60 to 100 yards apart. *Bowers v. Billings*, — N.C. App. —, 342 S.E.2d 58 (1986).

III. SERVICE ON COUNTIES, MUNICIPALITIES AND OTHER LOCAL PUBLIC BODIES.

County Hospital Authority. — Defendant hospital's motion to dismiss for insufficiency of process and insufficiency of service of process would be denied without prejudice to file a renewed motion if plaintiffs did not properly serve defendant within ten days of filing of courts order, where defendant was misnamed, in that the caption reads "Onslow Memorial Hospital, Incorporated," while defendant's actual name was the "Onslow County Hospital Authority," and where the complaint was served on the hospital administrator, who was not authorized to accept service for the hospital, since dismissal is not justified where it appears that service can be properly made. *Coastal Neuro-Psychiatric Assocs. v. Onslow County Hosp. Auth.*, 607 F. Supp. 49 (E.D.N.C. 1985).

V. SERVICE BY PUBLICATION.

This rule is appropriate only where a civil litigant's whereabouts are unknown, and the due diligence requirement contained therein is clear. In *re Clark*, 76 N.C. App. 83, 332 S.E.2d 196, cert. denied and appeal dismissed, 314 N.C. 665, 335 S.E.2d 322 (1985).

Parental Rights Termination Case. — Where the "name or identity" of a respondent parent is known, but his or her whereabouts are unknown, the petitioner in a parental rights termination case must proceed under G.S. 7A-289.27 and must comply with subdivision (j1) as regards service by publication, and specifically, with the due diligence requirement contained therein. In *re Clark*, 76 N.C. App. 83, 332 S.E.2d 196, cert. denied and appeal dismissed, 314 N.C. 665, 335 S.E.2d 322 (1985).

Personal Notice to Purported Adverse Possessor Not Required. — Where a city, in a foreclosure action, gave personal notice to all the record owners of the property in question and notice by publication to all others having an interest in the disputed property who could not with due diligence be located, it was not required to give personal notice to a purported adverse possessor whose purported interest was not recorded. *Overstreet v. City of Raleigh*, 75 N.C. App. 351, 330 S.E.2d 643 (1985).

Service by publication was void, etc. — In accord with original. See *In re Clark*, 76 N.C. App. 83, 332 S.E.2d 196, cert. denied and appeal dismissed, 314 N.C. 665, 335 S.E.2d 322 (1985).

VII. DISCONTINUANCE AND EXTENSIONS.

Tolling of Statute Stops Where Plaintiff Fails to Keep Action Alive. — While the statute of limitations is tolled when suit is properly instituted, and it stays tolled as long as the action is alive, the tolling stops if the suit is discontinued by operation of law because of the plaintiffs' failure to keep the action alive in an authorized manner after the original summons has lost its efficacy by not being served within the time allowed. *Long v. Fink*, — N.C. App. —, 342 S.E.2d 557 (1986).

Allowance of Voluntary Dismissal Held

Nugatory. — Where an action was discontinued by operation of law under section (e) of this rule, the statute of limitations having thereafter immediately run its remaining course, the

judge's subsequent order of voluntary dismissal allowing plaintiff another year within which to refile the action was nugatory. *Long v. Fink*, — N.C. App. —, 342 S.E.2d 557 (1986).

Rule 5. Service and filing of pleadings and other papers.

Legal Periodicals. —

For article analyzing the 1983 amendments to Rules 6, 7, 11, 16, 26, 52, 53 and 67, FRCP, comparing these rules with North Carolina

practice, and suggesting changes in certain state and federal rules, see 20 Wake Forest L. Rev. 819 (1984).

CASE NOTES

Quoted in *Estrada v. Burnham*, — N.C. —, 341 S.E.2d 538 (1986).

Cited in *State v. Hege*, 78 N.C. App. 435, 337 S.E.2d 130 (1985).

Rule 6. Time.

Legal Periodicals. —

For article analyzing the 1983 amendments to Rules 6, 7, 11, 16, 26, 52, 53 and 67, FRCP, comparing these rules with North Carolina

practice, and suggesting changes in certain state and federal rules, see 20 Wake Forest L. Rev. 819 (1984).

CASE NOTES

II. ENLARGEMENT OF TIME.

Extending Time in Which to File Complaint. — The clerk represents and is the court by virtue of § 1-7 and has the authority to exercise the discretionary powers conferred by this rule for the purpose of extending additional time in which to file a complaint. *Williams v. Jennette*, 77 N.C. App. 283, 335 S.E.2d 191 (1985).

IV. SERVICE OF MOTIONS AND AFFIDAVITS.

Service of Affidavits Supporting Summary Judgment. —

Although affidavits in support of a motion for summary judgment are required by section (d) of this rule and Rule 56(c) to be filed and served with the motion, Rule 56(e) grants to the trial judge wide discretion to permit further affidavits to supplement those which have already been served. *Rolling Fashion Mart, Inc. v. Mainor*, — N.C. App. —, 341 S.E.2d 61 (1986).

ARTICLE 3.

Pleadings and Motions.

Rule 7. Pleadings allowed; form of motions.

Legal Periodicals. —

For article analyzing the 1983 amendments to Rules 6, 7, 11, 16, 26, 52, 53 and 67, FRCP, comparing these rules with North Carolina

practice, and suggesting changes in certain state and federal rules, see 20 Wake Forest L. Rev. 819 (1984).

CASE NOTES

II. PLEADINGS.

But Some Pleading Alleging Last Clear Chance, etc. —

Where the plaintiff in a negligence action did not exercise the option of filing a reply al-

leging last clear chance, nor plead facts in his complaint sufficient to invoke the doctrine, the pleadings were not sufficient to raise the defense. *Meadows v. Lawrence*, 75 N.C. App. 86, 330 S.E.2d 47 (1985), *aff'd*, 315 N.C. 383, 337 S.E.2d 851 (1986).

Rule 8. General rules of pleadings.

(a) *Claims for relief.* — A pleading which sets forth a claim for relief, whether an original claim, counterclaim, crossclaim, or third-party claim shall contain

- (1) A short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief, and
- (2) A demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded. In all negligence actions, and in all claims for punitive damages in any civil action, wherein the matter in controversy exceeds the sum or value of ten thousand dollars (\$10,000), the pleading shall not state the demand for monetary relief, but shall state that the relief demanded is for damages incurred or to be incurred in excess of ten thousand dollars (\$10,000). However, at any time after service of the claim for relief, any party may request of the claimant a written statement of the monetary relief sought, and the claimant shall, within 10 days after such service, provide such statement, which shall not be filed with the clerk until the action has been called for trial or entry of default entered. Such statement may be amended in the manner and at times as provided by Rule 15.

(1967, c. 954, s. 1; 1975, 2nd Sess., c. 977, s. 5; 1979, ch. 654, s. 4; 1985 (Reg. Sess., 1986), c. 1027, s. 56.)

Only Part of Rule Set Out. — As the rest of the rule was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1027, s. 57, contains a severability clause.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective January 1, 1987, and applicable to pleadings, motions, or papers filed on or after that date, rewrote subdivision (a)(2), which formerly provided that the pleading should not state the demand for

monetary relief, but should state that the relief demanded exceeded \$10,000.00, in professional malpractice actions, including actions against health care providers, and in actions against product manufacturers, wholesalers or retailers for personal injury, death or property damage based on or arising out of any alleged defect or failure in relation to a product.

Legal Periodicals. —

For article, "The American Medical Association vs. The American Tort System," see 8 *Campbell L. Rev.* 241 (1986).

CASE NOTES

I. IN GENERAL.

The Right to Amend, etc. —

A motion to amend an answer is addressed to the sound discretion of the trial judge, and he has broad discretion in permitting or denying

amendments. *Hinson v. Brown*, — N.C. App. —, 343 S.E.2d 284 (1986).

This rule did not remove all requirements of particularity. Thus, mere assertion of a grievance will not suffice, but the pleader must plead with sufficient particularity to

identify the legal issues and to allow the other party to frame a responsive pleading. *Smith v. City of Charlotte*, — N.C. App. —, 339 S.E.2d 844 (1986).

The policy behind the notice theory of the present rules is to resolve controversies on the merits, following opportunity for discovery, rather than resolving them on technicalities of pleading. *Smith v. City of Charlotte*, — N.C. App. —, 339 S.E.2d 844 (1986).

Cited in *Wilder v. Amatex Corp.*, 314 N.C. 550, 336 S.E.2d 66 (1985).

II. PLEADINGS, GENERALLY.

All this rule requires is a "short and plain statement," etc. —

It was error for the court to strike a lengthy, highly detailed and technical complaint on the apparent grounds that it did not contain a short and plain statement of the facts. This rule prescribes the minimum information that a pleading must contain; it does not require that a complaint contain only a "short and plain statement." *Holley v. Burroughs Wellcome Co.*, 74 N.C. App. 738, 330 S.E.2d 228 (1985).

Complaint Held Sufficient. —

While the allegation in a malpractice claim, that the defendant-physician's conduct "amounted to a reckless and wanton disregard of and indifference to the rights and safety of" the plaintiff-patient, mentioned no particular

instance of aggravated conduct, it was sufficient to put the defendant on notice of a punitive damage claim, to provide an understanding of the nature and basis of the claim, and to allow him to prepare his defense. *Paris v. Kreitz*, 75 N.C. App. 365, 331 S.E.2d 234, cert. denied, 315 N.C. 185, 337 S.E.2d 858 (1985).

III. AFFIRMATIVE DEFENSES.

As Well as Laches. —

Laches is an affirmative defense which must be specifically pleaded by answer. *Bertie-Hertford Child Support Enforcement Agency v. Barnes*, — N.C. App. —, 342 S.E.2d 579 (1986).

Sudden Emergency. — Defendants failed to meet the requirement of section (c) of this rule when they failed to set forth affirmatively sudden emergency as an avoidance or affirmative defense. *Hinson v. Brown*, — N.C. App. —, 343 S.E.2d 284 (1986).

V. ALTERNATIVE, HYPOTHETICAL AND INCONSISTENT STATEMENTS.

There is no requirement that all claims be legally consistent. *Concrete Serv. Corp. v. Investors Group, Inc.*, — N.C. App. —, 340 S.E.2d 755 (1986).

A party may even allege and prove inconsistent or alternative theories without subjecting the case to directed verdict. *Hall v. Mabe*, 77 N.C. App. 758, 336 S.E.2d 427 (1985).

Rule 9. Pleading special matters.

CASE NOTES

IX. Time and Place.

I. IN GENERAL.

Intent and knowledge may be averred generally. *Carver v. Roberts*, 78 N.C. App. 511, 337 S.E.2d 126 (1985).

Applied in *Dellinger v. Lamb*, — N.C. App. —, 339 S.E.2d 480 (1986).

III. FRAUD, DURESS, MISTAKE, ETC.

Notice Pleading Not Applicable, etc. —

A claim for relief based on fraud is unique and must be pleaded with particularity even under the liberal rules of notice pleading. *Stanford v. Owens*, 76 N.C. App. 284, 332 S.E.2d 730, cert. denied, 314 N.C. 670, 336 S.E.2d 402 (1985).

What Constitutes Fraud. —

To prevail in a cause of action sounding in fraud, the plaintiff must prove that false representations or concealments were made with

knowledge of the truth or with reckless indifference thereto. *Watts v. Cumberland County Hosp. Sys.*, 74 N.C. App. 769, 330 S.E.2d 256, cert. granted, — N.C. —, 335 S.E.2d 499 (1985).

Requirements of Pleading Averring Fraud. —

In accord with 2nd paragraph in original. See *Watts v. Cumberland County Hosp. Sys.*, 75 N.C. App. 1, 330 S.E.2d 242, cert. denied as to additional issues, 314 N.C. 548, 335 S.E.2d 27 (1985).

Without any essential factual basis to support the plaintiff's allegation that the defendant knowingly made false misrepresentations — a critical element of fraud — his tort claim for fraud could not withstand a motion to dismiss. *Beasley v. National Sav. Life Ins. Co.*, 75 N.C. App. 104, 330 S.E.2d 207, cert. granted, 314 N.C. 537, 335 S.E.2d 13 (1985).

Mere generalities and conclusory, etc. —

In order to state a cause of action for fraud, facts must be alleged which, if true, would constitute fraud, it not being sufficient to allege the elements of fraud in general terms. *Watts v. Cumberland County Hosp. Sys.*, 74 N.C. App. 769, 330 S.E.2d 256, cert. granted, — N.C. —, 335 S.E.2d 499 (1985).

IX. TIME AND PLACE.

For the purposes of testing the timeliness of a complaint, averments of time and place are material. This allows early consideration of statute of limitations defenses, which are appropriately raised by motions to dismiss. *Smith v. City of Charlotte*, — N.C. App. —, 339 S.E.2d 844 (1986).

Rule 10. Form of pleadings.

CASE NOTES

Cited in *State v. McLean*, 74 N.C. App. 224, 328 S.E.2d 451 (1985).

Rule 11. Signing and verification of pleadings.

(a) *Signing by Attorney.* — Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

(1967, c. 954, s. 1; 1985 (Reg. Sess., 1986), c. 1027, s. 55.)

Only Part of Rule Set Out. — As the rest of the rule was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1027, s. 57, contains a severability clause.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective January 1, 1987, and applicable to pleadings, motions, or

papers filed on or after that date, rewrote subsection (a).

Legal Periodicals. —

For article analyzing the 1983 amendments to Rules 6, 7, 11, 16, 26, 52, 53 and 67, FRCP, comparing these rules with North Carolina practice, and suggesting changes in certain state and federal rules, see 20 Wake Forest L. Rev. 819 (1984).

CASE NOTES

Plaintiff May Not File Solely to Toll Statute. — A plaintiff may not file a complaint within the time permitted by the statute of limitations for the sole purpose of tolling the statute of limitations, but with no intention of pursuing the prosecution of the action, then voluntarily dismiss the complaint and thereby gain an additional year pursuant to Rule 41 (a)(1). *Estrada v. Burnham*, — N.C. —, 341 S.E.2d 538 (1986).

Pleading in Violation of Section (a) May Not Be Voluntarily Dismissed. — Rule 41(a)(1) and section (a) of this rule must be construed in *pari materia* to require that, in

order for a timely filed complaint to toll the statute of limitations and provide the basis for a one-year "extension" by way of a Rule 41(a)(1) voluntary dismissal without prejudice, the complaint must conform in all respects to the rules of pleading, including section (a) of this rule. A pleading filed in violation of section (a) should be stricken as "sham and false" and may not be voluntarily dismissed without prejudice in order to give the pleader the benefit of the "saving" provision of Rule 41(a)(1). *Estrada v. Burnham*, — N.C. —, 341 S.E.2d 538 (1986).

Rule 12. Defenses and objections — when and how presented — by pleading or motion — motion for judgment on pleading.

Legal Periodicals. —

For article analyzing the 1983 amendments to Rules 6, 7, 11, 16, 26, 52, 53 and 67, FRCP, comparing these rules with North Carolina

practice, and suggesting changes in certain state and federal rules, see 20 Wake Forest L. Rev. 819 (1984).

CASE NOTES

I. IN GENERAL.

Appeal of Dismissal. — Although order dismissing class action without prejudice did not determine the controversy and was interlocutory, the order affected a substantial right of the unnamed plaintiffs and was immediately appealable. *Crow v. Citicorp Acceptance Co.*, — N.C. App. —, 339 S.E.2d 437 (1986).

Applied in *Bjornsson v. Mize*, 75 N.C. App. 289, 330 S.E.2d 520 (1985); *Fraser v. Di Santi*, 75 N.C. App. 654, 331 S.E.2d 217 (1985); *Craven County Hosp. Corp. v. Lenoir County*, 75 N.C. App. 453, 331 S.E.2d 690 (1985); *Cheek v. Higgins*, 76 N.C. App. 151, 331 S.E.2d 712 (1985); *Biddix v. Henredon Furn. Indus., Inc.*, 76 N.C. App. 30, 331 S.E.2d 717 (1985); *Olive v. Great Am. Ins. Co.*, 76 N.C. App. 180, 333 S.E.2d 41 (1985); *Claycomb v. HCA-Raleigh Community Hosp.*, 76 N.C. App. 382, 333 S.E.2d 333 (1985); *Threatt v. Hiers*, 76 N.C. App. 521, 333 S.E.2d 772 (1985); *Forbes Homes, Inc. v. Trimpi*, — N.C. App. —, 342 S.E.2d 526 (1986).

Cited in *Evans v. Mitchell*, 74 N.C. App. 730, 329 S.E.2d 681 (1985); *North Carolina State Bar v. Wilson*, 74 N.C. App. 777, 330 S.E.2d 280 (1985); *Andrews v. Peters*, 75 N.C. App. 252, 330 S.E.2d 638 (1985); *Paris v. Kreitz*, 75 N.C. App. 365, 331 S.E.2d 234 (1985); *Square D Co. v. C.J. Kern Contractors*,

314 N.C. 423, 334 S.E.2d 63 (1985); *Bolton Corp. v. T.A. Loving Co.*, 77 N.C. App. 90, 334 S.E.2d 495 (1985); *Williams v. Jennette*, 77 N.C. App. 283, 335 S.E.2d 191 (1985); *Smith v. Mariner*, 77 N.C. App. 589, 335 S.E.2d 530 (1985); *DeSoto Trail, Inc. v. Covington Diesel, Inc.*, 77 N.C. App. 637, 335 S.E.2d 794 (1985); *Land-of-Sky Regional Council v. County of Henderson*, 78 N.C. App. 85, 336 S.E.2d 653 (1985); *Davidson v. Volkswagenwerk*, 78 N.C. App. 193, 336 S.E.2d 714 (1985); *Mastrom, Inc. v. Continental Cas. Co.*, 78 N.C. App. 483, 337 S.E.2d 162 (1985); *Blanton v. Moses H. Cone Mem. Hosp.*, 78 N.C. App. 502, 337 S.E.2d 200 (1985); *Azzolino v. Dingfelder*, 315 N.C. 103, 337 S.E.2d 528 (1985); *Landin Ltd. v. Sharon Luggage, Ltd., of Greensboro, Inc.*, 78 N.C. App. 558, 337 S.E.2d 685 (1985); *Alamance County Hosp. v. Neighbors*, 315 N.C. 362, 338 S.E.2d 87 (1986); *Schofield v. Schofield*, 78 N.C. App. 657, 338 S.E.2d 132 (1986); *Schuman v. Investors Title Ins. Co.*, 78 N.C. App. 783, 338 S.E.2d 611 (1986); *Trought v. Richardson*, 78 N.C. App. 758, 338 S.E.2d 617 (1986); *Poore v. Swan Quarter Farms, Inc.*, — N.C. App. —, 338 S.E.2d 817 (1986); *Vann v. North Carolina State Bar*, — N.C. App. —, 339 S.E.2d 95 (1986); *Dellinger v. Lamb*, — N.C. App. —, 339 S.E.2d 480 (1986); *Barrino v. Radiator Specialty Co.*, — N.C. —, 340 S.E.2d 295 (1986); *Lowder ex rel. Doby v. Doby*, — N.C.

App. —, 340 S.E.2d 487 (1986); *Little v. National Servs. Indus., Inc.*, — N.C. App. —, 340 S.E.2d 510 (1986); *Beasley v. National Sav. Life Ins. Co.*, — N.C. —, 341 S.E.2d 338 (1986); *Jackson v. Housing Auth.*, — N.C. —, 341 S.E.2d 523 (1986); *Estrada v. Burnham*, — N.C. —, 341 S.E.2d 538 (1986); *First Charter Nat'l Bank v. Taylor*, — N.C. App. —, 341 S.E.2d 747 (1986); *Mize v. County of Mecklenburg*, — N.C. App. —, 341 S.E.2d 767 (1986); *Hardaway Constructors, Inc. v. North Carolina Dep't of Transp.*, — N.C. App. —, 342 S.E.2d 52 (1986); *Clark v. Asheville Contracting Co.*, — N.C. —, 342 S.E.2d 832 (1986); *Lee ex rel. Schlosser v. Mowett Sales Co.*, — N.C. —, 342 S.E.2d 882 (1986); *Talbert v. Mauney*, — N.C. App. —, 343 S.E.2d 5 (1986); *Indiana Lumbermen's Mut. Ins. Co. v. Champion*, — N.C. App. —, 343 S.E.2d 15 (1986); *Pearce v. American Defender Life Ins. Co.*, — N.C. —, 343 S.E.2d 174 (1986); *Vick v. Vick*, — N.C. App. —, 343 S.E.2d 245 (1986).

IV. SUBJECT MATTER JURISDICTION.

Lack of jurisdiction, etc. —

Lack of subject matter jurisdiction may always be raised by a party, or the court may raise such defect on its own initiative, even after an answer has been filed. *Jackson County ex rel. Child Support Enforcement Agency v. Swayney*, 75 N.C. App. 629, 331 S.E.2d 145 (1985).

Civil Action Against Member of Cherokee Indians. — A state court lacked the necessary subject matter jurisdiction in a civil action brought by a county child support enforcement agency against a member of the Eastern Band of Cherokee Indians who resided within the exterior boundaries of the reservation, in light of the well established rules of federal preemption, in conjunction with the specific federal regulations involved. The county had to litigate the matter in the court of Indian offenses. *Jackson County ex rel. Child Support Enforcement Agency v. Swayney*, 75 N.C. App. 629, 331 S.E.2d 145 (1985).

V. PERSONAL JURISDICTION.

Filing Answer as Waiver of Right to Contest. — The defendant waived his right to contest lack of personal jurisdiction when he filed his answer without raising this defense. *Jackson County ex rel. Child Support Enforcement Agency v. Swayney*, 75 N.C. App. 629, 331 S.E.2d 145 (1985).

IX. FAILURE TO STATE CLAIM.

A. In General.

Motion to dismiss is the usual and proper method, etc. —

In accord with the 1st paragraph in the main volume. See *Braun v. Glade Valley School, Inc.*, 77 N.C. App. 83, 334 S.E.2d 404 (1985).

The test on a motion to dismiss for failure to state a claim upon which relief can be granted is whether the pleading is legally sufficient. *State ex rel. Tennessee Dep't of Health & Env't v. Environmental Mgt. Comm'n*, 78 N.C. App. 763, 338 S.E.2d 781 (1986).

Allegations Treated as True. —

In accord with 1st paragraph in the main volume. See *Ladd v. Estate of Kellenberger*, 314 N.C. 477, 334 S.E.2d 751 (1985); *Sorrell v. Sorrell's Farms & Ranches, Inc.*, 78 N.C. App. 415, 337 S.E.2d 595 (1985); *Hawkins v. Webster*, 78 N.C. App. 589, 337 S.E.2d 682 (1985).

In accord with 3rd paragraph in the main volume. See *State ex rel. Tennessee Dep't of Health & Env't v. Environmental Mgt. Comm'n*, 78 N.C. App. 763, 338 S.E.2d 781 (1986).

In an appellate review of a dismissal of a counterclaim under subsection (b)(6), the material allegations of fact alleged in the counterclaim were taken as admitted. *Barnaby v. Boardman*, 313 N.C. 565, 330 S.E.2d 600 (1985).

A legal insufficiency may be due to an absence of law to support a claim of the sort made, absence of fact sufficient to make a good claim, or the disclosure of some fact which will necessarily defeat the claim. *State ex rel. Tennessee Dep't of Health & Env't v. Environmental Mgt. Comm'n*, 78 N.C. App. 763, 338 S.E.2d 781 (1986).

Mere vagueness or lack of detail is not ground, etc. —

While mere vagueness is not enough to dismiss the complaint, the complaint must state enough to satisfy the requirements of the substantive law giving rise to the claim; merely asserting a grievance is not enough. *Braun v. Glade Valley School, Inc.*, 77 N.C. App. 83, 334 S.E.2d 404 (1985).

Upon Which Relief Can Be Granted, etc. —

In accord with 1st paragraph in main volume. See *Hawkins v. Webster*, 78 N.C. App. 589, 337 S.E.2d 682 (1985).

The facts pleaded in the complaint are the determining factors in deciding whether the complaint states a claim upon which relief can be granted; the legal theory set forth in the complaint does not determine the validity of the claim. *Braun v. Glade Valley School, Inc.*, 77 N.C. App. 83, 334 S.E.2d 404 (1985).

In order to survive a motion to dismiss pursuant to subdivision (b)(6), a complaint for fraud must allege with particularity all material facts and circumstances constituting

the fraud. But while the facts constituting fraud must be alleged with particularity, there is no requirement that any precise formula be followed or that any certain language be used. *Carver v. Roberts*, 78 N.C. App. 511, 337 S.E.2d 126 (1985).

Dismissal Is Precluded Absent Insurmountable, etc. —

In accord with 1st paragraph in the main volume. See *Ladd v. Estate of Kellenberger*, 314 N.C. 477, 334 S.E.2d 751 (1985).

A complaint would not be dismissed for failure to state a valid claim unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim. Unless the face of the complaint shows an insurmountable bar to recovery, plaintiff's action should not be dismissed on the pleading. *Lyon v. Continental Trading Co.*, 76 N.C. App. 499, 333 S.E.2d 774 (1985).

Subdivision (b)(6) generally precludes dismissal except in those instances in which the face of the complaint discloses some insurmountable bar to recovery. *Hawkins v. Webster*, 78 N.C. App. 589, 337 S.E.2d 682 (1985).

And a complaint should not, etc. —

In accord with 1st paragraph in main volume. See *Braun v. Glade Valley School, Inc.*, 77 N.C. App. 83, 334 S.E.2d 404 (1985); *Sorrell v. Sorrell's Farms & Ranches, Inc.*, 78 N.C. App. 415, 337 S.E.2d 595 (1985); *Bryant v. Pitt*, 78 N.C. App. 801, 338 S.E.2d 588 (1986); *Miller v. Parlor Furn. of Hickory, Inc.*, — N.C. App. —, 339 S.E.2d 804 (1986).

In accord with 4th paragraph in the main volume. See *Ladd v. Estate of Kellenberger*, 314 N.C. 477, 334 S.E.2d 751 (1985).

Dismissal of a complaint is proper under the provisions of subsection (b)(6) when one or more of the following three conditions is satisfied: (1) When the complaint on its face reveals that no law supports plaintiff's claim; (2) when the complaint reveals on its face the absence of fact sufficient to make a good claim; (3) when some fact disclosed in the complaint necessarily defeats the plaintiff's claim. *Oates v. Jag, Inc.*, 314 N.C. 276, 333 S.E.2d 222 (1985).

Complaint Without Merit May Be Dismissed. —

In accord with 1st paragraph in main volume. See *Lee v. Paragon Group Contractors*, 78 N.C. App. 334, 337 S.E.2d 132 (1985).

Or Where Complaint Discloses, etc. —

When a complaint states a valid claim but also discloses an unconditional affirmative defense which defeats the asserted claim, the motion to dismiss for failure to state a claim upon which relief can be granted will be granted and the action dismissed. *Skinner v. E.F. Hutton & Co.*, 314 N.C. 267, 333 S.E.2d 236 (1985).

A statute of limitations can be the basis for dismissal on a Rule 12(b)(6) motion if the face of the complaint discloses that plaintiff's claim is so barred. *Long v. Fink*, — N.C. App. —, 342 S.E.2d 557 (1986).

Appellate Court's Prior Decision Not Binding. — The appellate court's prior decision, in which it "vacated" an order dismissing the plaintiff's complaint for failure to state a claim, was not binding on the court on a later appeal of a judgment notwithstanding the verdict. While the appellate court, in the first appeal, held that the complaint disclosed no insurmountable bar to recovery under at least one of the claims for relief, its inquiry in the second appeal was a very different one: Was the evidence introduced at trial, viewed in the light most favorable to the plaintiff, insufficient as a matter of law to support the jury's verdict? *Pearce v. American Defender Life Ins. Co.*, 74 N.C. App. 620, 330 S.E.2d 9, cert. granted, 314 N.C. 542, 335 S.E.2d 20 (1985).

Motion to Dismiss for Abuse of Process.

— Allegations in the complaint that the defendant filed liens "for the purpose of injuring and destroying the credit business of the plaintiffs and in general to oppress the plaintiffs," and that the defendant knew they were without legal basis, stated an ulterior motive and a willful act not proper in the regular course of the earlier legal proceeding and, therefore, the defendant's motion to dismiss the action for abuse of process was properly denied. *Hewes v. Wolfe*, 74 N.C. App. 610, 330 S.E.2d 16 (1985).

Allegations of Plaintiff's Expenses Did Not State Claim. — Allegations made concerning the expenses the plaintiff occurred in presenting his claim and in preparing and pursuing his lawsuit did not state a claim that would support legal relief. *Dailey v. Integon Gen. Ins. Corp.*, 75 N.C. App. 387, 331 S.E.2d 148 (1985).

Complaint for Insurance Benefits Alleging Intentional Infliction of Emotional Distress. — Since a contract of insurance is a commercial transaction, absent allegations of specific facts which, if proved, would have demonstrated calculated intentional conduct causing emotional distress directed towards the claimant, a complaint for insurance benefits alleging intentional infliction of emotional distress did not withstand a motion to dismiss under subsection (b)(6). *Beasley v. National Sav. Life Ins. Co.*, 75 N.C. App. 104, 330 S.E.2d 207, cert. granted, 314 N.C. 537, 335 S.E.2d 13 (1985).

There is a difference between sufficiently alleging a claim and sufficiently proving it. Although the plaintiff clearly alleged a claim for the intentional infliction of emotional distress, there was no testimony whatsoever to indicate that he suffered emotional distress. Such an injury cannot be assumed, but must be proved

by evidence. *Dailey v. Integon Gen. Ins. Corp.*, 75 N.C. App. 387, 331 S.E.2d 148 (1985).

For claims based on third-party beneficiary contract doctrine to withstand a motion to dismiss, plaintiffs' allegations must show: (1) the existence of a contract between two other persons; (2) that the contract was valid and enforceable; and (3) that the contract was entered into for his direct, and not incidental, benefit. *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, — N.C. App. —, 339 S.E.2d 62 (1986).

Plaintiffs' allegation of a very general taking by aircraft overflights "within the past two years" failed to allege with reasonable specificity when the alleged appropriation or taking occurred; however, rather than dismissing the complaint altogether, the court should have required plaintiffs to come forward in accordance with defendant's motion for a more definite statement and plead the facts they possessed, so that the court could then rule on their timeliness and sufficiency. *Smith v. City of Charlotte*, — N.C. App. —, 339 S.E.2d 844 (1986).

Review of Denial of Motion to Dismiss Not Available after Judgment on Merits. — Where an unsuccessful motion to dismiss is grounded on an alleged insufficiency of the facts to state a claim for relief, and the case thereupon proceeds to judgment on the merits, the unsuccessful movant may not on an appeal from the final judgment seek review of the denial of the motion to dismiss. *Concrete Serv. Corp. v. Investors Group, Inc.*, — N.C. App. —, 340 S.E.2d 755 (1986).

B. Conversion of Motion to Dismiss to Summary Judgment Motion.

Illustrative Case. — Where plaintiff sought a personal judgment against owners based on its contract to drill a well and to have such

personal judgment declared to be a specific lien on the property allegedly conveyed by owners to purchasers, but there was no allegation in the complaint that the purchasers were indebted to plaintiff in any amount, and subsequently plaintiff abandoned its claim for a personal judgment based on the contract to drill the well by taking a voluntary dismissal of its claim against owners, when the trial judge granted the purchasers Rule 12(b) motion to dismiss there was no debt or judgment to be secured by a lien on the property in question, and since the court necessarily considered matters outside the pleadings, i.e., the voluntary dismissal of plaintiff's claim for personal judgment against owners, the Rule 12(b)(6) order was converted to a summary judgment for the purchasers with respect to the dismissal of plaintiff's claim to have a lien imposed on the property. *Caldwell's Well Drilling, Inc. v. Moore*, — N.C. App. —, 340 S.E.2d 515 (1986).

XI. MOTION FOR JUDGMENT ON THE PLEADINGS.

Findings and Conclusions as Surplusage. — Findings of fact and conclusions of law in a judgment on the pleadings were surplusage and of no legal effect. *United Va. Bank v. Air-Lift Assocs.*, — N.C. App. —, 339 S.E.2d 90 (1986).

XIII. MOTION TO STRIKE.

"Short and Plain Statement" Complaint. — It was error for the court to strike a lengthy, highly detailed and technical complaint on the apparent grounds that it did not contain a short and plain statement of the facts. Rule 8 prescribes the minimum information that a pleading must contain; it does not require that a complaint contain only a "short and plain statement." *Holley v. Burroughs Wellcome Co.*, 74 N.C. App. 736, 330 S.E.2d 228 (1985).

Rule 13. Counterclaim and crossclaim.

CASE NOTES

I. IN GENERAL.

Applied in *Basinger v. Basinger*, — N.C. App. —, 342 S.E.2d 549 (1986).

II. COUNTERCLAIMS.

The purpose of section (a), etc. —

In accord with original. See *Carolina Squire, Inc. v. Champion Map Corp.*, 75 N.C. App. 194, 330 S.E.2d 36 (1985).

Claim for damages for breach of contract should have been raised as compulsory counterclaim in a previously filed de-

claratory judgment action, since both actions arose out of the same franchise agreement, both actions were brought about by the same set of occurrences, the damage claim was clearly extant during the pleading phase of the declaratory judgment action, none of the exceptions to the compulsory counterclaim provisions were applicable, and the plaintiff made no showing that its rights would have been jeopardized if all issues were adjudicated in a single action. *Carolina Squire, Inc. v. Champion Map Corp.*, 75 N.C. App. 194, 330 S.E.2d 36 (1985).

Claim of Diversion of Partnership Assets and Accounting. — The original action claimed a diversion of partnership assets and sought a partnership accounting. A later abuse of process claim was that the plaintiffs in the original action, for ulterior motives, used their action to file *lis pendens* and liens against the property of the plaintiffs in the second action. The two claims, while possessing similar factual bases, required different proof, and the plaintiffs in the second action, by failing to plead a counterclaim in the first action, were not barred by *res judicata* from asserting their abuse of process claim. *Hewes v. Wolfe*, 74 N.C. App. 610, 330 S.E.2d 16 (1985).

A nonqualifying corporation, against which an action is brought in this State, may bring a compulsory counterclaim in that action. *E & E Indus., Inc. v. Crown Textiles, Inc.*, — N.C. App. —, 342 S.E.2d 397 (1986).

By suing in a forum of this State a foreign

corporation which has not obtained a certificate of authority before the commencement of the action, a North Carolina corporation effectively waives any protection which § 55-154 affords it from compulsory counterclaims asserted by the party sued. *E & E Indus., Inc. v. Crown Textiles, Inc.*, — N.C. App. —, 342 S.E.2d 397 (1986).

III. CROSSCLAIMS.

Dismissal of Plaintiff's Claims Does Not Require Dismissal of Crossclaims. — Unless a crossclaim is dependent upon the plaintiff's original claim (as would be, e.g., a crossclaim for indemnity or contribution) or is purely defensive, the plaintiff's dismissal of its claims against all of the defendants does not require the dismissal of a crossclaim properly filed in the same action. *Jennette Fruit & Produce Co. v. Seafare Corp.*, 75 N.C. App. 478, 331 S.E.2d 305 (1985).

Rule 14. Third-party practice.

This rule anticipates, etc. —

This rule anticipates the disposition in one trial of cases involving multiple parties. *City of Winston-Salem v. Ferrell*, — N.C. App. —, 338 S.E.2d 794 (1986).

When a third-party defendant has an op-

portunity to participate fully in the determination of third-party plaintiff's liability, it is bound by a judgment in favor of the original plaintiff. *City of Winston-Salem v. Ferrell*, — N.C. App. —, 338 S.E.2d 794 (1986).

Rule 15. Amended and supplemental pleadings.

CASE NOTES

I. IN GENERAL.

Federal Rule Compared, etc. —

As the official comment makes clear, the last sentence of section (a) was expressly intended to depart from the federal rule time table. *Hyder v. Dergance*, 76 N.C. App. 317, 332 S.E.2d 713 (1985).

This rule contemplates liberality, etc. —

In accord with 1st paragraph in original. See *Goodrich v. Rice*, 75 N.C. App. 530, 331 S.E.2d 195 (1985).

And Amendments Should Always be Freely Allowed, etc. —

In accord with 1st paragraph in main volume. See *Mauney v. Morris*, — N.C. —, 340 S.E.2d 397 (1986).

Burden of Party Objecting, etc. —

In accord with last paragraph in main volume. See *Mauney v. Morris*, — N.C. —, 340 S.E.2d 397 (1986).

Consent Presumed Absent Objection, etc. —

The defendant indicated his consent to the

amended complaint, allegedly filed without leave of the court or the written consent of the defendant, by filing an answer, by responding to the allegations within it, and by submitting materials in support of his motion for summary judgment. *Watts v. Cumberland County Hosp. Sys.*, 75 N.C. App. 1, 330 S.E.2d 242, cert. denied as to additional issues, 314 N.C. 548, 335 S.E.2d 27 (1985).

Reasons justifying denial of an amendment are: (a) undue delay, (b) bad faith, (c) undue prejudice, (d) futility of amendment, and (e) repeated failure to cure defects by previous amendments. *Martin v. Hare*, 78 N.C. App. 358, 337 S.E.2d 632 (1985).

The trial court has broad discretion, etc.

Under this rule, the trial judge had broad discretion to permit or deny defendant's motion to amend her answer to allege a counterclaim six months after her original answer was filed, whether the counterclaim to be alleged was compulsory or permissive. *Grant & Hastings*,

P.A. v. Arlin, 77 N.C. App. 813, 336 S.E.2d 111 (1985).

Court's Ruling Not Reviewable, etc. —

In accord with 2nd paragraph in main volume. See Mauney v. Morris, — N.C. —, 340 S.E.2d 397 (1986).

Discretion in allowing amendment of pleadings is vested in the trial judge and his ruling will not be disturbed on appeal absent a showing of prejudice to the opposing party. Goodrich v. Rice, 75 N.C. App. 530, 331 S.E.2d 195 (1985).

A motion to amend is directed to the discretion of the trial court, and the exercise of the court's discretion is not reviewable absent a clear showing of abuse. Martin v. Hare, 78 N.C. App. 358, 337 S.E.2d 632 (1985). Pressman v. UNC, 78 N.C. App. 296, 337 S.E.2d 644 (1985).

After the statutory time for amending pleadings as a matter of course has elapsed, a motion to amend a complaint pursuant to section (a) of this rule is addressed to the sound discretion of the trial judge, and the denial of such motion is not reviewable on appeal absent a clear showing of abuse. Caldwell's Well Drilling, Inc. v. Moore, — N.C. App. —, 340 S.E.2d 518 (1986).

Once party amends pleading without leave of court as permitted by section (a), the opposing party has 30 days in which to respond; the rule does not distinguish between minor and major amendments. Hyder v. Dergance, 76 N.C. App. 317, 332 S.E.2d 713 (1985).

Amendment Adding Plaintiff and Alleging That Defendant Was Conducting Business under Corporate Name. — In an action brought by agents of a landowner seeking damages for the defendants' failure to construct a pond, the defendants failed to demonstrate prejudice from amendments to the pleading adding an additional plaintiff — the landowner — and inserting additional language that one of the defendants was conducting business under a corporate name. Neither of these amendments brought out any new material, changed the theory of the case, or in any way surprised the defendants. Goodrich v. Rice, 75 N.C. App. 530, 331 S.E.2d 195 (1985).

Motion Held Timely. — Where plaintiff filed his motion to amend his complaint to add a cause of action to enforce a materialman's or laborer's lien on December 8, 1983, and the last day he had furnished material or labor to defendants' property was June 15, 1983, his motion was thus filed within the 180-day period set forth in § 44A-13(a), as the date of the filing of the motion, rather than the date on which the court ruled on it, was the crucial date in measuring the period of limitations. Plaintiff's amendment was therefore not

barred by the statute of limitations, and whether it would "relate back" to the filing of the original complaint was immaterial. Mauney v. Morris, — N.C. —, 340 S.E.2d 397 (1986).

Failure of trial court to state specific reasons for denial of motion to amend does not preclude appellate court from examining the reasons for denial. Martin v. Hare, 78 N.C. App. 358, 337 S.E.2d 632 (1985).

The trial court did not err by denying the plaintiffs' motion to amend complaint by adding an additional cause of action one year and seven months after the original filing of the complaint and only seven days before the hearing of a motion for summary judgment, which motion was filed nine months after the extensive discovery conducted in the case was complete. Pressman v. UNC, 78 N.C. App. 296, 337 S.E.2d 644 (1985).

In civil action wherein plaintiff alleged a contract with defendants to drill a well in property owned by them, which property was conveyed by defendants to purchasers, the trial court did not abuse its discretion in denying motion to amend plaintiff's complaint to allege that defendants acted as agent for purchasers, which motion was made when the case came on for hearing on defendants' Rule 12(b) motions to dismiss, as in their answer defendants had alleged that they were acting as agents for purchasers in contracting with plaintiff to drill the well, which answer was filed on January 4, 1985, and plaintiff did not make its motion to amend until April 22, 1985. Caldwell's Well Drilling, Inc. v. Moore, — N.C. App. —, 340 S.E.2d 518 (1986).

Applied in Crowder v. North Carolina Farm Bureau Mut. Ins. Co., — N.C. App. —, 340 S.E.2d 127 (1986); Perry v. Perry, — N.C. App. —, 341 S.E.2d 53 (1986).

Cited in Carver v. Roberts, 78 N.C. App. 511, 337 S.E.2d 126 (1985); Raritan River Steel Co. v. Cherry, Bekaert & Holland, — N.C. App. —, 339 S.E.2d 62 (1986).

II. AMENDMENTS TO CONFORM TO EVIDENCE.

Party who fails to object, etc. —

To limit the scope of the issues raised by the evidence at trial, it is the duty of the opponent to object specifically to evidence offered at trial as being outside the scope of the pleadings. Absent objection, the party will be deemed to have impliedly consented to trial of the issues. Mobley v. Hill, — N.C. App. —, 341 S.E.2d 46 (1986).

Better Practice, etc. —

Even though technically no amendment is required when issues are tried by implied consent, the better practice is to move to amend the pleadings to actually reflect the theory of

recovery. *Mobley v. Hill*, — N.C. App. —, 341 S.E.2d 46 (1986).

An amendment to conform the pleadings to the evidence may be offered even after oral argument. *Mobley v. Hill*, — N.C. App. —, 341 S.E.2d 46 (1986).

Burden of Party Objecting, etc. —

Even when a timely specific objection is made, the party objecting must show some actual prejudice arising from a proposed amendment, i.e., some undue disadvantage or difficulty in presenting the merits of its case. *Mobley v. Hill*, — N.C. App. —, 341 S.E.2d 46 (1986).

Specific Objections Required. — Under section (b) of this rule, a party attempting to limit the trial of issues by implied consent must object specifically to evidence outside the scope of the original pleadings; otherwise, allowing an amendment to conform the pleadings to the evidence will not be error, and, in fact, is not even technically necessary. *Concrete Serv. Corp. v. Investors Group, Inc.*, — N.C. App. —, 340 S.E.2d 755 (1986).

Fact that defendant had announced that he would not introduce evidence when motion to amend was made, nothing more appearing, did not give rise to prejudice. *Mobley v. Hill*, — N.C. App. —, 341 S.E.2d 46 (1986).

Reduction of Interest Being Sought. — Where plaintiff in complaint sought interest in excess of the 12% allowed under § 24-1.1, but presented evidence as to the amount of interest when calculated at 12% per annum, the trial court did not abuse its discretion in granting

an amendment to the pleadings so as to reduce the interest sought to that calculated at 12% per annum. *Northwestern Bank v. Barber*, — N.C. App. —, 339 S.E.2d 452 (1986).

Conversion of Condemnation Proceeding into Quiet Title Action. — Trial court did not err by applying section (b) of this rule in such a way as to convert condemnation proceeding brought by private condemnors, with the consent of the parties, into an action to quiet title. *VEPCO v. Tillett*, — N.C. —, 340 S.E.2d 62 (1986).

In an action alleging medical malpractice, although the plaintiff presented evidence tending to show that the defendant-physician altered emergency room records, they were not permitted to amend their pleadings under section (b). This was not simply an "act of negligence," but was a separate cause of action, which the defendant was not prepared to defend against and to which he did not impliedly consent to the trial of. *Paris v. Kreitz*, 75 N.C. App. 365, 331 S.E.2d 234, cert. denied, 315 N.C. 185, 337 S.E.2d 858 (1985).

III. RELATION BACK OF AMENDMENTS.

Criteria for Determining Whether, etc. —

Under the Rules of Civil Procedure, whether an amendment will relate back does not depend upon whether it states a new cause of action, but upon whether the original pleading gave defendants sufficient notice of the proposed new claim. *Mauney v. Morris*, — N.C. —, 340 S.E.2d 397 (1986).

Rule 16. Pre-trial procedure; formulating issues.

Legal Periodicals. —

For article analyzing the 1983 amendments to Rules 6, 7, 11, 16, 26, 52, 53 and 67, FRCP, comparing these rules with North Carolina

practice, and suggesting changes in certain state and federal rules, see 20 Wake Forest L. Rev. 819 (1984).

CASE NOTES

Pre-trial orders purporting to establish rule of damages and their amount are not favored, nor are they specifically authorized by any of these rules. *Maffei v. Alert Cable TV of N.C., Inc.*, 75 N.C. App. 473, 331 S.E.2d 188, cert. granted, 314 N.C. 667, 335 S.E.2d 323 (1985).

Failure to Find Stipulated Facts. — Especially in light of the conclusive nature of stipulations, and the binding effect of pretrial orders, failure to find facts stipulated to in a pre-trial order can hardly be prejudicial. *Andrews v. Andrews*, — N.C. App. —, 338 S.E.2d 809 (1986).

ARTICLE 4.

*Parties.***Rule 17. Parties plaintiff and defendant; capacity.**

CASE NOTES

I. IN GENERAL.

Applied in *Fraser v. Di Santi*, 75 N.C. App. 654, 331 S.E.2d 217 (1985).

Quoted in *In re Locklear*, 314 N.C. 412, 334 S.E.2d 46 (1985).

II. REAL PARTY IN INTEREST.

The real party in interest is the one who is entitled to receive the fruits of the litigation (i.e., the damages). *Goodrich v. Rice*, 75 N.C. App. 530, 331 S.E.2d 195 (1985).

The mere appointment of an agent does not make him the real party in interest. *Goodrich v. Rice*, 75 N.C. App. 530, 331 S.E.2d 195 (1985).

In a breach of contract action, the evidence clearly established an agency relationship, as it disclosed that certain individuals, the original plaintiffs, negotiated the construction of a pond on behalf of a landowner. The real party in interest was the landowner. *Goodrich v. Rice*, 75 N.C. App. 530, 331 S.E.2d 195 (1985).

Assignee of Franchisor. — In action for alleged breach of franchise agreement, plaintiff, as assignee of the franchisor, was a real party in interest, and had the right to enforce the contract against the defendant. *Wiener King Systems v. Brooks*, 628 F. Supp. 843 (W.D.N.C. 1986).

Rule 19. Necessary joinder of parties.

CASE NOTES

I. IN GENERAL.**Who are Necessary Parties.** —

An insurance company is only a necessary party plaintiff when it has compensated the insured for the insured's entire loss. *Smoky Mt. Enters., Inc.*, 76 N.C. App. 123, 332 S.E.2d 200 (1985).

Necessary Parties in Adjacent Landowners Action. — In a private nuisance action alleging that the separate development of

the lands owned by adjacent landowners together caused flooding damages, this claim could not be fully adjudicated without the addition of one of these landowners; thus, it was a necessary party. *Bjornsson v. Mize*, 75 N.C. App. 289, 330 S.E.2d 520, cert. denied, 314 N.C. 537, 335 S.E.2d 13 (1985).

Quoted in *State ex rel. Utilities Comm'n v. Nantahala Power & Light Co.*, 314 N.C. 246, 333 S.E.2d 217 (1985).

Rule 20. Permissive joinder of parties.

CASE NOTES

II. PERMISSIVE JOINDER.

Joining Insurance Company That Partially Paid Loss. — It is not error to join, as a proper party plaintiff to the action, an insur-

ance company that has partially paid the insured for the insured's loss, but the insurance company's presence in the action is not required. *Smoky Mt. Enters., Inc.*, 76 N.C. App. 123, 332 S.E.2d 200 (1985).

Rule 23. Class actions.

CASE NOTES

I. IN GENERAL.

The requirements for a class action are: (1) The existence of a class; (2) the class members within the jurisdiction of the court must adequately represent any class members outside the jurisdiction of the court; (3) the class must be so numerous as to make it impracticable to bring each member before the court; (4) more than one issue of law or fact common to the class should be present; (5) the party representing the class must fairly insure the representation of all class members; and (6) adequate notice must be given to the class members. *Crow v. Citicorp Acceptance Co.*, — N.C. App. —, 339 S.E.2d 437 (1986).

Whether a class exists is a question of fact, etc. —

Whether a class exists is a question of fact to be determined by the court on a case-by-case basis. *Crow v. Citicorp Acceptance Co.*, — N.C. App. —, 339 S.E.2d 437 (1986).

Burden on Party Invoking Rule. —

In accord with 1st paragraph of main volume. See *Crow v. Citicorp Acceptance Co.*, — N.C. App. —, 339 S.E.2d 437 (1986).

Discretion of Trial Court. —

Although this rule should receive a liberal construction and be kept free from technical restrictions, a court has broad discretion in deciding whether to allow a class action. *Crow v. Citicorp Acceptance Co.*, — N.C. App. —, 339 S.E.2d 437 (1986).

In deciding whether to certify a class, a trial judge has broad discretion and may consider factors not expressly mentioned in this rule. *Maffei v. Alert Cable TV of N.C., Inc.*, — N.C. —, 342 S.E.2d 867 (1986).

Refusal to Certify on Cost and Benefits Analysis. — Although one of the basic purposes of class actions is to provide a forum

whereby claims which might not be economically pursued individually can be aggregated in an efficient and economically reasonable manner, there is a level at which the costs in pursuing the class action far outweigh any economic good sense and fair use of judicial resources. *Maffei v. Alert Cable TV of N.C., Inc.*, — N.C. —, 342 S.E.2d 867 (1986), upholding trial court's refusal to certify a class where the recovery which each member stood to gain was a mere 29 cents.

Dismissal of Class Action Upheld. — Trial court did not err in dismissing class action alleging that plaintiffs, both named and unnamed, purchased new mobile or manufactured homes within North Carolina; that they financed at least \$3,000.00 of their purchases through retail installment sales contracts entered after April 1, 1980; that the retail installment sales contracts fixed a finance charge rate in excess of the maximum rate allowable; and that the retail installment sales contracts were ultimately assigned to defendants. The interest of each of the unnamed plaintiffs related solely to the particular retail installment sales contracted which such plaintiff signed, and there was insufficient "community of interest" between the named plaintiffs and the unnamed plaintiffs to require the trial court to certify the action as a class action. *Crow v. Citicorp Acceptance Co.*, — N.C. App. —, 339 S.E.2d 437 (1986).

Appeal of Order Dismissing Class Action. — Although order dismissing class action without prejudice did not determine the controversy and was interlocutory, the order affected a substantial right of the unnamed plaintiffs and was immediately appealable. *Crow v. Citicorp Acceptance Co.*, — N.C. App. —, 339 S.E.2d 437 (1986).

Rule 24. Intervention.

CASE NOTES

I. IN GENERAL.

In determining whether motion to intervene is timely, trial court will give consideration to: (1) The status of the case; (2) the unfairness or prejudice to the existing parties; (3) the reason for any delay in moving for intervention; (4) the resulting prejudice to the applicant if the motion is denied; and (5) any unusual circumstances. *State Employees'*

Credit Union, Inc. v. Gentry, 75 N.C. App. 260, 330 S.E.2d 645 (1985).

Motion Prior to Trial and After Judgment. — As a general rule, motions to intervene made prior to trial are seldom denied. Conversely, motions to intervene made after judgment has been rendered are disfavored and are granted only after a finding of extraordinary and unusual circumstances and upon a strong showing of entitlement and justifica-

tion. State Employee's Credit Union, Inc. v. Gentry, 75 N.C. App. 260, 330 S.E.2d 645 (1985).

A motion to intervene after the entry of default against the defendant, his liability to the plaintiff being conclusively established, the extent of liability never being in issue, was

untimely. State Employee's Credit Union, Inc. v. Gentry, 75 N.C. App. 260, 330 S.E.2d 645 (1985).

Cited in Colon v. Bailey, 76 N.C. App. 491, 333 S.E.2d 505 (1985); Trustees of Garden of Prayer Baptist Church v. Geraldco Bldrs., Inc., 78 N.C. App. 108, 336 S.E.2d 694 (1985).

ARTICLE 5.

Depositions and Discovery.

Rule 26. General provisions governing discovery.

Legal Periodicals. — For article analyzing the 1983 amendments to Rules 6, 7, 11, 16, 26, 52, 53 and 67, FRCP, comparing these rules

with North Carolina practice, and suggesting changes in certain state and federal rules, see 20 Wake Forest L. Rev. 819 (1984).

Rule 28. Persons before whom depositions may be taken.

CASE NOTES

I. IN GENERAL.

Applied in State v. Isleib, — N.C. App. —, 343 S.E.2d 234 (1986).

Rule 30. Depositions upon oral examination.

Legal Periodicals. — For article analyzing the 1983 amendments to Rules 6, 7, 11, 16, 26, 52, 53 and 67, FRCP, comparing these rules

with North Carolina practice, and suggesting changes in certain state and federal rules, see 20 Wake Forest L. Rev. 819 (1984).

Rule 32. Use of depositions in court proceedings.

Legal Periodicals. — For article analyzing the 1983 amendments to Rules 6, 7, 11, 16, 26, 52, 53 and 67, FRCP, comparing these rules

with North Carolina practice, and suggesting changes in certain state and federal rules, see 20 Wake Forest L. Rev. 819 (1984).

Rule 33. Interrogatories to parties.

Legal Periodicals. — For article analyzing the 1983 amendments to Rules 6, 7, 11, 16, 26, 52, 53 and 67, FRCP, comparing these rules

with North Carolina practice, and suggesting changes in certain state and federal rules, see 20 Wake Forest L. Rev. 819 (1984).

CASE NOTES

Where plaintiff served answers to interrogatories after defendant had filed motion to dismiss and plaintiff's failure to comply with this rule clearly prejudiced the defendant's ability to prepare for trial, the court had authority to dismiss the action. Hayes v.

Browne, 76 N.C. App. 98, 331 S.E.2d 763 (1985).

Interrogatories As Admissions of Party Opponent. — Defendant's answers to interrogatories, duly signed by defendant's attorney, were admissions of a party opponent, and

as such should have been admitted into evidence. *Karp v. UNC*, 78 N.C. App. 214, 336 S.E.2d 640 (1985).

Rule 34. Production of documents and things and entry upon land for inspection and other purposes.

CASE NOTES

I. IN GENERAL.

Cited in *Talbert v. Mauney*, — N.C. App. —, 343 S.E.2d 5 (1986).

Rule 36. Requests for admission; effect of admission.

Legal Periodicals. — For article analyzing the 1983 amendments to Rules 6, 7, 11, 16, 26, 52, 53 and 67, FRCP, comparing these rules with North Carolina practice, and suggesting changes in certain state and federal rules, see 20 Wake Forest L. Rev. 819 (1984).

CASE NOTES

Applied in *VEPCO v. Tillett*, — N.C. App. —, 343 S.E.2d 188 (1986).

Rule 37. Failure to make discovery; sanctions.

Legal Periodicals. — For article analyzing the 1983 amendments to Rules 6, 7, 11, 16, 26, 52, 53 and 67, FRCP, comparing these rules with North Carolina practice, and suggesting changes in certain state and federal rules, see 20 Wake Forest L. Rev. 819 (1984).

CASE NOTES

Although interlocutory, a party may appeal from order imposing sanctions by striking his defense and entering judgment as to liability. *Vick v. Davis*, 77 N.C. App. 359, 335 S.E.2d 197 (1985).

Burden to Show Justification for, etc. —

If a noncomplying party wishes to avoid court-imposed sanctions for his failure to answer interrogatories, the burden is upon him to show that there is justification for his noncompliance. *Hayes v. Browne*, 76 N.C. App. 98, 331 S.E.2d 763 (1985).

Section (d) requires no finding, etc. —

The language of subsection (d) requires no finding of willfulness. The 1975 amendment to subsection (d) deletes the specific reference to "willful" from the rule. *Hayes v. Browne*, 76 N.C. App. 98, 331 S.E.2d 763 (1985).

For case upholding default judgment, etc. —

In accord with 1st paragraph in the main volume. See *Vick v. Davis*, 77 N.C. App. 359, 335 S.E.2d 197 (1985).

Where plaintiff served answers to interrogatories after defendant had filed motion to dismiss and plaintiff's failure to comply with Rule 33 clearly prejudiced the defendant's ability to prepare for trial, the court had authority to dismiss the action. *Hayes v. Browne*, 76 N.C. App. 98, 331 S.E.2d 763 (1985).

Sanction Overturned Only, etc. —

In accord with 1st paragraph in the 1985 Cumulative Supplement. See *Vick v. Davis*, 77 N.C. App. 359, 335 S.E.2d 197 (1985).

The choice of sanctions under this rule cannot be overturned absent a showing of abuse of that discretion. *Mount Olive Home Health Care Agency, Inc. v. N.C. Dep't of Human Resources*, 78 N.C. App. 224, 336 S.E.2d 625 (1985).

Hearing officer's order excluding petitioner's expert witnesses for failure to identify them, in violation of court order, until four days before the hearing date, showed no abuse of discretion. *Mount Olive Home*

Health Care Agency, Inc. v. N.C. Dep't of Human Resources, 78 N.C. App. 224, 336 S.E.2d 625 (1985).

Applied in Leary v. Nantahala Power &

Light Co., 76 N.C. App. 165, 332 S.E.2d 703 (1985).

Cited in Talbert v. Mauney, — N.C. App. —, 343 S.E.2d 5 (1986).

ARTICLE 6.

Trials.

Rule 40. Assignment of cases for trial; continuances.

Legal Periodicals. — For article analyzing the 1983 amendments to Rules 6, 7, 11, 16, 26, 52, 53 and 67, FRCP, comparing these rules

with North Carolina practice, and suggesting changes in certain state and federal rules, see 20 Wake Forest L. Rev. 819 (1984).

Rule 41. Dismissal of actions.

CASE NOTES

I. IN GENERAL.

Applied in Cheek v. Higgins, 76 N.C. App. 151, 331 S.E.2d 712 (1985); Lyon v. Continental Trading Co., 76 N.C. App. 499, 333 S.E.2d 774 (1985); Sharpe v. Park Newspapers of Lumberton, Inc., 78 N.C. App. 275, 337 S.E.2d 174 (1985).

Cited in Howard v. Smoky Mt. Enters., Inc., 76 N.C. App. 123, 332 S.E.2d 200 (1985); Harwood v. Harrelson Ford, Inc., 78 N.C. App. 445, 337 S.E.2d 158 (1985).

II. VOLUNTARY DISMISSAL.

Complaint Filed Solely to Toll Statute May Not Be Voluntarily Dismissed Without Prejudice. — A plaintiff may not file a complaint within the time permitted by the statute of limitations for the sole purpose of tolling the statute of limitations, but with no intention of pursuing the prosecution of the action, then voluntarily dismiss the complaint and thereby gain an additional year pursuant to subsection (a)(1) of this rule. Estrada v. Burnham, — N.C. —, 341 S.E.2d 538 (1986).

Nor May Pleading in Violation of Rule 11(a). — Subsections (a)(1) of this rule and 11(a) must be construed in pari materia to require that, in order for a timely filed complaint to toll the statute of limitations and provide the basis for a one-year "extension" by way of a voluntary dismissal without prejudice, the complaint must conform in all respects to the rules of pleading, including Rule 11(a). A pleading filed in violation of Rule 11(a) should be stricken as "sham and false" and may not be voluntarily dismissed without prejudice in order to give the pleader the benefit of the "saving" provision of subsection (a)(1) of this rule.

Estrada v. Burnham, — N.C. —, 341 S.E.2d 538 (1986).

Where an action was discontinued by operation of law under Rule 4(e), the statute of limitations having thereafter immediately run its remaining course, the judge's subsequent order of voluntary dismissal allowing plaintiff another year within which to refile the action was nugatory. Long v. Fink, — N.C. App. —, 342 S.E.2d 557 (1986).

Administrative Adjustment of Claims. — Once the conditions of § 136-29(a) (administrative adjustment of claims) were satisfied — the claimant filed its claim within six months of an adverse ruling by the state highway administrator —, the trial court was vested with jurisdiction and the claimant was allowed, as a matter of right under subsection (a)(1), to take a voluntary dismissal and refile its claim within one year. C.W. Matthews Contracting Co. v. State, 75 N.C. App. 317, 330 S.E.2d 630 (1985).

Fraud Claim Not Exempt From Limitation of § 1-25. — Though a claim of fraud rested upon somewhat the same allegations that were made in support of a negligent misrepresentation claim when an action was first filed, the plaintiffs did not in effect or otherwise also allege that the defendants had defrauded them, so this rule did not exempt the fraud claim from the fatal effects of the limitations period under § 1-52. Stanford v. Owens, 314 N.C. App. 292, 332 S.E.2d 730, cert. denied, 314 N.C. 670, 336 S.E.2d 402 (1985).

III. INVOLUNTARY DISMISSAL.

A. In General.

Judge May Consider Motion At Conclu-

sion of Plaintiff's Evidence. — The trial judge may weigh the evidence, find the facts and sustain defendant's Rule 41(b) motion at the conclusion of plaintiff's evidence even though plaintiff has made out a prima facie case which would have precluded a directed verdict for defendant in a jury trial. *Childers v. Hayes*, 77 N.C. App. 792, 336 S.E.2d 146 (1985).

Function of Judge. — Since the court will determine the facts anyway, the function of a judge on a motion to dismiss under subsection (b) of this rule is to evaluate the evidence without any limitations as to inferences in favor of the plaintiff. *Holthusen v. Holthusen*, — N.C. App. —, 339 S.E.2d 823 (1986).

Dismissal with prejudice under subsection (b) cannot be premised on party's failure to comply with erroneous order. In *re Will of Parker*, 76 N.C. App. 594, 334 S.E.2d 97, cert. denied, 315 N.C. 185, 337 S.E.2d 859 (1985).

Motion to Dismiss Provides Procedure to Render Judgment Against Plaintiff. — A motion for dismissal pursuant to this rule, made at the close of plaintiff's evidence in a non-jury trial, not only tests the sufficiency of plaintiff's proof to show a right to relief, but also provides a procedure whereby the judge may weigh the evidence, determine the facts, and render judgment on the merits against the plaintiff, even though the plaintiff may have made out a prima facie case. *McKnight v. Cagle*, 76 N.C. App. 142, 331 S.E.2d 707 (1985).

Findings of Fact and Conclusions of Law. — As a fact-finder, the trial judge in ruling on a motion for involuntary dismissal, must find the facts on all issues raised by the pleadings, and state his conclusions of law based thereon, in order that appellate court may determine from the record the basis of his decision. The findings of fact are conclusive on appeal if supported by competent evidence. *McKnight v. Cagle*, 76 N.C. App. 142, 331 S.E.2d 707 (1985).

When a motion under section (b) of this rule is made in a nonjury trial, the judge becomes both the judge and the jury and he must consider and weigh all competent evidence before him. *Childers v. Hayes*, 77 N.C. App. 792, 336 S.E.2d 146 (1985).

Authority to Dismiss in Absence of Motion. — The trial judge has the authority to dismiss a claim pursuant to subsection (b) in the absence of a motion by the defendant to do so. *Blackwelder Furn. Co. of Statesville, Inc. v. Harris*, 75 N.C. App. 625, 331 S.E.2d 274 (1985).

Whether a judge may dismiss a claim pursuant to subsection (b) depends on the facts and circumstances surrounding the particular case.

Blackwelder Furn. Co. of Statesville, Inc. v. Harris, 75 N.C. App. 625, 331 S.E.2d 274 (1985).

Motion at Close of All Evidence. — Where the court sits as finder of fact, if it allows a motion under subsection (b) of this rule it must find facts just as it would in entering judgment without allowing the motion. There is therefore little point in making such a motion at the close of all the evidence. *Concrete Serv. Corp. v. Investors Group, Inc.*, — N.C. App. —, 340 S.E.2d 755 (1986).

B. Failure to Prosecute or to Comply with Rules or Orders.

Motion to Have Bankruptcy Trustee Made Party to Action. — Since the plaintiff made a motion to have its trustee in bankruptcy a party to the action, which the court improperly denied, as the trustee appeared to be a necessary party, without making the required findings of fact, and since the trustee was present when the case was called, the court erred in dismissing the plaintiff's claim for failure to prosecute. *Blackwelder Furn. Co. of Statesville, Inc. v. Harris*, 75 N.C. App. 625, 331 S.E.2d 274 (1985).

When Dismissal for Failure to Prosecute Not Proper. — The trial court erred in dismissing plaintiff's action for failure to appear and prosecute his action, where plaintiff's attorney was present and appeared ready to go forward with his case. *Terry v. Bob Dunn Ford, Inc.*, 77 N.C. App. 457, 335 S.E.2d 227 (1985).

C. Failure to Show Right to Relief.

Motion for Involuntary Dismissal Appropriate Test for, etc. —

A Rule 50(a) motion for directed verdict is appropriate only to a case tried before a jury. In non-jury trials, a motion for involuntary dismissal under subsection (b) provides a procedure whereby, at the close of the plaintiff's evidence, the judge can give judgment against the plaintiff, not only because his proof has failed to make out a case, but also on the basis of facts as the judge may determine them. *Goodrich v. Rice*, 75 N.C. App. 530, 331 S.E.2d 195 (1985).

In a nonjury trial when a motion to dismiss pursuant to subsection (b) is made, the judge becomes both judge and jury. He must consider and weigh all competent evidence before him, and must pass on the credibility of the witnesses and determine the weight to be accorded their testimony. In *re Hughes*, 74 N.C. App. 751, 330 S.E.2d 213 (1985).

Significance of motion to dismiss, etc. —

In a bench trial, there is little point to a motion to dismiss at the close of all the evidence,

since at that point in trial the judge will decide the facts in any event. When the judge decides the case, either on a motion for dismissal or at the close of all the evidence, he must make findings of fact and separate conclusions of law. In *re Hughes*, 74 N.C. App. 751, 330 S.E.2d 213 (1985).

Question Raised by Section (b). —

In a nonjury case, after the plaintiff has

rested his case, the defendant may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The question presented is whether the plaintiff's evidence, taken as true, would support findings of fact upon which the trier of fact could properly base a judgment for the plaintiff. *Woodlief v. Johnson*, 75 N.C. App. 49, 330 S.E.2d 265 (1985).

Rule 42. Consolidation; separate trials.

CASE NOTES

I. IN GENERAL.

Cited in *Harwood v. Harrelson Ford, Inc.*, 78 N.C. App. 445, 337 S.E.2d 158 (1985).

Rule 43. Evidence.

CASE NOTES

I. IN GENERAL.

Cited in *State v. Baker*, 77 N.C. App. 465, 335 S.E.2d 56 (1985).

Rule 45. Subpoena.

Legal Periodicals. — For article analyzing the 1983 amendments to Rules 6, 7, 11, 16, 26, 52, 53 and 67, FRCP, comparing these rules

with North Carolina practice, and suggesting changes in certain state and federal rules, see 20 Wake Forest L. Rev. 819 (1984).

Rule 46. Objections and exceptions.

CASE NOTES

I. IN GENERAL.

Applied in *State v. Bright*, 78 N.C. App. 239, 337 S.E.2d 87 (1985).

Rule 49. Verdicts.

CASE NOTES

I. IN GENERAL.

Applied in *Fallston Finishing, Inc. v. First*

Union Nat'l Bank, 76 N.C. App. 347, 333 S.E.2d 321 (1985); *Dobruck v. Lineback*, 77 N.C. App. 233, 334 S.E.2d 455 (1985).

Rule 50. Motion for a directed verdict and for judgment notwithstanding the verdict.

Legal Periodicals. — For article analyzing the 1983 amendments to Rules 6, 7, 11, 16, 26, 52, 53 and 67, FRCP, comparing these rules

with North Carolina practice, and suggesting changes in certain state and federal rules, see 20 Wake Forest L. Rev. 819 (1984).

CASE NOTES

I. IN GENERAL.

Rule 50 motions apply only to issues tried by a jury, not a judge. *Holthusen v. Holthusen*, — N.C. App. —, 339 S.E.2d 823 (1986).

Applied in *Tyson Foods, Inc. v. Ammons*, 75 N.C. App. 548, 331 S.E.2d 208 (1985); *Cockman v. White*, 76 N.C. App. 387, 333 S.E.2d 54 (1985); *Pasour v. Pierce*, 76 N.C. App. 364, 333 S.E.2d 314 (1985); *Fallston Finishing, Inc. v. First Union Nat'l Bank*, 76 N.C. App. 347, 333 S.E.2d 321 (1985); *Campbell v. Connor*, 77 N.C. App. 627, 335 S.E.2d 788 (1985).

Cited in *Hornby v. Pennsylvania Nat'l Mut. Cas. Ins. Co.*, 77 N.C. App. 475, 335 S.E.2d 335 (1985); *Azzolino v. Dingfelder*, 315 N.C. 103, 337 S.E.2d 528 (1985); *Landin Ltd. v. Sharon Luggage, Ltd.*, of Greensboro, Inc., 78 N.C. App. 558, 337 S.E.2d 685 (1985); *Baynard v. Service Distrib. Co.*, 78 N.C. App. 796, 338 S.E.2d 622 (1986); *McDaniel v. Bass-Smith Funeral Home*, — N.C. App. —, 343 S.E.2d 228 (1986).

II. DIRECTED VERDICT.

A. In General.

Purpose of this rule. —

In accord with 1st paragraph in the main volume. See *Burris v. Shumate*, 77 N.C. App. 209, 334 S.E.2d 514 (1985).

A motion for directed verdict is to test the legal sufficiency of the evidence to take the case to the jury. *DeHart v. R/S Fin. Corp.*, 78 N.C. App. 93, 337 S.E.2d 94 (1985).

Motion for directed verdict is the only procedure, etc. —

In accord with 2nd paragraph in main volume. See *Yeargin v. Spurr*, 78 N.C. App. 243, 336 S.E.2d 680 (1985).

With Contradictions, Conflicts, etc. —

In considering a motion for directed verdict, the nonmovant's evidence must be taken as true, and contradictions, inconsistencies and conflicts in the evidence must be resolved in favor of the nonmovant. *Morris v. Brune*, 78 N.C. App. 668, 338 S.E.2d 561 (1986).

And Giving Nonmovant the Benefit, etc. —

In accord with 2nd paragraph in main volume. See *Chastain v. Wall*, 78 N.C. App. 350, 337 S.E.2d 150 (1985).

In accord with 5th paragraph in main volume. See *Phelps v. Duke Power Co.*, 78 N.C. App. 222, 332 S.E.2d 715, cert. denied, 314 N.C. 668, 336 S.E.2d 401 (1985); *Hall v. Mabe*, 77 N.C. App. 758, 336 S.E.2d 427 (1985).

In accord with 10th paragraph in main volume. See *DeHart v. R/S Fin. Corp.*, 78 N.C. App. 93, 337 S.E.2d 94 (1985).

When passing on a motion for a directed verdict, the plaintiff should be given the benefit of all reasonable inferences; the motion should be denied if there is a scintilla of evidence to support plaintiffs' prima facie case in all its constituent elements. These principles are equally applicable to defendants' counterclaim. *Burris v. Shumate*, 77 N.C. App. 209, 334 S.E.2d 514 (1985).

On a directed verdict motion, the record is viewed in the light most favorable to the non-moving party, resolving all conflicts in its favor and giving it the benefit of every favorable inference. *Broyhill v. Coppage*, — N.C. App. —, 339 S.E.2d 32 (1986).

Motion for a directed verdict under section (a) tests the legal, etc. —

A motion for directed verdict by a defendant tests the legal sufficiency of the evidence to go to the jury. *Hall v. Mabe*, 77 N.C. App. 758, 336 S.E.2d 427 (1985).

Question Presented by Motion for Directed Verdict. —

A motion for a directed verdict presents the same question for both the trial and appellate courts: Whether the evidence, taken in the light most favorable to the nonmovant, and giving the nonmovant the benefit of every reasonable inference arising from the evidence, is sufficient for submission to the jury. *Alston v. Herrick*, 76 N.C. App. 246, 332 S.E.2d 720 (1985), aff'd, 315 N.C. 386, 337 S.E.2d 851 (1986).

A verdict may never be directed when the facts, etc. —

A verdict may never be directed when there is conflicting evidence on contested issues of fact. *DeHart v. R/S Fin. Corp.*, 78 N.C. App. 93, 337 S.E.2d 94 (1985).

Motion for directed verdict may be

granted only if the evidence is insufficient to justify a verdict, etc. —

In accord with 1st paragraph in main volume. See *Homeland, Inc. v. Backer*, 78 N.C. App. 477, 337 S.E.2d 114 (1985).

In accord with 2nd paragraph in main volume. See *Morris v. Bruney*, 78 N.C. App. 668, 338 S.E.2d 561 (1986).

A directed verdict in favor of the party with the burden of proof is proper only when the proponent has established a clear and uncontradicted prima facie case and the credibility of his evidence is manifest as a matter of law. *Homeland, Inc. v. Backer*, 78 N.C. App. 477, 337 S.E.2d 114 (1985).

As Where Credibility, etc. —

A directed verdict or a judgment notwithstanding the verdict may be entered in favor of the party with the burden of proof where credibility is manifest as a matter of law. *Smith v. Price*, — N.C. —, 340 S.E.2d 408 (1986).

If more than Scintilla of Evidence, etc. —

If there is more than a scintilla of evidence supporting each element of nonmovant's case, the motion for directed verdict should be denied. *Broyhill v. Coppage*, — N.C. App. —, 339 S.E.2d 32 (1986).

Movant for subsection (b) motion must make motion for directed verdict at the close of all evidence. *Penley v. Penley*, 314 N.C. 1, 332 S.E.2d 51 (1985).

Trial judge was held to have authority to direct verdict of his own initiative; however, mindful of the low evidentiary threshold necessary to take a case to the jury, and also of the detailed procedure outlined in this rule, which presumes the use of a motion before a verdict is directed, the court of appeals did not encourage the frequent use of this practice, and cautioned trial judges to use it sparingly. *L. Harvey & Son Co. v. Jarman*, 76 N.C. App. 191, 333 S.E.2d 47 (1985).

Trial court erred in directing verdict on issue of contributory negligence. — See *Alston v. Herrick*, 76 N.C. App. 246, 332 S.E.2d 720 (1985), *aff'd*, 315 N.C. 386, 337 S.E.2d 851 (1986).

Motion for directed verdict improperly granted. — See *Calhoun v. Calhoun*, 76 N.C. App. 305, 332 S.E.2d 734 (1985).

B. Statement of Specific Grounds.

The purpose of the "specific grounds" requirement, etc. —

In accord with main volume. See *Nelson v. Chin Yung Chang*, 78 N.C. App. 471, 337 S.E.2d 650 (1985).

A motion for directed verdict must state the grounds therefor; otherwise, error may not be urged on appeal. *Hall v. Mabe*, 77 N.C. App. 758, 336 S.E.2d 427 (1985).

Appellant who fails to state specific grounds, etc. —

A motion for directed verdict must state the grounds therefor, and grounds not asserted in the trial court may not be asserted on appeal. *Broyhill v. Coppage*, — N.C. App. —, 339 S.E.2d 32 (1986).

III. JUDGMENT NOTWITHSTANDING THE VERDICT AND NEW TRIAL.

What is Motion for Judgment N.O.V. —

In accord with 1st paragraph in main volume. See *DeHart v. R/S Fin. Corp.*, 78 N.C. App. 93, 337 S.E.2d 94 (1985).

In accord with 2nd paragraph in original. See *Penley v. Penley*, 314 N.C. 1, 332 S.E.2d 51 (1985).

Standards for granting a motion for judgment n.o.v. are the same, etc. —

In accord with 1st paragraph in main volume. See *State v. Moore*, — N.C. —, 340 S.E.2d 401 (1986).

In accord with 2nd paragraph in main volume. See *DeHart v. R/S Fin. Corp.*, 78 N.C. App. 93, 337 S.E.2d 94 (1985).

Evidence Must Be Viewed, etc. —

In resolving the question whether the evidence is sufficient to support the verdict, the evidence, of course, must be viewed in the light most favorable to the party who won the verdict. *Dailey v. Integon Gen. Ins. Corp.*, 75 N.C. App. 387, 331 S.E.2d 148 (1985).

Giving Nonmovant the Benefit of Every Inference, etc. —

In accord with 2nd paragraph in original. See *Penley v. Penley*, 314 N.C. 1, 332 S.E.2d 51 (1985).

In considering a motion for judgment n.o.v., the trial court is to consider all evidence in the light most favorable to the party opposing the motion. The nonmovant is to be given the benefit of every reasonable inference that legitimately may be drawn from the evidence, and contradictions must be resolved in the nonmovant's favor. *Smith v. Price*, — N.C. —, 340 S.E.2d 408 (1986).

Motion to be Decided as Question of Law. — A motion to set a verdict aside and for a new trial pursuant to Rule 59 is directed to the discretion of the trial judge while a motion for judgment notwithstanding the verdict pursuant to this rule is to be decided as a question of law. *Penley v. Penley*, 314 N.C. 1, 332 S.E.2d 51 (1985).

A motion for directed verdict is appropriate only to a case tried before a jury. In non-jury trials, a motion for involuntary dismissal under Rule 41(b) provides a procedure whereby, at the close of the plaintiff's evidence, the judge can give judgment against the plaintiff, not only because his proof has failed to make out a case, but also on the basis of facts

as the judge may determine them. *Goodrich v. Rice*, 75 N.C. App. 530, 331 S.E.2d 195 (1985).

Scope of Review. — A motion for judgment notwithstanding the verdict involves the same legal questions raised by the motion for di-

rected verdict, and is therefore equally restricted as a basis for asserting error on appeal. *Mobley v. Hill*, — N.C. App. —, 341 S.E.2d 46 (1986).

Rule 51. Instructions to jury.

Legal Periodicals. —

For article analyzing the 1983 amendments to Rules 6, 7, 11, 16, 26, 52, 53 and 67, FRCP, comparing these rules with North Carolina practice, and suggesting changes in certain state and federal rules, see 20 *Wake Forest L. Rev.* 819 (1984).

For article, "Rummaging Through a Wilderness of Verbiage: The Charge Conference, Jury Argument and Instructions," see 8 *Campbell L. Rev.* 269 (1986).

CASE NOTES

I. IN GENERAL.

Quoted in *Dobson v. Honeycutt*, 78 N.C. App. 709, 338 S.E.2d 605 (1986).

Cited in *Penley v. Penley*, 314 N.C. 1, 332 S.E.2d 51 (1985); *Mills v. New River Wood Corp.*, 77 N.C. App. 576, 335 S.E.2d 759 (1985).

II. CHARGE TO THE JURY, GENERALLY.

Judge Must Declare, etc. —

In accord with 1st paragraph in 1985 Cumulative Supplement. *Penley v. Penley*, 314 N.C. 1, 332 S.E.2d 51 (1985).

The trial court has a duty to explain the law and apply it to the evidence on all substantial features of the case. Failure to do so constitutes prejudicial error and entitles the aggrieved party to a new trial. *Scher v. Antonucci*, 77 N.C. App. 810, 336 S.E.2d 434 (1985).

Trial judge properly refused to submit instruction on "proper control" of automobile. See *Dunn v. Herring*, 75 N.C. App. 308,

330 S.E.2d 834, cert. denied, 314 N.C. 538, 535 S.E.2d 16 (1985).

Instruction for following too closely. — Where violation of § 20-152(a) bore directly on the issue of defendant's negligence, which was a substantial feature of the case, the court should have declared and explained the section in its charge to the jury, and should also have explained that violation of this section was negligence per se. It has this duty irrespective of plaintiff's request for special instructions. *Scher v. Antonucci*, 77 N.C. App. 810, 336 S.E.2d 434 (1985).

IV. SPECIAL INSTRUCTIONS.

Once contributory negligence becomes a question for the jury, the "reasonable person" objective standard comes into play. The trial court's refusal to give a subsection (b) requested special jury instruction phrased in terms of actual knowledge, the subjective standard, was proper. *King v. Allred*, 76 N.C. App. 427, 333 S.E.2d 758, cert. denied, 315 N.C. 184, 337 S.E.2d 857 (1985).

Rule 52. Findings by the court.

Legal Periodicals. —

For article analyzing the 1983 amendments to Rules 6, 7, 11, 16, 26, 52, 53 and 67, FRCP, comparing these rules with North Carolina

practice, and suggesting changes in certain state and federal rules, see 20 *Wake Forest L. Rev.* 819 (1984).

CASE NOTES

I. IN GENERAL.

Jurisdiction of Trial Court. —

The trial court is not divested of jurisdiction to hear and rule on a Rule 52(b) motion, even though notice of appeal has been given. *York v. Taylor*, — N.C. App. —, 339 S.E.2d 830 (1986).

Where notice of appeal from default judgment for defendants with respect to plaintiff's claim and defendants' counter-claim against plaintiff was filed at the same time as plaintiff's Rule 52(b) motion for amended and additional findings of fact and his Rule 60(b) mo-

tion for relief from judgment, under the circumstances of the case the trial court had jurisdiction to rule on plaintiff's Rule 60(b) motion. *York v. Taylor*, — N.C. App. —, 339 S.E.2d 830 (1986).

Presumption Where Trial Court Is Not Required to Find Facts. — When the trial court is not required to find facts and make conclusions of law and does not do so, it is presumed that the court on proper evidence found facts to support its judgment. *Estrada v. Burnham*, — N.C. —, 341 S.E.2d 538 (1986).

Applied in *McKnight v. Cagle*, 76 N.C. App. 59, 331 S.E.2d 707 (1985); *Gebb v. Gebb*, 77 N.C. App. 309, 335 S.E.2d 221 (1985); *Smith v. Mariner*, 77 N.C. App. 589, 335 S.E.2d 530 (1985).

Stated in *In re Environmental Mgt. Comm'n*, — N.C. App. —, 341 S.E.2d 588 (1986).

Cited in *Edge v. Metropolitan Life Ins. Co.*, 78 N.C. App. 624, 337 S.E.2d 672 (1985).

II. FINDINGS AND CONCLUSIONS, GENERALLY.

In actions tried upon facts without jury, the court must make its own determination as to what pertinent facts are established by the evidence, rather than merely reciting what the evidence may tend to show. *Lee v. Lee*, 78 N.C. App. 632, 337 S.E.2d 690 (1985).

Subsection (a)(1) of this rule requires, in

nonjury cases, that the trial judge make specific findings of ultimate facts established by the evidence, state the conclusions of law thereon, and direct entry of the appropriate judgment. *City of Statesville v. Roth*, 77 N.C. App. 803, 336 S.E.2d 142 (1985).

Trial court's findings of fact are conclusive if they are supported, etc. —

In accord with 1st paragraph in main volume. See *City of Statesville v. Roth*, 77 N.C. App. 803, 336 S.E.2d 142 (1985).

III. FINDINGS AND CONCLUSIONS ON GRANT OR DENIAL OF MOTIONS, PRELIMINARY INJUNCTIONS, ETC.

Trial court's compliance with party's motion under subsection (a)(2) is mandatory. *Andrews v. Peters*, 75 N.C. App. 252, 330 S.E.2d 638, cert. denied, 315 N.C. 182, 337 S.E.2d 65 (1985).

Additional Findings of Fact Necessary. — Given the defendant's motion specifically asking for findings of fact and conclusions of law on the decision of the plaintiff's motion for a new trial, the insufficient findings of fact in the order granting the motion, and the conflicting evidence in the record, additional findings of fact were essential to provide the appellate court with a basis for a meaningful review. *Andrews v. Peters*, 75 N.C. App. 252, 330 S.E.2d 638, cert. denied, 315 N.C. 182, 337 S.E.2d 65 (1985).

Rule 53. Referees.

Legal Periodicals. —

For article analyzing the 1983 amendments to Rules 6, 7, 11, 16, 26, 52, 53 and 67, FRCP, comparing these rules with North Carolina

practice, and suggesting changes in certain state and federal rules, see 20 *Wake Forest L. Rev.* 819 (1984).

CASE NOTES

I. IN GENERAL.

The ordering of a reference is within the sound discretion of the court. *Livermon v. Bridgett*, 77 N.C. App. 533, 335 S.E.2d 753 (1985), cert. denied, 315 N.C. 391, 338 S.E.2d 880 (1986).

The ordering or refusal to order a compulsory reference is a matter within the discretion of the trial judge. *Vick v. Vick*, — N.C. App. —, 343 S.E.2d 245 (1986).

Ordering Reference in Boundary Dispute Case. — Where the pleadings showed a potentially complicated boundary dispute in which one side claimed the boundaries were not as stated in the deeds but were marked by known and visible boundaries on the ground, and a view of the premises would, therefore, be

helpful, there was no abuse of discretion by the trial court in ordering the reference. *Livermon v. Bridgett*, 77 N.C. App. 533, 335 S.E.2d 753 (1985), cert. denied, 315 N.C. 391, 338 S.E.2d 880 (1986).

The referee has authority to resolve issues not contained in the pleadings at any stage of the action. *Fauchette v. Zimmerman*, — N.C. App. —, 338 S.E.2d 804 (1986).

Applied in *Davis v. Hall*, — N.C. App. —, 342 S.E.2d 576 (1986).

II. JURY TRIAL.

Preservation of Right to Jury Trial. — When the referee's report is adverse to a party, that party may preserve his right to jury trial pursuant to subsection (b) of this rule.

Fauchette v. Zimmerman, — N.C. App. —, 338 S.E.2d 804 (1986).

Right to Jury Trial Only If Evidence Raises Fact Issue. — Although when a court orders a compulsory reference, a party preserves his right to trial by complying with the

procedural steps outlined in this rule, the party is entitled to trial by jury only if the evidence before the referee was sufficient to raise an issue of fact. Fauchette v. Zimmerman, — N.C. App. —, 338 S.E.2d 804 (1986).

ARTICLE 7.

Judgment.

Rule 54. Judgments.

CASE NOTES

I. IN GENERAL.

Final Judgment Defined. —

In accord with main volume. See Beam v. Morrow, 77 N.C. App. 800, 336 S.E.2d 106 (1985).

The order of an appellate court dismissing an appeal upon denying a petition for review is not a judgment; it is not a ruling on the merits of the rights or obligations of the parties, but is purely procedural in nature. Hunter v. City of Asheville, — N.C. App. —, 341 S.E.2d 743 (1986).

The effective date of an annexation ordinance was July 11, 1983, the date the judgment of the Court of Appeals holding the ordinance to be valid was certified, and not December 6, 1983, the date of the Supreme Court's order dismissing plaintiffs' appeal and denying discretionary review of the judgment of the Court of Appeals, as the final judgment in the annexation case was the judgment of the Court of Appeals. Hunter v. City of Asheville, — N.C. App. —, 341 S.E.2d 743 (1986).

Quoted in Beasley v. National Sav. Life Ins. Co., 75 N.C. App. 104, 330 S.E.2d 207 (1985).

Cited in Lee v. Mowett Sales Co., 78 N.C. App. 556, 334 S.E.2d 250 (1985); Rivenbark v. Southmark Corp., 77 N.C. App. 225, 334 S.E.2d 451 (1985); City of Winston-Salem v. Ferrell, — N.C. App. —, 338 S.E.2d 794 (1986); United Va. Bank v. Air-Lift Assocs., — N.C. App. —, 339 S.E.2d 90 (1986); Clark v. Asheville Contracting Co., — N.C. —, 342 S.E.2d 832 (1986).

II. JUDGMENT ON MULTIPLE CLAIMS OR INVOLVING MULTIPLE PARTIES.

"Other Statutes" Refers Particularly, etc. —

The "other statutes" referred to by subsection (b) of this section are § 1-227 and § 7A-27(d), which allow an immediate appeal from a judicial determination which deprives

appellant of a substantial right which he would lose if the ruling is not reviewed on appeal before final judgment. Beam v. Morrow, 77 N.C. App. 800, 336 S.E.2d 106 (1985).

The right to appeal is available through two channels. — This rule allows appeal if there has been a final judgment as to all of the claims and parties, or if the specific action of the trial court from which appeal is taken is final and the trial judge expressly determines that there is no just reason for delaying the appeal. The second channel to an appeal is by way of §§ 1-277 or 7A-27; an appeal will be permitted under these statutes if a substantial right would be affected by not allowing appeal before final judgment. Brown v. Brown, 77 N.C. App. 206, 334 S.E.2d 506 (1985), cert. denied, 315 N.C. 389, 335 S.E.2d 878 (1986).

In determining the appealability of interlocutory orders a substantial right is a right which will be lost or irremediably adversely affected if the order is not reviewable before the final judgment. Jenkins v. Maintenance, Inc., 76 N.C. App. 110, 332 S.E.2d 90 (1985).

Trial judge's order that denial of immediate appeal would affect substantial right of plaintiffs was tantamount to certification that there was no just reason for delay, and accordingly the appeal was effectively certified and was therefore properly before the court of appeals. Smock v. Brantley, 76 N.C. App. 73, 331 S.E.2d 714 (1985).

In an action seeking quiet title to property which the plaintiffs, the original owners, alleged was secured by two of the defendants by fraud or by mutual mistake and conveyed to the other defendant, the current owner, by general warranty deed, summary judgment in favor of the current owner precluded the plaintiffs from obtaining reformation of the deed and reconveyance of the property, thereby affecting a substantial right; and, therefore, the interlocutory order was appealable. Jenkins v.

Maintenance, Inc., 76 N.C. App. 110, 332 S.E.2d 90 (1985).

In action by discharged employee seeking to recover accumulated vacation leave, "substantial right" of the plaintiff was affected by the granting of summary judgment for the defendant, so that the order granting the motion for summary judgment was appeal-

able, despite the defendant's pending counterclaim for wrongful conversion of company funds, and despite the absence of a determination by the trial judge under subsection (b), that "there was no just reason for delay." *Narron v. Hardee's Food Systems*, 75 N.C. App. 579, 331 S.E.2d 205, cert. denied, 314 N.C. 542, 335 S.E.2d 316 (1985).

Rule 55. Default.

CASE NOTES

I. IN GENERAL.

A motion to intervene after the entry of default against the defendant, his liability to the plaintiff being conclusively established, the extent of liability never being in issue, was untimely. *State Employee's Credit Union, Inc. v. Gentry*, 75 N.C. App. 260, 330 S.E.2d 645 (1985).

Applied in *Smith v. Barfield*, 77 N.C. App. 217, 334 S.E.2d 487 (1985).

II. ENTRY OF DEFAULT.

Entry of default is only, etc. —

The entry of default is interlocutory in nature and is not a final judicial action. *State Employee's Credit Union, Inc. v. Gentry*, 75 N.C. App. 260, 330 S.E.2d 645 (1985).

Defaults may not be entered, etc. —

By waiting till an answer had been tardily filed before seeking to obtain entry of default, the plaintiff waived its rights to entry of default. *Joe Newton, Inc. v. Tull*, 75 N.C. App. 325, 330 S.E.2d 664 (1985).

Substantive Allegations Deemed, etc. —

In accord with original. See *State Employee's Credit Union, Inc. v. Gentry*, 75 N.C. App. 260, 330 S.E.2d 645 (1985).

Raising Affirmative Defense for First Time on Summary Judgment Ruling. — Even if the plaintiff's motion to strike the tardily filed answer had been ruled upon and allowed before the trial court considered the defendant's motion for summary judgment based upon an affirmative defense, the defendants would have been entitled to proceed with

their motion. An affirmative defense may be raised for the first time by affidavit for the purpose of ruling on a motion for summary judgment. *Joe Newton, Inc. v. Tull*, 75 N.C. App. 325, 330 S.E.2d 664 (1985).

III. ENTRY OF JUDGMENT BY DEFAULT.

B. By Judge.

When Judgment Must Be Entered by Judge. —

In accord with 1st paragraph in the main volume. See *Williams v. Jennette*, 77 N.C. App. 283, 335 S.E.2d 191 (1985).

An appearance need not be a direct response to the complaint; there may be an appearance whenever a defendant takes, seeks or agrees to some step in the proceedings that is beneficial to himself or detrimental to the plaintiff. *Williams v. Jennette*, 77 N.C. App. 283, 335 S.E.2d 191 (1985).

IV. SETTING ASIDE DEFAULT.

Where 30 days had not elapsed since the filing of amended complaint, judgment by default was not available; the default judgment obtained was, therefore, void; and it was error as a matter of law for the court to refuse to set it aside. *Hyder v. Dergance*, 76 N.C. App. 317, 332 S.E.2d 713 (1985).

And Court's Determination Will Not Be Disturbed, etc. —

In accord with 1st paragraph in the main volume. See *Williams v. Jennette*, 77 N.C. App. 283, 335 S.E.2d 191 (1985).

Rule 56. Summary judgment.

CASE NOTES

I. IN GENERAL.

Applied in *Spears v. Walker*, 75 N.C. App. 169, 330 S.E.2d 38 (1985); *Rodgers Bldrs., Inc. v. McQueen*, 76 N.C. App. 16, 331 S.E.2d 726 (1985); *Chaparral Supply v. Bell*, 76 N.C. App. 119, 331 S.E.2d 735 (1985); *Sartin v. Carter*, 76 N.C. App. 278, 332 S.E.2d 521 (1985); *Olive v. Great Am. Ins. Co.*, 76 N.C. App. 180, 333 S.E.2d 41 (1985); *Morris v. Morris*, — N.C. App. —, 339 S.E.2d 424 (1986); *Hartman v. Hartman*, — N.C. App. —, 343 S.E.2d 11 (1986).

Quoted in *Johnson v. Smith, Scott & Assocs.*, 77 N.C. App. 386, 335 S.E.2d 205 (1985).

Stated in *Vann v. North Carolina State Bar*, — N.C. App. —, 339 S.E.2d 95 (1986).

Cited in *Bolton Corp. v. T.A. Loving Co.*, 77 N.C. App. 90, 334 S.E.2d 495 (1985); *Woodell v. Pinehurst Surgical Clinic*, 78 N.C. App. 230, 336 S.E.2d 716 (1985); *Lee v. Paragon Group Contractors*, 78 N.C. App. 334, 337 S.E.2d 132 (1985); *Poore v. Swan Quarter Farms, Inc.*, — N.C. App. —, 338 S.E.2d 817 (1986); *Bruce v. Bruce*, — N.C. App. —, 339 S.E.2d 855 (1986); *Barrino v. Radiator Specialty Co.*, — N.C. —, 340 S.E.2d 295 (1986); *Graham v. Mid-State Oil Co.*, — N.C. App. —, 340 S.E.2d 521 (1986).

II. PURPOSE OF SUMMARY JUDGMENT.

This rule is designed to permit penetration of, etc. —

In accord with 1st paragraph in the main volume. See *N.C. Coastal Motor Line v. Everette Truck Line*, 77 N.C. App. 149, 334 S.E.2d 499 (1985), cert. denied, 315 N.C. 391, 338 S.E.2d 880 (1986).

And to Bring Litigation, etc. —

In accord with 1st paragraph in original. *Harris v. Walden*, 314 N.C. 284, 333 S.E.2d 254 (1985); *Campbell v. Board of Educ.*, 76 N.C. App. 495, 333 S.E.2d 507 (1985), cert. denied, 315 N.C. 390, 338 S.E.2d 878 (1986).

The purpose of this rule is to eliminate, etc. —

In accord with 3rd paragraph in the main volume. See *Pierce Concrete, Inc. v. Cannon Realty & Constr. Co.*, 77 N.C. App. 411, 335 S.E.2d 30 (1985).

The purpose of summary judgment is to eliminate formal trials where only questions of law are involved by permitting penetration of an unfounded claim or defense in advance of trial and allowing summary disposition for either party when a fatal weakness in the claim

or defense is exposed. *Pressman v. UNC*, 78 N.C. App. 296, 337 S.E.2d 644 (1985).

One purpose of motion for summary judgment is to avoid useless trials when a debtor has chosen to defend rather than default. *Land-of-Sky Regional Council v. County of Henderson*, 78 N.C. App. 85, 336 S.E.2d 653 (1985).

The purpose of a motion for summary judgment is to avoid a useless trial. *N.C. Coastal Motor Line v. Everette Truck Line*, 77 N.C. App. 149, 334 S.E.2d 499 (1985), cert. denied, 315 N.C. 391, 338 S.E.2d 880 (1986).

It is not the purpose of the summary judgment, etc. —

Summary judgment is not a device to resolve factual disputes; however, complex facts and legal issues do not preclude summary judgment. *Land-of-Sky Regional Council v. County of Henderson*, 78 N.C. App. 85, 336 S.E.2d 653 (1985).

III. PROPRIETY OF SUMMARY JUDGMENT.

A. In General.

Especially in Negligence Cases. —

In accord with original. See *Laughter v. Southern Pump & Tank Co.*, 75 N.C. App. 185, 330 S.E.2d 51, cert. denied, 314 N.C. 666, 335 S.E.2d 495 (1985).

And Awarded Only Where the Truth Is Clear. —

In accord with main volume. See *Warren v. Rosso & Mastracco, Inc.*, 78 N.C. App. 163, 336 S.E.2d 699 (1985).

So That No Party is Deprived, etc. —

In accord with main volume. See *Barnes v. Wilson Hdwe. Co.*, 77 N.C. App. 473, 336 S.E.2d 457 (1985).

Generally Summary Judgment Inappropriate Where Subjective Feelings, etc. —

Summary judgment is rarely proper when a state of mind such as intent or knowledge is at issue. *Valdese Gen. Hosp. v. Burns*, — N.C. App. —, 339 S.E.2d 23 (1986).

Summary judgment is generally not appropriate where intent or other subjective feelings are at issue. The rule that intent should generally be a question of fact for the jury does not mean, however, that it should always be so. *Little v. National Servs. Indus., Inc.*, — N.C. App. —, 340 S.E.2d 510 (1986).

And Whether Party Is Entitled to Judgment. —

In accord with 1st paragraph in the main volume. See *First Am. Fed. Sav. & Loan Ass'n*

v. Royall, 77 N.C. App. 131, 334 S.E.2d 792 (1985).

A genuine issue, etc. —

In accord with main volume. See Cox v. Cox, 75 N.C. App. 354, 330 S.E.2d 506 (1985); Surrette v. Duke Power Co., 78 N.C. App. 647, 338 S.E.2d 129 (1986).

When Issue Is Material. —

In accord with 1st paragraph in main volume. See Cox v. Cox, 75 N.C. App. 354, 330 S.E.2d 506 (1985).

In accord with 4th paragraph in main volume. See Surrette v. Duke Power Co., 78 N.C. App. 647, 338 S.E.2d 129 (1986).

A Question of Fact Which Is Immaterial Does Not Preclude, etc. —

In accord with main volume. See Little v. National Servs. Indus., Inc., — N.C. App. —, 340 S.E.2d 510 (1986).

Summary Judgment to Be, etc. —

In accord with 7th paragraph in original. See Bicycle Transit Auth., Inc. v. Bell, 314 N.C. 219, 333 S.E.2d 299 (1985).

Summary judgment is appropriate only where there are no genuine and material issues of fact to be resolved. Harris-Teeter Supermarkets, Inc. v. Hampton, 76 N.C. App. 649, 334 S.E.2d 81, cert. denied, 315 N.C. 183, 337 S.E.2d 857 (1985).

Summary judgment under this section should be granted when there is no genuine issue of material fact and only issues of law remain. Johnson v. Holbrook, 77 N.C. App. 485, 335 S.E.2d 53 (1985).

And Where a Party Is Entitled to Judgment as a Matter of Law. —

In accord with 1st paragraph in main volume. See Laughter v. Southern Pump & Tank Co., 75 N.C. App. 185, 330 S.E.2d 51, cert. denied, 314 N.C. 666, 335 S.E.2d 495 (1985); Schaffner v. Cumberiand County Hosp. Sys., 77 N.C. App. 689, 336 S.E.2d 116 (1985); Valdese Gen. Hosp. v. Burns, — N.C. App. —, 339 S.E.2d 23 (1986); Ward v. Turcotte, — N.C. App. —, 339 S.E.2d 444 (1986); Little v. National Servs. Indus., Inc., — N.C. App. —, 340 S.E.2d 510 (1986).

In accord with 2nd paragraph in main volume. See Candid Camera Video World, Inc. v. Mathews, 76 N.C. App. 634, 334 S.E.2d 94 (1985), cert. denied, 315 N.C. 390, 338 S.E.2d 879 (1986).

In accord with 4th paragraph in main volume. See Amoco Oil Co. v. Griffin, 78 N.C. App. 716, 338 S.E.2d 601 (1986).

A motion for summary judgment should be allowed only when there exists no triable genuine issue of material fact and the movant's forecast of the evidence demonstrates that it is entitled to a judgment as a matter of law. Cashion v. Texas Gulf, Inc., — N.C. App. —, 339 S.E.2d 797 (1986).

Summary judgment is appropriate only where the pleadings, affidavits and other evidentiary materials before the court disclose that there is no genuine issue of material fact and that a party is entitled to judgment as a matter of law. Rolling Fashion Mart, Inc. v. Mainor, — N.C. App. —, 341 S.E.2d 61 (1986).

This rule does not require that party move for summary judgment in order to be entitled to it; however, the nonmovant must be entitled to the judgment as a matter of law. N.C. Coastal Motor Line v. Everette Truck Line, 77 N.C. App. 149, 334 S.E.2d 499 (1985), cert. denied, 315 N.C. 391, 338 S.E.2d 880 (1986).

If different material conclusions can be drawn, etc. —

In accord with 3rd paragraph in main volume. See Warren v. Rosso & Mastracco, Inc., 78 N.C. App. 163, 336 S.E.2d 699 (1985).

And Presence of Difficult Questions of Law, etc. —

Summary judgment is appropriate where there is no genuine issue of material fact and the case presents only questions of law. This is true even if the questions of law are complex. VEPCO v. Tillett, — N.C. App. —, 343 S.E.2d 188 (1986).

When defendant establishes a complete defense, etc. —

The court may grant summary judgment if the movant conclusively establishes every element of its claim or conclusively establishes a complete defense or legal bar to the nonmovant's claim. VEPCO v. Tillett, — N.C. App. —, 343 S.E.2d 188 (1986).

A defending party is entitled to summary judgment if he can show that no claim for relief exists or that the claimant cannot overcome an affirmative defense to the claim. Rolling Fashion Mart, Inc. v. Mainor, — N.C. App. —, 341 S.E.2d 61 (1986).

A defending party may show as a matter of law, etc. —

A defending party is entitled to summary judgment if he can show that the claimant cannot prove the existence of an essential element of his claim or cannot surmount an affirmative defense which would bar the claim. Little v. National Servs. Indus., Inc., — N.C. App. —, 340 S.E.2d 510 (1986).

Summary judgment may be granted in favor of a nonmoving party, etc. —

In an appropriate case, summary judgment may be rendered against the moving party. Candid Camera Video World, Inc. v. Mathews, 76 N.C. App. 634, 334 S.E.2d 94 (1985), cert. denied, 315 N.C. 390, 338 S.E.2d 879 (1980).

Summary judgment may be granted for a party with the burden of proof, etc. —

In accord with 1985 Cum. Supp. See Valdese Gen. Hosp. v. Burns, — N.C. App. —, 339 S.E.2d 23 (1986).

B. Particular Types of Actions, etc.

Summary judgment is an appropriate procedure in a declaratory judgment action. —

Summary judgment can be appropriate in an action for a declaratory judgment where there is no genuine issue of material fact and one of the parties is entitled to judgment as a matter of law. *North Carolina Ass'n of ABC Bds. v. Hunt*, 76 N.C. App. 290, 332 S.E.2d 693, cert. denied, 314 N.C. 667, 336 S.E.2d 400 (1985).

Summary judgment is rarely appropriate in a negligence action. —

In accord with main paragraph. See *Barnes v. Wilson Hdwe. Co.*, — N.C. App. —, 336 S.E.2d 457 (1985); *Warren v. Rosso & Mastracco, Inc.*, 78 N.C. App. 163, 336 S.E.2d 699 (1985).

And Ordinarily Negligence Actions, etc. —

Issues of negligence should ordinarily be resolved by a jury and are rarely appropriate for summary judgment. *Schaffner v. Cumberland County Hosp. Sys.*, 77 N.C. App. 689, 336 S.E.2d 116 (1985).

As is usually the jury's prerogative, etc. —

Ordinarily, summary judgment is not appropriate in negligence actions because the right of recovery usually depends on the application of the reasonable person standard of care. Only the jury, under instructions from the court, may apply that standard. *Holley v. Burroughs Wellcome Co.*, 74 N.C. App. 736, 330 S.E.2d 228 (1985).

Summary judgment is rarely appropriate in negligence cases, even when there is no dispute as to the facts, because the issue of whether a party acted in conformity with the reasonable person standard is ordinarily an issue to be determined by a jury. *Surrette v. Duke Power Co.*, 78 N.C. App. 647, 338 S.E.2d 129 (1986).

When Summary Judgment for Defendant Is Proper in Negligence Action. —

Summary judgment may be granted, in a negligence case where there is no question as to the credibility of witnesses and the evidence shows either (1) a lack of any negligence on the part of the defendant, or (2) that plaintiff was contributorily negligent as a matter of law. *Surrette v. Duke Power Co.*, 78 N.C. App. 647, 338 S.E.2d 129 (1986).

Summary judgment is generally inappropriate in an action for fraud, etc. —

In accord with 2nd paragraph in original. See *Watts v. Cumberland County Hosp. Sys.*, 75 N.C. App. 1, 330 S.E.2d 242, cert. denied as to additional issues, 314 N.C. 548, 335 S.E.2d 27 (1985).

In claim for relief based on fraud, summary judgment for defendant is proper where the forecast of evidence shows that even

one of the essential elements of fraud is missing. *Uzzell v. Integon Life Ins. Corp.*, 78 N.C. App. 458, 337 S.E.2d 639 (1985).

The inference created by res ipsa loquitur will defeat a motion for summary judgment even though the defendant presents evidence tending to establish absence of negligence. The burden of proving negligence, however, remains with the plaintiff; accordingly, the finder of fact may reject the permissible inference of negligence even though the defendant presents no evidence. *Schaffner v. Cumberland County Hosp. Sys.*, 77 N.C. App. 689, 336 S.E.2d 116 (1985).

For discussion of application of res ipsa loquitur in medical malpractice actions, see *Schaffner v. Cumberland County Hosp. Sys.*, 77 N.C. App. 689, 336 S.E.2d 116 (1985).

C. Cases in Which Summary Judgment Held Proper.

Summary judgment properly entered for defendants. — See *Smith v. Association for Retarded Citizens for Hous. Dev. Servs., Inc.*, 75 N.C. App. 435, 331 S.E.2d 324 (1985).

Action to Quiet Title. — Where a city became the record owner of property pursuant to a tax foreclosure sale, and where purported adverse possessors brought their action to quiet title beyond the one year statute of limitation contained in § 105-377, there were no genuine issues of material fact and the city was entitled to summary judgment. *Overstreet v. City of Raleigh*, 75 N.C. App. 351, 330 S.E.2d 643 (1985).

In a private nuisance action against adjacent landowners, one of the defendants presented an affidavit that it was not and had never been an owner of the land in question. By failing to come forward with evidence, by affidavit or otherwise, which would have tended to show an issue of triable fact, the plaintiff's claim was subject to summary judgment. *Bjornsson v. Mize*, 75 N.C. App. 289, 330 S.E.2d 520, cert. denied, 314 N.C. 537, 335 S.E.2d 13 (1985).

D. Cases in Which Summary Judgment Held Improper.

Use of Road Where Dedication in Issue. — Where the plaintiff brought an action against her neighbor to enjoin his use of a road which ran against the plaintiff's property to the defendant's property, the material issue of whether the road dedication had ever been accepted or rejected by an appropriate authority precluded summary judgment as a matter of law. *Cavin v. Ostwalt*, 76 N.C. App. 309, 332 S.E.2d 509 (1985).

Separation Agreement Did Not Bar Divorce Action Where Issue of Duress Raised. — Since the plaintiff's affidavit, aver-

ring duress or fear, raised a genuine issue of material fact as to the validity of a separation agreement asserted by the defendant in bar of the action for absolute divorce and an equitable distribution of marital property, the court improvidently granted the defendant's motion for summary judgment. *Cox v. Cox*, 75 N.C. App. 354, 330 S.E.2d 506 (1985).

In a fraudulent concealment claim, conclusory, self-serving denials of fraud contained in the defendant's affidavits were clearly insufficient to show that the defendant was entitled to summary judgment. *Watts v. Cumberland County Hosp. Sys.*, 75 N.C. App. 1, 330 S.E.2d 242, cert. denied as to additional issues, 314 N.C. 548, 335 S.E.2d 27 (1985).

Conflict in forecasts of evidence as to causation. — In a private nuisance action, where there was a conflict in the forecasts of evidence as to causation offered by the parties' affidavits, the question of causation was a question of fact and the court erred in granting summary judgment. *Bjornsson v. Mize*, 75 N.C. App. 289, 330 S.E.2d 520, cert. denied, 314 N.C. 537, 335 S.E.2d 13 (1985).

IV. BURDEN ON MOTION FOR SUMMARY JUDGMENT.

Movant Must Establish Lack of a Triable Issue. —

In accord with 1st paragraph in original. See *Overstreet v. City of Raleigh*, 75 N.C. App. 351, 330 S.E.2d 643 (1985); *Sanyo Elec., Inc. v. Albright Distrib. Co.*, 76 N.C. App. 115, 331 S.E.2d 738 (1985); *Lessard v. Lessard*, 77 N.C. App. 97, 334 S.E.2d 475 (1985); *Land-of-Sky Regional Council v. County of Henderson*, 78 N.C. App. 85, 336 S.E.2d 653 (1985).

In accord with 2nd paragraph in original. See *Campbell v. Board of Educ.*, 76 N.C. App. 495, 333 S.E.2d 507 (1985), cert. denied, 315 N.C. 390, 338 S.E.2d 878 (1986); *Uzzell v. Integon Life Ins. Corp.*, 78 N.C. App. 458, 337 S.E.2d 639 (1985).

A party moving for summary judgment may prevail if it meets the burden (1) of proving an essential element of the opposing party's claim is nonexistent, or (2) of showing through discovery that the opposing party cannot produce evidence to support an essential element of his or her claim. *Bicycle Transit Auth., Inc. v. Bell*, 314 N.C. 219, 333 S.E.2d 299 (1985).

The party moving for summary judgment has the burden of showing the lack of any genuine issue of material fact. If the movant is also the party bringing the action, he must establish his claim beyond any genuine dispute with respect to any material fact. *Lambe-Young, Inc. v. Austin*, 75 N.C. App. 569, 331 S.E.2d 293 (1985).

A party moving for summary judgment must establish that there is no genuine issue of ma-

terial fact or that it has a complete defense as a matter of law. *Walker v. Westinghouse Elec. Corp.*, 77 N.C. App. 253, 335 S.E.2d 79 (1985).

And Must Show Entitlement to Judgment. —

In accord with 3rd paragraph in original. See *Cox v. Cox*, 75 N.C. App. 354, 330 S.E.2d 506 (1985); *Bjornsson v. Mize*, 75 N.C. App. 289, 330 S.E.2d 520, cert. denied, 314 N.C. 537, 335 S.E.2d 13 (1985); *Branch Banking & Trust Co. v. Kenyon Inv. Corp.*, 76 N.C. App. 1, 332 S.E.2d 186, cert. granted, 314 N.C. 662, 335 S.E.2d 902 (1985); *Pardue v. Northwestern Bank*, 77 N.C. App. 834, 336 S.E.2d 456 (1985); *Surrette v. Duke Power Co.*, 78 N.C. App. 677, 338 S.E.2d 129 (1986).

If a defendant moves for summary judgment, etc. —

A defendant who moves for summary judgment assumes the burden of positively and clearly showing that there is no genuine issue as to any material fact and that he or she is entitled to judgment as a matter of law. A defendant may meet this burden by: (1) proving that an essential element of the plaintiff's case is nonexistent; or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim; or (3) showing that the plaintiff cannot surmount an affirmative defense which would bar the claim. Once the defendant satisfies his or her burden of proof, the burden shifts to the plaintiff to present a forecast of evidence which shows that a genuine issue of fact exists, or to provide an excuse for not so doing. *Watts v. Cumberland County Hosp. Sys.*, 75 N.C. App. 1, 330 S.E.2d 242 (1985), cert. denied as to additional issues, 314 N.C. 548, 338 S.E.2d 27 (1986).

Or to Surmount an Affirmative Defense. —

In accord with 2nd paragraph in original. See *Sanyo Elec., Inc. v. Albright Distrib. Co.*, 76 N.C. App. 115, 331 S.E.2d 738, cert. denied, 314 N.C. 668, 335 S.E.2d 496 (1985).

Nonmovant does not have burden, etc. —

The burden rests on the movant to make a conclusive showing; until then, the non-movant has no burden to produce evidence. *VEPCO v. Tillett*, — N.C. App. —, 343 S.E.2d 188 (1986).

If the moving party satisfies, etc. —

In accord with 1st paragraph in 1985 Cum. Supp. See *Little v. National Servs. Indus., Inc.*, — N.C. App. —, 340 S.E.2d 510 (1986).

If the movant's burden is carried, the burden is on the opposing party to show that there is a question of material fact that can only be resolved by proceeding to trial. *Branch Banking & Trust Co. v. Kenyon Inv. Corp.*, 76 N.C. App. 1, 332 S.E.2d 186, cert. denied, 314 N.C. 662, 335 S.E.2d 902 (1985).

The burden is upon the party moving for summary judgment to show that there is no genuine issue of law. If the movant meets this burden, the burden then shifts to the nonmovant to set forth specific facts showing that there is a genuine issue of material fact for trial. *BM & W of Fayetteville, Inc. v. Barnes*, 75 N.C. App. 600, 331 S.E.2d 308 (1985).

Once the moving party has submitted materials in support of the motion the burden shifts to the opposing party to produce evidence establishing that the motion should not be granted. *Campbell v. Board of Educ.*, 76 N.C. App. 495, 333 S.E.2d 507 (1985), cert. denied, 315 N.C. 390, 338 S.E.2d 878 (1986).

When Nonmovant Must Come Forward, etc. —

When the moving party presents an adequately supported motion, the opposing party must come forward with facts, not mere allegations, which controvert the facts set forth in the moving party's case, or otherwise suffer a summary judgment. *Campbell v. Board of Educ.*, 76 N.C. App. 495, 333 S.E.2d 507 (1985), cert. denied, 315 N.C. 390, 338 S.E.2d 878 (1986).

Once plaintiff has made and supported its motion for summary judgment, under section (e) of this rule, the burden is then on the defendant to introduce evidence in opposition to the motion setting forth specific facts showing that there is a genuine issue for trial. The defendant then must come forward with a forecast of his own evidence. *Amoco Oil Co. v. Griffin*, 78 N.C. App. 716, 338 S.E.2d 601 (1986).

Hence When Motion, etc. —

The moving party has the burden of establishing a lack of triable issues of fact but the nonmoving party may not rest upon mere allegations of his pleadings. *Cashion v. Texas Gulf, Inc.*, — N.C. App. —, 339 S.E.2d 797 (1986).

The moving party, through his forecast of the evidence, has the burden of establishing a lack of triable issues of fact, but the nonmoving party may not rest upon the mere allegations of his pleadings. *Johnson v. Builder's Transp., Inc.*, — N.C. App. —, 340 S.E.2d 515 (1986).

But Must Demonstrate Existence of a Genuine Issue. —

In accord with 1st paragraph in the main volume. See *Pierce Concrete, Inc. v. Cannon Realty & Constr. Co.*, 75 N.C. App. 411, 335 S.E.2d 30 (1985).

General Denial by Nonmovant, etc. —

An answer filed by defendant as nonmovant which only generally denies the allegations of the complaint fails to raise a genuine issue of fact. An affidavit which merely reaffirms the allegations of the defendant's answer is also insufficient. *Amoco Oil Co. v. Griffin*, 78 N.C. App. 716, 338 S.E.2d 601 (1986).

But party opposing motion, etc. —

In accord with original. See *Cox v. Cox*, 75 N.C. App. 354, 330 S.E.2d 506 (1985).

V. FUNCTION OF TRIAL COURT.

Court Is Not Authorized, etc. —

The court is not authorized to decide an issue of fact but to determine if such an issue exists. *Campbell v. Board of Educ.*, 76 N.C. App. 495, 333 S.E.2d 507 (1985), cert. denied, 315 N.C. 390, 338 S.E.2d 878 (1986).

In ruling on a motion for summary judgment, the court does not resolve issues of fact, and must deny the motion if there is any genuine issue of material fact. *Warren v. Rosso & Mastracco, Inc.*, 78 N.C. App. 163, 336 S.E.2d 699 (1985).

Nor to Make Findings, etc. —

Findings of fact in a summary judgment order are ill advised because they indicate that a question of fact was presented and resolved by the trial court. *Amoco Oil Co. v. Griffin*, 78 N.C. App. 716, 338 S.E.2d 601 (1986).

A trial judge is not required to make findings of fact for summary judgment. *Amoco Oil Co. v. Griffin*, 78 N.C. App. 716, 338 S.E.2d 601 (1986).

But to Determine, etc. —

In accord with 1st paragraph in original. See *Narron v. Hardee's Food Systems*, 75 N.C. App. 579, 331 S.E.2d 205, cert. denied, 314 N.C. 542, 335 S.E.2d 316 (1985); *Lessard v. Lessard*, 77 N.C. App. 97, 334 S.E.2d 475 (1985), cert. granted as to additional issues, 315 N.C. 390, 338 S.E.2d 879 (1986); *Barnes v. Wilson Hdwe. Co.*, 77 N.C. App. 773, 336 S.E.2d 457 (1985); *Johnson v. Builder's Transp., Inc.*, — N.C. App. —, 340 S.E.2d 515 (1986).

In accord with last paragraph in main volume. See *Land-of-Sky Regional Council v. County of Henderson*, 78 N.C. App. 85, 336 S.E.2d 653 (1985).

VI. EVIDENCE ON MOTION.

A. In General.

Judge May Determine Credibility of Deposition Witness. — Witness credibility is ordinarily a jury question. On a motion for summary judgment, however, the judge may determine that a deposition witness is credible as a matter of law where only latent doubts exist as to the witness' credibility and the opposing party fails to go beyond his pleadings in opposing the motion. *Holley v. Burroughs Wellcome Co.*, 74 N.C. App. 736, 330 S.E.2d 228 (1985).

Mere Interest Does Not Render Deposition Testimony Inherently Suspect. — In North Carolina, the mere fact that a witness has an interest in a case is not sufficient by itself to render his deposition testimony inherently suspect for purposes of summary judg-

ment. In order for the testimony of an interested witness to be inherently suspect, it must concern facts peculiarly within the knowledge of the witness. *Holley v. Burroughs Wellcome Co.*, 74 N.C. App. 736, 330 S.E.2d 228 (1985).

Plaintiffs Not Required to Go Beyond Pleadings Where Interested Party's Testimony Inherently Suspect. — In a civil action for injuries allegedly resulting from the negligent marketing and promotion of an anesthetic, the physician responsible for anesthetizing the injured party was clearly an interested party and more than a latent doubt was raised as to his credibility, even though a malpractice action against the doctor was settled prior to trial. Accordingly, his deposition testimony was inherently suspect and the plaintiffs were not required to go beyond their pleadings in order to defeat the summary judgment motion. *Holley v. Burroughs Wellcome Co.*, 74 N.C. App. 736, 330 S.E.2d 228 (1985).

B. Form of Affidavits and Other Evidence.

Affidavit merely restating allegations of the complaint consists of conclusory allegations, unsupported by facts. It thus does not suffice to defeat a motion for summary judgment. *Campbell v. Board of Educ.*, 76 N.C. App. 495, 333 S.E.2d 507 (1985), cert. denied, 315 N.C. 390, 338 S.E.2d 878 (1986).

The trial court has discretionary authority to exclude confusing materials which purport to supplement affidavits supporting summary judgment. *VEPCO v. Tillett*, — N.C. App. —, 343 S.E.2d 188 (1986).

VII. CONSTRUCTION OF EVIDENCE AND INFERENCES.

Court Must View Record, etc. —

In accord with 1st paragraph in original. See *Watts v. Cumberland County Hosp. Sys.*, 75 N.C. App. 1, 330 S.E.2d 242 (1985), cert. denied as to additional issues, 314 N.C. 548, 338 S.E.2d 27 (1986); *Walker v. Westinghouse Elec. Corp.*, 77 N.C. App. 253, 335 S.E.2d 79 (1985); *Surrette v. Duke Power Co.*, 78 N.C. App. 647, 338 S.E.2d 129 (1986); *VEPCO v. Tillett*, — N.C. App. —, 343 S.E.2d 188 (1986); *Hinson v. Hinson*, — N.C. App. —, 343 S.E.2d 266 (1986).

And Draw All Reasonable Inferences in Favor of Nonmovant. —

In accord with 3rd paragraph in the main volume. See *Lessard v. Lessard*, 77 N.C. App. 97, 334 S.E.2d 475 (1985), cert. granted as to additional issues, 315 N.C. 390, 338 S.E.2d 878 (1986); *Walker v. Westinghouse Elec. Corp.*, 77 N.C. App. 253, 335 S.E.2d 79 (1985).

While the Opposing Party's Papers, etc. —

In accord with 1st paragraph in original. See

Cox v. Cox, 75 N.C. App. 354, 330 S.E.2d 506 (1985); *Overstreet v. City of Raleigh*, 75 N.C. App. 351, 330 S.E.2d 643 (1985); *Walker v. Westinghouse Elec. Corp.*, 77 N.C. App. 253, 335 S.E.2d 79 (1985).

No Appeal of Right from Denial of Motion. — The order entered by the trial court denying the defendants' motions to dismiss and for summary judgment was not a final determination of the defendants' rights, even though the trial court stated that "there is no just reason to delay the appeal," and did not affect the defendants' substantial rights. The appeal of the order, therefore, could not lie as of right. *Fraser v. Di Santi*, 75 N.C. App. 654, 331 S.E.2d 217, cert. denied, 315 N.C. 183, 337 S.E.2d 856 (1985).

X. SERVICE AND FILING OF AFFIDAVITS.

Admission of Supplemental Affidavits.

— Although affidavits in support of a motion for summary judgment are required by Rule 6(d) and Section (c) of this rule to be filed and served with the motion, section (e) of this rule grants to the trial judge wide discretion to permit further affidavits to supplement those which have already been served. *Rolling Fashion Mart, Inc. v. Mainor*, — N.C. App. —, 341 S.E.2d 61 (1986).

Affidavit which did no more than explain transactions referred to in earlier affidavits filed by the parties and provide copies of the documents involved in those transactions was clearly supplemental, and it was not an abuse of discretion for the court to admit this affidavit when filed on the day of the hearing. *Rolling Fashion Mart, Inc. v. Mainor*, — N.C. App. —, 341 S.E.2d 61 (1986).

XIII. APPEALS.

Grant of Summary Judgment Is Fully Reviewable. — Since the trial court, in entering summary judgment, rules only on questions of law, a summary judgment is fully reviewable on appeal. *VEPCO v. Tillett*, — N.C. App. —, 343 S.E.2d 188 (1986).

Denial of Motion, etc. —

The denial of a motion for summary judgment is not reviewable on appeal from final judgment. *Concrete Serv. Corp. Investors Group, Inc.*, — N.C. App. —, 340 S.E.2d 755 (1986).

The standard for reviewing a summary judgment motion is whether the pleadings, depositions, answers to interrogatories, and admissions together with the affidavits, if any, show that there is no genuine issue as to any material fact and that a party is entitled to judgment as a matter of law. *Pressman v. UNC*, 78 N.C. App. 296, 337 S.E.2d 644 (1985).

Rule 58. Entry of judgment.

CASE NOTES

The purpose of requirements for notations required by this rule is to provide a basis for making the time of entry of judgment easily identifiable and to give fair notice to all the parties of the entry of judgment. *Landin Ltd. v. Sharon Luggage, Ltd., of Greensboro, Inc.*, 78 N.C. App. 558, 337 S.E.2d 685 (1985).

Objectives of Rule. —

In accord with 1st paragraph in original. See *John T. Council, Inc. v. Balfour Prods. Group, Inc.*, 74 N.C. App. 668, 330 S.E.2d 6, cert. denied, 314 N.C. 538, 335 S.E.2d 316 (1985).

Entry of judgment in open court by another district court judge without notice to the parties that the judgment was entered was error, but as the notice of appeal was timely filed, there was no prejudice. *Brower v. Brower*, 75 N.C. App. 425, 331 S.E.2d 170 (1985).

Order Dismissing Receiver Not Entered When Mere Instruction to Prepare Order Given. — An order dismissing a receiver from

his duties was entered and notice given when entry of the order was given to the clerk, the order filed, and notice of its filing mailed to all parties, and not when, at an earlier hearing, the court "merely instructed" the receiver to prepare an appropriate order. *John T. Council, Inc. v. Balfour Prods. Group, Inc.*, 74 N.C. App. 668, 330 S.E.2d 6, cert. denied, 314 N.C. 538, 335 S.E.2d 316 (1985).

Withdrawal of Rule 59 motion did not entitle defendants to ten days from their withdrawal to file notice of appeal from judgment; to hold otherwise would thwart the tolling provision of Rule 3(c), N.C. Rules App. P. and circumvent this rule, i.e., to give all interested parties a definite fixed time of a judicial determination they can point to as the time of entry of judgment. *Landin Ltd. v. Sharon Luggage, Ltd., of Greensboro, Inc.*, 78 N.C. App. 558, 337 S.E.2d 685 (1985).

Quoted in *Vick v. Vick*, — N.C. App. —, 343 S.E.2d 245 (1986).

Rule 59. New trials; amendment of judgments.

CASE NOTES

I. IN GENERAL.

A motion for a new trial is no substitute for timely motions for directed verdict and judgment n.o.v. In *re Will of King*, — N.C. App. —, 342 S.E.2d 394 (1986).

Motion Directed to Court's Discretion While Rule 50 Motion Presents Question of Law. — A motion to set a verdict aside and for a new trial pursuant to this rule is directed to the discretion of the trial judge, while a motion for judgment notwithstanding the verdict pursuant to Rule 50 is to be decided as a question of law. *Penley v. Penley*, 314 N.C. 1, 332 S.E.2d 51 (1985).

Discretion of Court as to Motion Claiming Excessive or Inadequate Damages. — A motion for a new trial on the grounds that damages awarded are inadequate or excessive and which appear to have been given under the influence of passion or prejudice is directed to the sound discretion of the trial court. The trial court's decision will not be disturbed on appeal in the absence of a showing of abuse of discretion. *Haas v. Kelso*, 76 N.C. App. 77, 331 S.E.2d 759 (1985).

And the Court's Decision Is Not Reviewable Absent Abuse. —

In accord with 2nd paragraph in original. See *Watts v. Schult Homes Corp.*, 75 N.C. App. 110, 330 S.E.2d 41, cert. denied, 314 N.C. 548, 335 S.E.2d 320 (1985); *State v. Hanes*, 77 N.C. App. 222, 334 S.E.2d 444 (1985); *Yeargin v. Spurr*, 78 N.C. App. 243, 336 S.E.2d 680 (1985).

Additional Findings Held Essential to Provide Basis for Review. — Given the defendant's motion specifically asking for findings of fact and conclusions of law on the decision of the plaintiff's motion for a new trial, the insufficiency in the findings of fact in the order granting the motion, and the conflicting evidence in the record, additional findings of fact were essential to provide the appellate court with a basis for a meaningful review. *Andrews v. Peters*, 75 N.C. App. 252, 330 S.E.2d 638, cert. denied, 315 N.C. 182, 337 S.E.2d 65 (1985).

Vacating of Dismissal for Failure to State Claim Not Binding on Later Appeal. — The appellate court's prior decision, in which it "vacated" an order dismissing the plaintiff's complaint for failure to state a claim, was not binding on the court on a later appeal of a judgment notwithstanding the verdict. While the appellate court, in the first appeal,

held that the complaint disclosed no insurmountable bar to recover under at least one of the claims for relief, its inquiry in the second appeal was a very different one: Was the evidence introduced at trial, viewed in the light most favorable to the plaintiff, insufficient as a matter of law to support the jury's verdict? *Pearce v. American Defender Life Ins. Co.*, 74 N.C. App. 620, 330 S.E.2d 9, cert. granted, 314 N.C. 542, 335 S.E.2d 20 (1985).

Scope of Review of Discretionary Ruling. —

In accord with 1st paragraph in main volume. See *Yeargin v. Spurr*, 78 N.C. App. 243, 336 S.E.2d 680 (1985).

An appellate court's review of a trial judge's discretionary ruling denying a motion to set aside a verdict and order a new trial is limited to a determination of whether the record clearly demonstrates a manifest abuse of discretion by the trial judge. *Pittman v. Nationwide Mut. Fire Ins. Co.*, — N.C. App. —, 339 S.E.2d 441 (1986).

Since under this rule motions are addressed to the sound discretion of the trial court, the only question before the court on appeal is whether the trial court abused its discretion in denying the motion. In *re Will of King*, — N.C. App. —, 342 S.E.2d 394 (1986).

The courts of this state have no authority to grant remittiturs without consent of the prevailing party. *Pittman v. Nationwide Mut. Fire Ins. Co.*, — N.C. App. —, 339 S.E.2d 441 (1986).

A discretionary new trial order, as opposed to order granting new trial as matter of law, is not reviewable on appeal in the absence of manifest abuse. *Edge v. Metropolitan Life Ins. Co.*, 78 N.C. App. 624, 337 S.E.2d 672 (1985).

Withdrawal of Rule 59 motion did not entitle defendants to ten days from their withdrawal to file notice of appeal from judgment; to hold otherwise would thwart the tolling provision of Rule 3(c), N.C. Rules App. P. and circumvent Rule 58, N.C. Rules Civ. P., i.e., to give all interested parties a definite fixed time of a judicial determination they can point to as the time of entry of judgment. *Landin Ltd. v. Sharon Luggage, Ltd., of Greensboro, Inc.*, 78 N.C. App. 558, 337 S.E.2d 685 (1985).

The law does not require that trial judge specify his reasons for granting discretionary new trial in the absence of a specific request. *Edge v. Metropolitan Life Ins. Co.*, 78 N.C. App. 624, 337 S.E.2d 672 (1985).

Section (d), requiring statement of reasons, applies only to cases in which trial court orders new trial on its own motion. *Edge v. Metropolitan Life Ins. Co.*, 78 N.C. App. 624, 337 S.E.2d 672 (1985).

New Trial Where Instructions Did Not Reflect Change in Law Only Hours Before.

— Although plaintiffs did not object to jury instructions, it was not error for the trial court to grant a new trial on the grounds that the jury had been erroneously charged where both court and counsel were understandably unaware that the law had changed only hours before the jury was charged. Any objections lodged by the plaintiffs would have been unavailing where the trial judge instructed the jury in accordance with what to him was still established law. *Hunnicut v. Griffin*, 76 N.C. App. 259, 332 S.E.2d 525 (1985).

Order denying a motion for a new trial was reversed because it was based upon an error of law, to wit, that the evidence raised an issue of fact as to contributory negligence. The evidence was undisputed and susceptible of only one inference, i.e., no contributory negligence, and the question should have been withdrawn from the jury. *Watts v. Schult Homes Corp.*, 75 N.C. App. 110, 330 S.E.2d 41, cert. denied, 314 N.C. 548, 335 S.E.2d 320 (1985).

New Trial on Basis of Juror Misconduct. — Prior to July 1, 1984, the effective date of the Rules of Evidence, a juror's testimony could not be received even to show that extraneous prejudicial information was improperly brought to the jury's attention. While such evidence could be received in a criminal case because of the constitutional right of confrontation, no such exception to the general anti-impeachment rule applied in civil cases. Therefore, it was error for judge to grant a conditional new trial on the basis of juror misconduct proved solely by the juror's affidavit and testimony. *Smith v. Price*, — N.C. —, 340 S.E.2d 408 (1986).

Stated in *Hinson v. Hinson*, 78 N.C. App. 613, 337 S.E.2d 663 (1985).

Cited in *Leary v. Nantahala Power & Light Co.*, 76 N.C. App. 165, 332 S.E.2d 703 (1985); *Appelbe v. Appelbe*, 76 N.C. App. 391, 333 S.E.2d 312 (1985); *Dewey v. Dewey*, 77 N.C. App. 787, 336 S.E.2d 451 (1985); *Carver v. Roberts*, 78 N.C. App. 511, 337 S.E.2d 126 (1985).

II. TIME FOR SERVING MOTIONS AND AFFIDAVITS.

Amendment of Divorce Judgment. — Although not so designated, a motion to have separation agreement incorporated into divorce decree was essentially one made pursuant to this rule to alter or amend the divorce judgment. The trial court had no authority to alter or amend such judgment under this rule pursuant to a motion made more than 10 days after entry of the judgment sought to be altered or amended. *Coats v. Coats*, — N.C. App. —, 339 S.E.2d 676 (1986).

III. ALTERING OR AMENDING JUDGMENTS.

Rule 59 motion to amend judgment filed 10 days after judgment by defendant tolled the time for filing and serving a cross-motion of appeal until entry of an order on the motion pursuant to Rule 3(c) N.C. Rules App.

P. However, where defendants later withdrew their Rule 59 motion, the 10-day time limit to give notice of appeal under Rule 3(c) was not tolled because there was never a judicial determination on defendants' motion. *Landin Ltd. v. Sharon Luggage, Ltd., of Greensboro, Inc.*, 78 N.C. App. 558, 337 S.E.2d 685 (1985).

Rule 60. Relief from judgment or order.

CASE NOTES

I. IN GENERAL.

Applied in *Buie v. Johnston*, 313 N.C. 586, 330 S.E.2d 197 (1985); *In re Saunders*, 77 N.C. App. 462, 335 S.E.2d 58 (1985).

Cited in *Andrews v. Peters*, 75 N.C. App. 252, 330 S.E.2d 638 (1985); *Appelbe v. Appelbe*, 76 N.C. App. 391, 333 S.E.2d 312 (1985); *Smith v. Barfield*, 77 N.C. App. 217, 334 S.E.2d 487 (1985); *Carver v. Roberts*, 78 N.C. App. 511, 337 S.E.2d 126 (1985); *Harwood v. Harrelson Ford, Inc.*, 78 N.C. App. 445, 337 S.E.2d 158 (1985); *Schofield v. Schofield*, 78 N.C. App. 657, 338 S.E.2d 132 (1986); *Weiss v. Woody*, — N.C. App. —, 341 S.E.2d 103 (1986); *Amick v. Amick*, — N.C. App. —, 341 S.E.2d 613 (1986); *Hartman v. Hartman*, — N.C. App. —, 343 S.E.2d 11 (1986).

II. RELIEF UNDER SECTION (a).

The court's authority under section (a) is limited to the correction of clerical errors or omissions. Courts do not have the power under section (a) to affect the substantive rights of the parties or to correct substantive errors in their decisions. *Hinson v. Hinson*, 78 N.C. App. 613, 337 S.E.2d 663 (1985).

III. RELIEF UNDER SECTION (b).

A. In General.

Motion under section (b), etc. —

In accord with 2nd paragraph in main volume. See *Long v. Fink*, — N.C. App. —, 342 S.E.2d 557 (1986).

And Will Be Disturbed Only for Abuse of Discretion. —

In accord with 1st paragraph in the main volume. See *Williams v. Jennette*, 77 N.C. App. 283, 335 S.E.2d 191 (1985).

Appellate review, etc. —

In accord with 1st paragraph in original. See *Thomas M. McInnis & Assocs. v. Hall*, 76 N.C. App. 486, 333 S.E.2d 544 (1985), cert. granted, — N.C. —, 339 S.E.2d 413 (1986).

Court to Make Findings of Fact. —

In accord with main volume. See *York v. Taylor*, — N.C. App. —, 339 S.E.2d 830 (1986).

Applicable to Industrial Commission Motion. — Since the North Carolina Industrial Commission has no rule comparable to section (b), and because the Rules of Civil Procedure are applicable, the Industrial Commission should have treated defendant's motion pursuant to § 97-85 and Industrial Commission Rule XXI for a new hearing on the ground that he had not received notice of hearing in which plaintiff was awarded compensation as one made pursuant to section (b) to be relieved from a judgment. *Long v. Reeves*, 77 N.C. App. 830, 336 S.E.2d 98 (1985).

Motion Made after Notice of Appeal. — The trial court does not have jurisdiction to rule on a motion pursuant to section (b) of this rule where such motion is made after the notice of appeal has been given. *York v. Taylor*, — N.C. App. —, 339 S.E.2d 830 (1986).

As a general rule, an appeal divests the trial court of jurisdiction of a case and, pending appeal, the trial court is functus officio. However, the trial court retains limited jurisdiction to hear and consider a Rule 60(b) motion to indicate what action it would be inclined to take were an appeal not pending. *Talbert v. Mauney*, — N.C. App. —, 343 S.E.2d 5 (1986).

Notice of Appeal Filed at Same Time as Motions. — Where notice of appeal from default judgment for defendants with respect to plaintiff's claim and defendants' counterclaim against plaintiff was filed at the same time as plaintiff's Rule 52(b) motion for amended and additional findings of fact and his Rule 60(b) motion for relief from judgment under the circumstances of the case, the trial court had jurisdiction to rule on plaintiff's Rule 60(b) motion. *York v. Taylor*, — N.C. App. —, 339 S.E.2d 830 (1986).

B. Mistake, Inadvertence, Surprise and Excusable Neglect.

1. In General.

Along with Finding, etc. —

In accord with 2nd paragraph in original. See *Chaparral Supply v. Bell*, 76 N.C. App. 119, 331 S.E.2d 735 (1985).

In accord with 3rd paragraph in original. See *Thomas M. McInnis & Assocs. v. Hall*, 76 N.C. App. 486, 333 S.E.2d 544 (1985), cert. granted, — N.C. —, 339 S.E.2d 413 (1986).

Court Determines Only Whether Meritorious Defense Pleaded. — As for the defense, the trial court does not hear the facts but determines only whether the movant has pleaded a meritorious defense. *Chaparral Supply v. Bell*, 76 N.C. App. 119, 331 S.E.2d 735 (1985).

To merely deny indebtedness and assert presence of a meritorious defense is not sufficient. This is true even when the facts found justify a conclusion that the movant's neglect was excusable. The trial court cannot set aside the judgment unless there is a meritorious defense, a real or substantial defense on the merits. *Chaparral Supply v. Bell*, 76 N.C. App. 119, 331 S.E.2d 735 (1985).

Collateral Estoppel Not Meritorious Defense to Breach of Contract With Joint Obligors. — The doctrine of collateral estoppel is not a meritorious defense to a breach of contract action involving joint obligors. Under § 1-72, joint obligors on a contract are jointly and severally liable. The statute permits an injured party to seek recovery against one or more joint obligors without impairing his right to proceed against the other joint obligors later. Conversely, a joint obligor who is not a party to the original action is not bound by any judgment rendered in that action. Thus, in application, the doctrine of joint and several liability is inconsistent with the doctrine of collateral estoppel. Collateral estoppel prevents parties, and those in privity with them, from relitigating issues that were necessarily decided in a prior action. *Thomas M. McInnis & Assocs. v. Hall*, 76 N.C. App. 486, 333 S.E.2d 544 (1985), cert. granted, — N.C. —, 339 S.E.2d 413 (1986).

Wife's failure to respond to complaint was excusable neglect, where she turned the papers over to her husband upon the assurance from him that this matter had been resolved and that there was no necessity to respond to the complaint. *Thomas M. McInnis & Assocs. v. Hall*, 76 N.C. App. 486, 333 S.E.2d 544 (1985), cert. granted, — N.C. —, 339 S.E.2d 413 (1986).

Finality of Findings, etc. —

In accord with 2nd paragraph in original.

See *Chaparral Supply v. Bell*, 76 N.C. App. 119, 331 S.E.2d 735 (1985).

Remand for Hearing and Findings. — Where although a hearing was conducted, at which plaintiff's counsel was not present, the trial court made no findings of fact resolving the critical issues as to whether plaintiff was entitled to relief from judgment on the grounds of "mistake, inadvertence, surprise, or excusable neglect" and whether plaintiff had a meritorious defense to defendants' counterclaim, the order denying plaintiff's motion would be vacated and the case would be remanded to the district court for a new hearing and ruling on all issues raised by the Rule 60(b) motion. *York v. Taylor*, — N.C. App. —, 339 S.E.2d 830 (1986).

C. Newly Discovered Evidence.

Failure to Produce Evidence, etc. —

In order to support a motion under subsection (b)(2) of this rule, new evidence must be presented that was not discoverable by due diligence in time to move for a new trial. *Hill v. Hanes Corp.*, — N.C. App. —, 339 S.E.2d 1 (1986).

E. Other Reasons Justifying Relief under Subsection (b)(6).

Due Diligence Requirement Not Circumvented. — On defendants' motion under Rule 60(b)(6), seeking relief from Industrial Commission's award, the court would decline to circumvent the "due diligence" requirement of Rule 60(b)(2) by indiscriminately entertaining any and all "newly discovered evidence" under Rule 60(b)(6). Otherwise, Rule 60(b)(6) would become a vehicle for unsuccessful litigants to obtain automatic rehearings before the Commission without satisfying the requirements of § 97-47. *Hill v. Hanes Corp.*, — N.C. App. —, 339 S.E.2d 1 (1986).

The Industrial Commission has inherent power analogous to that conferred on courts by Rule 60(b)(6), in the exercise of supervision over its own judgments to set aside a former judgment when the paramount interest in achieving a just and proper determination of a workers compensation claim requires it. *Hogan v. Cone Mills Corp.*, 315 N.C. 127, 337 S.E.2d 477 (1985).

Rule 61. Harmless error.

CASE NOTES

Error alone will not justify reversal; the error must affect some substantial right of the appellant. *Andrews v. Andrews*, — N.C. App. —, 338 S.E.2d 809 (1986).

Mere formal defects in findings ordinarily will be ignored if the substance of the judgment is sufficient. *Andrews v. Andrews*, — N.C. App. —, 338 S.E.2d 809 (1986).

The failure to make certain findings, even when specifically requested, does not rise to the level of reversible error if the requested findings are not material. *Andrews v. Andrews*, — N.C. App. —, 338 S.E.2d 809 (1986).

Especially in light of the conclusive nature of

stipulations and the binding effect of pretrial orders, failure to find facts stipulated to in a pretrial order can hardly be prejudicial. *Andrews v. Andrews*, — N.C. App. —, 338 S.E.2d 809 (1986).

The introduction of inadmissible evidence by itself will not require reversal; the appellant must demonstrate that the error was prejudicial, i.e., that it probably influenced the verdict of the jury. *Broyhill v. Coppage*, — N.C. App. —, 339 S.E.2d 32 (1986).

Applied in *Mills v. New River Wood Corp.*, 77 N.C. App. 576, 335 S.E.2d 759 (1985).

Rule 62. Stay of proceedings to enforce a judgment.

CASE NOTES

Cited in *Leary v. Nantahala Power & Light Co.*, 76 N.C. App. 165, 332 S.E.2d 703 (1985).

Rule 63. Disability of judge.

CASE NOTES

Entry of judgment in open court by another district court judge without notice to the parties that the judgment was entered was error, but as the notice of appeal was

timely filed, there was no prejudice. *Brower v. Brower*, 75 N.C. App. 425, 331 S.E.2d 170 (1985).

ARTICLE 8.

Miscellaneous.

Rule 65. Injunctions.

(b) *Temporary restraining order; notice; hearing; duration.* — A temporary restraining order may be granted without notice to the adverse party if it clearly appears from specific facts shown by affidavit or by verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had thereon. Every temporary restraining order granted without notice shall be endorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the judge fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice and a

motion for a preliminary injunction is made, it shall be set down for hearing at the earliest possible time and takes precedence over all matters except older matters of the same character; and when the motion comes on for hearing, the party who obtained the temporary restraining order shall proceed with a motion for a preliminary injunction, and, if he does not do so, the judge shall dissolve the temporary restraining order. On two days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the judge may prescribe, the adverse party may appear and move its dissolution or modification and in that event the judge shall proceed to hear and determine such motion as expeditiously as the ends of justice require. Damages may be awarded in an order for dissolution as provided in section (e).

(1967, c. 954, s. 1.)

Only Part of Rule Set Out. — As the rest of the rule was not affected, it is not set out.

Editor's Note. — Subsection (b) of this rule

is set out to correct an error in the main volume.

CASE NOTES

III. TEMPORARY RESTRAINING ORDER.

It was error for court to issue permanent injunction at hearing to show cause why temporary restraining order should not be continued. *Everette v. Taylor*, 77 N.C. App. 442, 335 S.E.2d 212 (1985).

No Jurisdiction to Determine Controversy on Merits. — A judge conducting a hearing to determine whether a temporary restraining order should be continued as a preliminary injunction pursuant to this rule has no jurisdiction to determine a controversy on its merits; neither can the parties to an action confer this jurisdiction upon the trial court by granting consent to such a hearing. *Everette v. Taylor*, 77 N.C. App. 442, 335 S.E.2d 212 (1985).

VI. DAMAGES ON DISSOLUTION.

Damages Following Voluntary Dismissal. — Award of damages upon the dissolution of an injunction was not improper where the injunction was granted because there was probable cause to believe that defendants might be able to establish their right to the injunction upon trying the issues raised by their counterclaim, but where after the case was tried almost to a conclusion, defendants voluntarily dismissed their counterclaim; although it was done "without prejudice," this dismissal could only be construed as an acknowledgement by the defendants that they could not establish their entitlement to the restraining order. *Pinehurst, Inc. v. O'Leary Bros. Realty*, — N.C. App. —, 338 S.E.2d 918 (1986).

Chapter 1B. **Contribution.**

ARTICLE 1.

Uniform Contribution among Tort-Feasors Act.

§ 1B-1. Right to contribution.

CASE NOTES

I. IN GENERAL.

The right to contribution is statutory and is applicable only between joint tort-

feasors. *Roseboro Ford, Inc. v. Bass*, 77 N.C. App. 363, 335 S.E.2d 214 (1985).

Applied in *United States v. Ward*, 618 F. Supp. 884 (E.D.N.C. 1985).

Chapter 1C.

Enforcement of Judgments.

ARTICLE 16.

Exempt Property.

§ 1C-1601. What property exempt; waiver; exceptions.

CASE NOTES

North Carolina law clearly requires individual to retain both ownership and use of residence if that person is to retain a homestead exemption. North Carolina's courts have failed to draw a distinction between bankruptcy debtors and civil judgment debtors when interpreting the statutory provision creating the homestead exemption. In *re Love*, 54 Bankr. 947 (E.D.N.C. 1985).

If jewelry is acquired and kept as an investment rather than as an item of ornamental apparel, then it is not wearing apparel. In *re Mims*, 49 Bankr. 283 (Bankr. E.D.N.C. 1985).

"Wearing apparel" exemption provided in this section may include a diamond engagement ring. In *re Mims*, 49 Bankr. 283 (Bankr. E.D.N.C. 1985).

Where the court found that the debtor had worn her diamond engagement ring as part of her daily attire since she received it from her ex-husband, the ring was not held as an investment, and the engagement ring was part of the debtor's daily wearing apparel. In *re Mims*, 49 Bankr. 283 (Bankr. E.D.N.C. 1985).

Exemptions under 11 U.S.C. § 522(d) compared. — Many of the new North Carolina exemptions were borrowed from the 11 U.S.C. § 522(d) bankruptcy exemptions. In fact, while the amounts are different, the categories of personal property which may be exempt under subdivision (a)(4) of this section

are identical to the categories which are exemptable under 11 U.S.C. § 522(d)(3). In *re Mims*, 49 Bankr. 283 (Bankr. E.D.N.C. 1985).

Controlling Effect of 11 U.S.C. § 522(f). — There may be an inconsistency in the operation of the state exemption statute and the Bankruptcy Code due to the conditional nature of North Carolina exemptions. To the extent that there is any conflict between the operation of 11 U.S.C. § 522(f) and the state statute, the federal provision controls. In *re Jackson*, 55 Bankr. 343 (Bankr. M.D.N.C. 1985).

State May Not "Opt-Out" of 11 U.S.C. § 522(f). — While a state may "opt-out" of the federal exemptions listed in 11 U.S.C. § 522(d), a state may not "opt-out" of 11 U.S.C. § 522(f). In *re Jackson*, 55 Bankr. 343 (Bankr. M.D.N.C. 1985), granting debtors' motion to avoid nonpossessory, nonpurchase money security interest in debtors' household personal property, which impaired the total value of the property as exempt.

Relief from Waiver of Exemption in Bankruptcy. — Debtor who had waived his property exemption by failing to have his exempt property designated by motion within 20 days as required by § 1C-1603, was entitled to relief from such waiver under 11 U.S.C. § 522 which provides no specific time limit for filing exemption. *North Carolina Baptist Hosps. v. Howell*, 51 Bankr. 1015 (M.D.N.C. 1985).

§ 1C-1603. Procedure for setting aside exempt property.

CASE NOTES

Relief from Waiver of Exemption in Bankruptcy. — Debtor who had waived his property exemption by failing to have his exempt property designated by motion within 20 days as required by this section, was entitled to relief from such waiver under 11 U.S.C. § 522 which provides no specific time limit for filing exemption. *North Carolina Baptist Hosps. v. Howell*, 51 Bankr. 1015 (M.D.N.C. 1985).

Conflicts between 11 U.S.C. § 522(l) and Time Limits under State Law. — Sections 1C-1601(c) and 1C-1603(e) severely undermine the effectiveness and limit the application of the federal bankruptcy provisions. The federal provision, 11 U.S.C. § 522(l), must be read independent of the state provision in order to resolve the inherent conflict between the two.

There is no question that when a state law conflicts with a federal law, the former is preempted by the latter. The inconsistencies which exist between federal and state law should undoubtedly be resolved in favor of federal law. Thus, where a time limitation or a lack of time limitation in a federal provision is different from a provision in state legislation, the federal legislation controls. To hold otherwise, especially in the context of bankruptcy, would frustrate Congress' policy of giving debtors a new start. *North Carolina Baptist*

Hosps. v. Howell, 51 Bankr. 1015 (M.D.N.C. 1985).

North Carolina law clearly requires individual to retain both ownership and use of residence if that person is to retain a homestead exemption. North Carolina's courts have failed to draw a distinction between bankruptcy debtors and civil judgment debtors when interpreting the statutory provision creating the homestead exemption. *In re Love*, 54 Bankr. 947 (E.D.N.C. 1985).

§ 1C-1604. Effect of exemption.

CASE NOTES

North Carolina law clearly requires individual to retain both ownership and use of residence if that person is to retain a homestead exemption. North Carolina's courts have failed to draw a distinction between bankruptcy debtors and civil judgment debtors when interpreting the statutory provision creating the homestead exemption. *In re Love*, 54 Bankr. 947 (E.D.N.C. 1985).

Controlling Effect of 11 U.S.C. § 522(f). — There may be an inconsistency in the operation of the state exemption statute and the Bankruptcy Code due to the conditional nature of North Carolina exemptions. To the extent that there is any conflict between the operation of 11 U.S.C. § 522(f) and the state statute, the federal provision controls. *In re Jackson*, 55 Bankr. 343 (Bankr. M.D.N.C. 1985).

Chapters 2 to 14.

Editor's Note. — The 1986 legislation and annotations affecting Chapters 2 to 7A have been included in recently published replacement chapters to be placed in Volume 1A, Part

II and the 1986 legislation and annotations affecting Chapters 8 to 14 have been included in recently published Replacement Volume 1B.

Chapter 15.

Criminal Procedure.

ARTICLE 4A.

Administrative Search and Inspection Warrants.

§ 15-27.2. Warrants to conduct inspections authorized by law.

CASE NOTES

Alternative Criteria, etc. —

Under subdivision (c)(1) of this section, one of the following two conditions must be met before an administrative search warrant can be issued: First, the property to be searched or inspected must be searched or inspected as part of a "legally authorized program of inspection which naturally includes that property"; or second, there must be "probable cause for believing that there is a condition, object, activity or circumstance that legally justifies such a search or inspection of that property". In re Computer Technology Corp., 78 N.C. App. 402, 337 S.E.2d 165 (1985).

Inspection of Corporate Records in Fraud Investigation. — An ex parte order

from the superior court, directing officials of a certain corporation to make available the records pertaining to its transactions with two other corporations and with City of Charlotte, incident to an investigation into possible fraud and irregularities in the purchasing of parts, equipment and services by the city, was not an administrative search warrant to which the strictness of the Fourth Amendment to the United States Constitution, N.C. Const., Art. I, § 20, and this section would apply. Where such order was neither unreasonably broad nor indefinite, its issuance would be affirmed. In re Computer Technology Corp., 78 N.C. App. 402, 337 S.E.2d 165 (1985).

ARTICLE 15.

Indictment.

§ 15-144. Essentials of bill for homicide.

CASE NOTES

Article 1, § 23, N.C. Const., and § 15A-924(a)(5) did not specifically repeal this section, nor did they repeal it by implication. State v. Avery, 315 N.C. 1, 337 S.E.2d 786 (1985).

Indictment in form prescribed, etc. —

An indictment which complies with the short

form indictment authorized by this section is sufficient to charge first degree murder without specifically alleging premeditation and deliberation or felony murder. State v. Avery, 315 N.C. 1, 337 S.E.2d 786 (1985).

Cited in State v. Ledford, — N.C. —, 340 S.E.2d 309 (1986).

§ 15-144.1. Essentials of bill for rape.

CASE NOTES

An indictment charging "attempted rape" necessarily includes assault on a fe-

male as a lesser offense. *State v. Wortham*, — N.C. App. —, 341 S.E.2d 76 (1986).

§ 15-144.2. Essentials of bill for sex offense.

CASE NOTES

Defendant May Demand to Know Specific "Sexual Act" Charged. — When the State does not specify at the outset which "sexual act" was committed by a defendant, it can be required to do so before trial on the indictment is had. *State v. Loudner*, 77 N.C. App. 453, 335 S.E.2d 78 (1985).

State Bound by Allegation of Specific Sexual Act. — While the State was not required to allege the specific nature of the sex act in the indictment, having chosen to do so, it

is bound by its allegations. *State v. Loudner*, 77 N.C. App. 453, 335 S.E.2d 78 (1985).

Evidence Must Correspond to Allegations. — The evidence in a criminal prosecution must correspond to the material allegations of the indictment, and where the evidence tends to show the commission of an offense not charged in the indictment, the defendant's conviction thereof cannot stand. *State v. Loudner*, 77 N.C. App. 453, 335 S.E.2d 78 (1985).

ARTICLE 17.

Trial in Superior Court.

§ 15-169. Conviction of assault, when included in charge.

CASE NOTES

Same — Attempted First Degree Rape. — An indictment charging "attempted rape" necessarily includes assault on a female as a

lesser offense. *State v. Wortham*, — N.C. App. —, 341 S.E.2d 76 (1986).

§ 15-170. Conviction for a less degree or an attempt.

CASE NOTES

I. GENERAL CONSIDERATION.

Facts of particular case, etc. —

The determination of whether one crime is a lesser included offense of another is made on a definitional, not a factual, basis. All essential elements of the lesser offense must be completely covered by the essential elements of the greater offense. *State v. Wortham*, — N.C. App. —, 341 S.E.2d 76 (1986).

III. LESSER AND INCLUDED OFFENSES.

Attempted Rape. — An indictment charging "attempted rape" necessarily includes assault on a female as a lesser offense. *State v. Wortham*, — N.C. App. —, 341 S.E.2d 76 (1986).

Larceny Pursuant to Breaking or Entering. — While it is error for the court to permit the jury to convict based on some abstract theory not supported by the bill of indictment, an indictment charging defendant with larceny pursuant to a burglary was sufficient to uphold defendant's conviction for larceny pursuant to a breaking or entering, as felonious breaking or entering is a lesser degree of the offense of second degree burglary, and this section provides that upon the trial of any indictment the prisoner may be convicted of the crime charged therein or of a lesser degree of the same crime. *State v. McCoy*, — N.C. App. —, 339 S.E.2d 419 (1986).

§ 15-173. Demurrer to the evidence.

CASE NOTES

I. GENERAL CONSIDERATION.

Cited in State v. Ausley, 78 N.C. App. 791, 338 S.E.2d 547 (1986).

II. OTHER MOTIONS COMPARED.

Motion to dismiss under § 15A-1227(a)(1) for insufficiency of the evidence to go to the jury is tantamount to a motion for nonsuit under this section. State v. Bruce, 315 N.C. 273, 337 S.E.2d 510 (1985).

III. QUESTION PRESENTED BY MOTION.

Question Presented. —

In accord with 9th paragraph in 1985 Cumulative Supplement. See State v. Perry, — N.C. —, 340 S.E.2d 450 (1986).

When a defendant moves under § 15A-1227(a)(2) or under this section for dismissal at the close of all of the evidence, the trial court is to determine whether there is substantial evidence (a) of each essential element of the offense charged, or of a lesser offense included therein, and (b) of the defendant's being the perpetrator of the offense. State v. Bruce, 315 N.C. 273, 337 S.E.2d 510 (1985).

VI. EVIDENCE.

Defendant's motion to dismiss must be considered in light of all the evidence introduced by the State, as well as that introduced by defendant. State v. Perry, — N.C. —, 340 S.E.2d 450 (1986).

Defendant's Evidence May Be Considered. — In considering a motion to dismiss

made at the close of all the evidence, the defendant's evidence as well as the State's evidence may be considered. State v. Davis, — N.C. App. —, 342 S.E.2d 530 (1986).

Need Not Exclude Every Reasonable Hypothesis, etc. —

In accord with original. See State v. Bruce, 315 N.C. 273, 337 S.E.2d 510 (1985).

Evidence Considered in Light Most Favorable to State. — When defendant moves under § 15A-1227(a)(2) or under this section for dismissal at the close of all the evidence, the trial court is to view all of the evidence in the light most favorable to the state and give the state all reasonable inferences that may be drawn from the evidence supporting the charges against the defendant. State v. Bruce, 315 N.C. 273, 337 S.E.2d 510 (1985).

Contradictions and Discrepancies, etc. —

Contradictions and discrepancies in the evidence are for the jury to resolve and do not warrant dismissal. State v. Bruce, 315 N.C. 273, 337 S.E.2d 510 (1985).

VII. INTRODUCTION OF TESTIMONY BY DEFENDANT AT TRIAL.

Effect of Defendant Introducing Testimony, etc. —

In accord with 2nd paragraph in original. See State v. Lilley, 78 N.C. App. 100, 337 S.E.2d 89 (1985); State v. Bruce, 315 N.C. 273, 337 S.E.2d 510 (1985).

In accord with 3rd paragraph in main volume. See State v. Davis, — N.C. App. —, 342 S.E.2d 530 (1986).

Chapter 15A.

Criminal Procedure Act.

SUBCHAPTER VI. PRELIMINARY PROCEEDINGS.

Article 31.

The Grand Jury and Its Proceedings.

Sec.

15A-622. Formation and organization of grand juries; other preliminary matters.

15A-623. Grand jury proceedings and operation in general.

SUBCHAPTER VII. SPEEDY TRIAL; ATTENDANCE OF DEFENDANTS.

Article 35.

Speedy Trial.

15A-701. Time limits and exclusions.

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15A-1353. Order of commitment when imprisonment imposed; release pending appeal.

Article 85.

Parole.

15A-1371. Parole eligibility, consideration, and refusal.

Article 85A.

Parole of Certain Convicted Felons.

15A-1380.2. Reentry parole of felons.

SUBCHAPTER I. GENERAL.

ARTICLE 1.

*Definitions and General Provisions.***§ 15A-101. Definitions.**

CASE NOTES

Cited in *State v. Norris*, 77 N.C. App. 525,
335 S.E.2d 764 (1985).

SUBCHAPTER II. LAW-ENFORCEMENT AND
INVESTIGATIVE PROCEDURES.

ARTICLE 9.

*Search and Seizure by Consent.***§ 15A-222. Person from whom effective consent may be obtained.**

CASE NOTES

Quoted in *State v. Moore*, — N.C. —, 341
S.E.2d 733 (1986).

§ 15A-223. Permissible scope of consent search and seizure.

CASE NOTES

Police officer's delivery of seizure inventory form to defendant was not an "initiation" of conversation. Indeed, law enforcement authorities are required to make a list of the things seized, and deliver a receipt embodying the list to the person who consented to

the search. The fact that delivery of the receipt was made after a request for the presence of an attorney does not alter the routineness of such a delivery nor does it thereby constitute the initiation of questioning. *State v. Williams*, 314 N.C. 337, 333 S.E.2d 708 (1985).

ARTICLE 11.

Search Warrants.

§ 15A-253. Scope of the search; seizure of items not named in the warrant.

CASE NOTES

II. PLAIN VIEW.

A padlock found under telephone book on bedside table, which was relevant to murder

case, was lawfully seized from motel room pursuant to a warrant authorizing search for bloody clothing. *State v. Williams*, 315 N.C. 310, 338 S.E.2d 75 (1986).

ARTICLE 14.

Nontestimonial Identification.

§ 15A-271. Authority to issue order.

CASE NOTES

This Article was enacted in response to dictum contained in *Davis v. Mississippi*, 394 U.S. 721, 89 S. Ct. 1394, 22 L. Ed. 2d 676 (1969) inviting the use of narrowly circumscribed procedures for obtaining the fingerprints of individuals for whom there is no probable cause to arrest. *State v. Welch*, — N.C. —, 342 S.E.2d 789 (1986).

Article Inapplicable to In-Custody Accused. —

In accord with 1st paragraph in main volume. See *State v. Norris*, 77 N.C. App. 525, 335 S.E.2d 764 (1985).

This Article applies only to suspects and accused persons before arrest, and persons formally charged and arrested, who have been released from custody pending trial. The statute

does not apply to an in custody accused. *State v. Welch*, — N.C. —, 342 S.E.2d 789 (1986).

Blood Sample Taken from Defendant Confined in County Jail. — Where defendant had been indicted for first-degree murder and was in custody at the county jail when nontestimonial identification order was issued upon the State's motion, it was error for the trial court to issue the order, and defendant's Fourth Amendment right to be free from unreasonable searches and seizures was violated when sample of his blood was drawn pursuant to this order in the absence of a search warrant. *State v. Welch*, — N.C. —, 342 S.E.2d 789 (1986), declining, however, to apply the exclusionary rule to this good faith violation of the Fourth Amendment.

§ 15A-272. Time of application; additional investigative procedures not precluded.

CASE NOTES

Juvenile Procedure Compared. — Under this section, the adult statute, time of application focuses on the arrest of the suspect, while § 7A-597 focuses on taking the juvenile into

custody, indicating an expanded time period when procedural protection of juveniles is necessary. *State v. Norris*, 77 N.C. App. 525, 335 S.E.2d 764 (1985).

§ 15A-273. Basis for order.

CASE NOTES

Blood Sample Taken from Defendant Confined in County Jail. — Where defendant had been indicted for first-degree murder and was in custody at the county jail when nontestimonial identification order was issued upon the State's motion, it was error for the trial court to issue the order, and defendant's Fourth Amendment right to be free from un-

reasonable searches and seizures was violated when the sample of his blood was drawn pursuant to this order in the absence of a search warrant. *State v. Welch*, — N.C. —, 342 S.E.2d 789 (1986), declining, however, to apply the exclusionary rule to this good faith violation of the Fourth Amendment.

§ 15A-274. Issuance of order.

CASE NOTES

Blood Sample Taken from Defendant Confined in County Jail. — Where defendant had been indicted for first-degree murder and was in custody at the county jail when nontestimonial identification order was issued upon the State's motion, it was error for the trial court to issue the order, and defendant's Fourth Amendment right to be free from un-

reasonable searches and seizures was violated when the sample of his blood was drawn pursuant to this order in the absence of a search warrant. *State v. Welch*, — N.C. —, 342 S.E.2d 789 (1986), declining, however, to apply the exclusionary rule to this good faith violation of the Fourth Amendment.

§ 15A-281. Nontestimonial identification order at request of defendant.

CASE NOTES

The unannounced, unexpected presence of the robbery victim at the defendant's arraignment did not deny the defendant the right to a neutral line up procedure. The defendant made no request for such a procedure, nor did he ask the trial court to find that he intended to request such a procedure and that

the procedure could not be fairly conducted. *State v. Latta*, 75 N.C. App. 611, 331 S.E.2d 213, cert. denied, 314 N.C. 334, 333 S.E.2d 494 (1985).

Cited in *State v. Welch*, — N.C. —, 342 S.E.2d 789 (1986).

SUBCHAPTER III. CRIMINAL PROCESS.

ARTICLE 17.

Criminal Process.

§ 15A-301. Criminal process generally.

CASE NOTES

Cited in *In re King*, — N.C. App. —, 339 S.E.2d 87 (1986).

§ 15A-302. Citation.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 852, s. 17 amends Session Laws 1985, c. 764, s. 40, so as to change the effective date of the amendment to this section by c. 764 from July 1, 1986 to September 1, 1986.

Session Laws 1985, c. 764, s. 40, as amended by Session Laws 1985 (Reg. Sess., 1986), c. 852,

s. 17, provides: "This act shall become effective September 1, 1986, and shall apply to offenses committed on or after that date. Offenses committed before the effective date of this act [September 1, 1986] shall be governed by the law in effect at the time of the offense."

§ 15A-303. Criminal summons.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 852, s. 17 amends Session Laws 1985, c. 764, s. 40, so as to change the effective date of the amendment to this section by c. 764 from July 1, 1986 to September 1, 1986.

Session Laws 1985, c. 764, s. 40, as amended by Session Laws 1985 (Reg. Sess., 1986), c. 852,

s. 17, provides: "This act shall become effective September 1, 1986, and shall apply to offenses committed on or after that date. Offenses committed before the effective date of this act [September 1, 1986] shall be governed by the law in effect at the time of the offense."

SUBCHAPTER IV. ARREST.

ARTICLE 20.

Arrest.

§ 15A-401. Arrest by law-enforcement officer.

CASE NOTES

I. GENERAL CONSIDERATION.

It was not necessary to read defendant the Miranda rights in order to make lawful arrest, where defendant was advised by the arresting officers that he was being arrested on a charge of rape in compliance with subsection

(c)(2)(c). *State v. Kinch*, 314 N.C. 99, 331 S.E.2d 665 (1985).

Quoted in *State v. Perry*, — N.C. —, 340 S.E.2d 450 (1986).

Cited in *State v. Primes*, 314 N.C. 202, 333 S.E.2d 278 (1985).

§ 15A-402. Territorial jurisdiction of officers to make arrests.

Local Modification. — Gaston County: 1985 (Reg. Sess., 1986), c. 836, s. 1.

SUBCHAPTER V. CUSTODY.

ARTICLE 24.

Initial Appearance.

§ 15A-511. Initial appearance.

CASE NOTES

Statute Does Not Prescribe, etc. —

This section does not prescribe mandatory procedures affecting the validity of a trial. For a violation of this section to be substantial, defendant must show that the delay in some way prejudiced him, for example, by causing a vio-

lation of his constitutional rights, or by resulting in a confession that would not have been obtained but for the delay. *State v. Martin*, — N.C. —, 340 S.E.2d 326 (1986), involving a delay of less than two hours.

ARTICLE 26.

Bail.

§ 15A-534. Procedure for determining conditions of pretrial release.

CASE NOTES

Modification of Pretrial Release Orders.

— After a case is before the superior court, a superior court judge may modify the pretrial release order of a magistrate, clerk or district court judge or any such order entered by him at any time before defendant's guilt has been established in superior court. Section 15A-536 imposes additional restrictions upon the modification of pretrial release orders after a defendant has been convicted in superior court. *State v. Perry*, — N.C. —, 340 S.E.2d 450 (1986).

Increase in Bond during Trial. — Where, during trial, the trial judge noted defendant's misconduct in the presence of jurors and the court, and he was aware that defendant faced

serious punishment if convicted and that defendant had just lost the aid of one of his prime witnesses, and in light of these circumstances, the court expressed doubt as to the sufficiency of the bond to bring defendant to court until a final determination of his guilt or innocence, the trial judge did not err by increasing defendant's bond during the course of the trial. *State v. Perry*, — N.C. —, 340 S.E.2d 450 (1986).

Commitment of Defendant during Trial.

— In addition to modification of a bail bond, a trial judge has discretionary power to order a defendant taken into custody during the progress of a trial. *State v. Perry*, — N.C. —, 340 S.E.2d 450 (1986).

§ 15A-536. Release after conviction in the superior court.

CASE NOTES

Modification of Pretrial Release Orders.

— After a case is before the superior court, a superior court judge may modify the pretrial release order of a magistrate, clerk or district court judge or any such order entered by him at any time before defendant's guilt has been es-

tablished in superior court. This section imposes additional restrictions upon the modification of pretrial release orders after a defendant has been convicted in superior court. *State v. Perry*, — N.C. —, 340 S.E.2d 450 (1986).

SUBCHAPTER VI. PRELIMINARY PROCEEDINGS.

ARTICLE 29.

*First Appearance before District Court Judge.***§ 15A-606. Demand or waiver of probable-cause hearing.**

CASE NOTES

Cited in *In re Bass*, 77 N.C. App. 110, 334 S.E.2d 779 (1985); *State v. Muncy*, — N.C. App. —, 339 S.E.2d 466 (1986).

ARTICLE 31.

*The Grand Jury and Its Proceedings.***§ 15A-622. Formation and organization of grand juries; other preliminary matters.**

(h) A written petition for convening of grand jury under this section may be filed by the district attorney, with the concurrence of the Attorney General, with the Clerk of the North Carolina Supreme Court. The Chief Justice shall appoint a panel of three judges to determine whether to order the grand jury convened. A grand jury under this section may be convened if the three-judge panel determines that:

- (1) The petition alleges the commission of or a conspiracy to commit a violation of G.S. 90-95(h) or G.S. 90-95.1, any part of which violation or conspiracy occurred in the county where the grand jury sits, and that persons named in the petition have knowledge related to the identity of the perpetrators of those crimes but will not divulge that knowledge voluntarily or that such persons request that they be allowed to testify before the grand jury; and
- (2) The affidavit sets forth facts that establish probable cause to believe that the crimes specified in the petition have been committed and reasonable grounds to suspect that the persons named in the petition have knowledge related to the identity of the perpetrators of those crimes.

The affidavit shall be based upon personal knowledge or, if the source of the information and basis for the belief are stated, upon information and belief. The panel's order convening the grand jury as an investigative grand jury shall direct the grand jury to investigate the crimes and persons named in the petition, and shall be filed with the Clerk of the North Carolina Supreme Court. A grand jury so convened retains all powers, duties, and responsibilities of a grand jury under this Article. The contents of the petition and the affidavit shall not be disclosed. Upon receiving a petition under this subsection, the Chief Justice shall appoint a panel to determine whether the grand jury should be convened as an investigative grand jury. (1779, c. 157, s. 11, P.R.; R.C., c. 31, s. 33; 1879, c. 12; Code, ss. 404, 1742; Rev., ss. 1969, 1971; C.S., ss. 2333, 2336; 1929, c. 228; 1967, c. 218, s. 1; 1973, c. 1286, s. 1; 1975, c. 166, s. 27; 1977, c. 711, s. 24; 1979, c. 177, s. 1; 1981, c. 440, s. 1; 1985 (Reg. Sess., 1986), c. 843, s. 2.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 843, s. 6 provides that the act shall become effective October 1, 1986, and

shall expire October 1, 1988, but that the expiration date shall not affect the term or authority of a grand jury constituted at that time.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective October 1, 1986, added subsection (h).

CASE NOTES

II. DISCRIMINATION IN SELECTING JURORS.

Role of the foreman of a North Carolina grand jury is not so significant to the administration of justice that discrimination in the ap-

pointment of that office impugns the fundamental fairness of the process itself so as to undermine the integrity of the indictment. *State v. Gary*, 78 N.C. App. 29, 337 S.E.2d 70 (1985).

§ 15A-623. Grand jury proceedings and operation in general.

(h) If a grand jury is convened pursuant to G.S. 15A-622(h), notwithstanding subsection (d) of this section, a prosecutor shall be present to examine witnesses, and a court reporter shall be present and record the examination of witnesses. If the prosecutor determines that it is necessary to compel testimony from the witness, he may grant use immunity to the witness. The grant of use immunity shall be given to the witness in writing by the prosecutor and shall be signed by the prosecutor. The written grant of use immunity shall also be read into the record by the prosecutor and shall include an explanation of use immunity as provided in G.S. 15A-1051. A witness shall have the right to leave the grand jury room to consult with his counsel at reasonable intervals and for a reasonable period of time upon the request of the witness. Notwithstanding subsection (e) of this section, the record of the examination of witnesses shall be made available to the examining prosecutor, and he may disclose contents of the record to other investigative or law-enforcement officers to the extent that the disclosure is appropriate to the proper performance of his official duties. The record of the examination of a witness may be used in a trial to corroborate or impeach that witness to the extent that it is relevant and otherwise admissible. Further disclosure of grand jury proceedings convened pursuant to this act may be made upon written order of a superior court judge if the judge determines disclosure is essential:

- (1) To prosecute a witness who appeared before the grand jury for contempt or perjury; or
- (2) To protect a defendant's constitutional rights or statutory rights to discovery pursuant to G.S. 15A-903.

Upon the convening of the investigative grand jury pursuant to approval by the three-judge panel, the district attorney shall subpoena the witnesses. The subpoena shall be served by the investigative grand jury officer, who shall be appointed by the court. The name of the person subpoenaed and the issuance and service of the subpoena shall not be disclosed, except that a witness so subpoenaed may divulge that information. A copy of all subpoenas and other process shall be returned to the Chief Justice or to such member of the three-judge panel as the Chief Justice may designate, to be filed with the Clerk of the North Carolina Supreme Court. The subpoena shall otherwise be subject to the provisions of G.S. 15A-801. When an investigative grand jury has completed its investigation of the crimes alleged in the petition, the investigative functions of the grand jury shall be dissolved and such investigation shall cease. The District Attorney shall file a notice of dissolution of the investiga-

tive functions of the grand jury with the Clerk of the North Carolina Supreme Court. (1973, c. 1286, s. 1; 1985 (Reg. Sess., 1986), c. 843, s. 3.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 843, s. 6 provides that the act shall become effective October 1, 1986, and shall expire October 1, 1988, but that the expiration date shall not affect the term or authority of a grand jury constituted at that time.

The reference in subsection (h) of this section to "this act" refers to Session Laws 1985 (Reg. Sess., 1986), c. 843, which amended §§ 5A-12, 8-57, 15A-622, and 15A-1051, as well as this section.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective October 1, 1986, added subsection (h).

CASE NOTES

Applied in *State v. Gary*, 78 N.C. App. 29, 337 S.E.2d 70 (1985).

§ 15A-624. Grand jury the judge of facts; judge the source of legal advice.

CASE NOTES

Applied in *State v. Gary*, 78 N.C. App. 29, 337 S.E.2d 70 (1985).

§ 15A-626. Who may call witnesses before grand jury; no right to appear without consent of prosecutor or judge.

CASE NOTES

Applied in *State v. Gary*, 78 N.C. App. 29, 337 S.E.2d 70 (1985).

§ 15A-628. Functions of grand jury; record to be kept by clerk.

CASE NOTES

Applied in *State v. Gary*, 78 N.C. App. 29, 337 S.E.2d 70 (1985).

§ 15A-630. Notice to defendant of true bill of indictment.

CASE NOTES

Mailing Not Jurisdictional. — There is nothing in this section to indicate that the mailing of the return of indictment is jurisdic-

tional. *State v. Williams*, 77 N.C. App. 136, 334 S.E.2d 491 (1985), cert. denied, 315 N.C. 396, 338 S.E.2d 877 (1986).

ARTICLE 32.

*Indictment and Related Instruments.***§ 15A-641. Indictment and related instruments; definitions of indictment, information, and presentment.**

CASE NOTES

Cited in *In re King*, — N.C. App. —, 339 S.E.2d 87 (1986).

§ 15A-642. Prosecutions originating in superior court to be upon indictment or information; waiver of indictment.

CASE NOTES

Applied in *State v. Ragland*, — N.C. App. —, 342 S.E.2d 532 (1986).

§ 15A-644. Form and content of indictment, information or presentment.

CASE NOTES

Applied in *State v. Gary*, 78 N.C. App. 29, 337 S.E.2d 70 (1985).

§ 15A-646. Superseding indictments and informations.

CASE NOTES

Stated in *State v. Parker*, — N.C. —, 341 S.E.2d 555 (1986).

SUBCHAPTER VII. SPEEDY TRIAL; ATTENDANCE OF DEFENDANTS.

ARTICLE 35.

*Speedy Trial.***§ 15A-701. Time limits and exclusions.**

(b) The following periods shall be excluded in computing the time within which the trial of a criminal offense must begin:

- (7) Any period of delay resulting from a continuance granted by any judge if the judge granting the continuance finds that the ends of justice served by granting the continuance outweigh the best interests of the public and the defendant in a speedy trial and sets forth in writing in the record of the case the reasons for so finding. A superior court judge must not grant a motion for continuance unless the motion is in writing and he has made written findings as provided in this subdivision.

The factors, among others, which a judge shall consider in determining whether to grant a continuance are as follows:

- a. Whether the failure to grant a continuance would be likely to result in a miscarriage of justice; and
- b. Whether the case taken as a whole is so unusual and so complex, due to the number of defendants or the nature of the prosecution or otherwise, that it is unreasonable to expect adequate preparation within the time limits established by this section;
- c. Repealed by Session Laws 1977, 2nd Sess., c. 1179, s. 6;
- d. Good cause for granting a continuance shall include those instances when the defendant, a witness, or counsel of record has an obligation of service to the State of North Carolina, including service as a member of the General Assembly.

When a judge grants a continuance pursuant to this subsection, he may specify in his order the period of time which shall be excluded from the time within which the trial of the criminal case must begin.

(1973, c. 1286, s. 1; 1977, c. 787, s. 1; 1977, 2nd Sess., c. 1179, ss. 1-8; 1979, c. 1018, ss. 1-2A; 1979, 2nd Sess., c. 1317; 1981, c. 626, ss. 1-10; c. 902, ss. 1-3; 1983, c. 571, ss. 1, 3; 1985, c. 603, s. 9.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Subdivision (b)(7) of this section is set out above to correct an error in the 1985 Cumulative Supplement.

CASE NOTES

III. Periods Excluded from Time Computation. F. Continuances.

I. GENERAL CONSIDERATION.

When 120-Day Period Triggered. —

In accord with 4th paragraph in the main volume. See *State v. Parker*, — N.C. —, 341 S.E.2d 555 (1986).

No Maximum Outer Time Limit. — Neither the Supreme Court, Court of Appeals, nor the Legislature has established a maximum

outer limit within which a case must be tried in order to comply with a defendant's statutory right to speedy trial. *State v. White*, 77 N.C. App. 45, 334 S.E.2d 786, cert. denied, 315 N.C. 190, 337 S.E.2d 864 (1985).

Findings of Fact. — While the better practice is for the court to make findings of fact, the court's failure to make findings does not constitute reversible error when it is apparent the

court determined the state carried its burden of proof under § 15A-703(a). *State v. Waller*, 77 N.C. App. 184, 334 S.E.2d 796 (1985), cert. denied, 315 N.C. 396, 338 S.E.2d 886 (1986).

Applied in *State v. Lyszaj*, 314 N.C. 256, 333 S.E.2d 288 (1985); *State v. Bare*, 77 N.C. App. 516, 335 S.E.2d 748 (1985).

III. PERIODS EXCLUDED FROM TIME COMPUTATION.

A. In General.

Court's reference to grounds stated in motion for continuance is a sufficient recitation of its reasons for making the finding

which subdivision (b)(7) of this section requires in order to exclude delays occasioned by the granting of a continuance. *State v. Heath*, 77 N.C. App. 264, 335 S.E.2d 350 (1985).

F. Continuances.

Burden of Justifying Periods Excluded.

— Once a defendant shows that the 120-day period under the Speedy Trial Act has been exceeded, the state must assume the burden of justifying periods it contends were properly excluded. *State v. White*, 77 N.C. App. 45, 334 S.E.2d 786, cert. denied, 315 N.C. 190, 337 S.E.2d 864 (1985).

§ 15A-702. Counties with limited court sessions.

CASE NOTES

Discretion of Court. — An order that the defendant's case be brought to trial within not less than 30 days is discretionary with the trial

court. *State v. Bare*, 77 N.C. App. 516, 335 S.E.2d 748 (1985), cert. denied, 315 N.C. 392, 338 S.E.2d 881 (1986).

§ 15A-703. Sanctions.

CASE NOTES

Findings of Fact. — While the better practice is for the court to make findings of fact, the court's failure to make findings does not constitute reversible error when it is apparent the court determined the State carried its burden of proof under subsection (a). *State v. Waller*,

77 N.C. App. 184, 334 S.E.2d 796 (1985), cert. denied, 315 N.C. 396, 338 S.E.2d 886 (1986).

Applied in *State v. Parker*, 76 N.C. App. 508, 333 S.E.2d 551 (1985); *State v. Bare*, 77 N.C. App. 516, 335 S.E.2d 748 (1985).

ARTICLE 36.

Special Criminal Process for Attendance of Defendants.

§ 15A-711. Securing attendance of criminal defendants confined in institutions within the State; requiring prosecutor to proceed.

CASE NOTES

Filing Requirement Not Waived by Statement in Handbook for Inmates. — Where the defendant did not comply with subsection (c), by serving a copy of his request for trial on the prosecutor in the manner provided by § 1A-1, Rule 5(b), he was not entitled to have his case dismissed under this section. The

State did not waive the provisions of subsection (c) by the issuance of a handbook by the North Carolina Department of Corrections which instructed inmates that they had to file the request for a trial only with the clerk of superior court. *State v. Hege*, 78 N.C. App. 435, 337 S.E.2d 130 (1985).

ARTICLE 38.

Interstate Agreement on Detainers.

§ 15A-761. Agreement on Detainers entered into; form and contents.

CASE NOTES

Applied in *State v. Lyszaj*, 314 N.C. 256, 333 S.E.2d 288 (1985).

SUBCHAPTER VIII. ATTENDANCE OF WITNESSES;
DEPOSITIONS.

ARTICLE 42.

Attendance of Witnesses Generally.

§ 15A-803. Attendance of witnesses.

CASE NOTES

Discretion of Court. —

A trial judge may not exercise his discretion to issue an order to secure the attendance of a material witness in a manner inconsistent with the Sixth Amendment guarantee that an accused be afforded compulsory process for obtaining witnesses in his favor. *State v. Coen*, 78 N.C. App. 778, 338 S.E.2d 784 (1986).

The trial court did not abuse its discretion and did not violate defendant's right to compulsory process in denying motion to issue an order under subsection (d) of this section, where defense counsel was dilatory in advising the court of any problem he was having with witness. *State v. Coen*, 78 N.C. App. 778, 338 S.E.2d 784 (1986).

ARTICLE 45.

Fair Treatment for Victims and Witnesses.

§ 15A-824. Definitions.

As used in this Article, unless the context clearly requires otherwise:

- (1) "Crime" means a felony or an act committed by a juvenile that, if committed by a competent adult, would constitute a felony.
- (2) "Family member" means a spouse, child, parent or legal guardian, or the closest living relative.
- (3) "Victim" means a person against whom there is probable cause to believe a crime has been committed.
- (4) "Witness" means a person who has been or is expected to be summoned to testify for the prosecution in a criminal action concerning a felony, or who by reason of having relevant information is subject to being called or is likely to be called as a witness for the prosecution in such an action, whether or not an action or proceeding has been commenced. (1985 (Reg. Sess., 1986), c. 998, s. 1.)

Editor's Note. — Section 5 of Session Laws 1985 (Reg. Sess., 1986), c. 998, makes this Article effective October 1, 1986.

§ 15A-825. Treatment due victims and witnesses.

To the extent reasonably possible and subject to available resources, the employees of law-enforcement agencies, the prosecutorial system, the judicial system, and the correctional system should make a reasonable effort to assure that each victim and witness within their jurisdiction:

- (1) Is provided information regarding immediate medical assistance when needed and is not detained for an unreasonable length of time before having such assistance administered.
- (2) Is provided information about available protection from harm and threats of harm arising out of cooperation with law-enforcement prosecution efforts, and receives such protection.
- (3) Has any stolen or other personal property expeditiously returned by law-enforcement agencies when it is no longer needed as evidence, and its return would not impede an investigation or prosecution of the case. When feasible, all such property, except weapons, currency, contraband, property subject to evidentiary analysis, and property whose ownership is disputed, should be photographed and returned to the owner within a reasonable period of time of being recovered by law-enforcement officials.
- (4) Is provided appropriate employer intercession services to seek the employer's cooperation with the criminal justice system and minimize the employee's loss of pay and other benefits resulting from such cooperation whenever possible.
- (5) Is provided, whenever practical, a secure waiting area during court proceedings that does not place the victim or witness in close proximity to defendants and families or friends of defendants.
- (6) Is informed of the procedures to be followed to apply for and receive any appropriate witness fees or victim compensation.
- (7) Is given the opportunity to be present during the final disposition of the case or is informed of the final disposition of the case, if he has requested to be present or be informed.
- (8) Is notified, whenever possible, that a court proceeding to which he has been subpoenaed will not occur as scheduled.
- (9) Has a victim impact statement prepared for consideration by the court.
- (10) Is informed that civil remedies may be available and that statutes of limitation apply in civil cases.
- (11) Is notified before a proceeding is held at which the release of the offender from custody is considered, if the crime for which the offender was placed in custody is a Class G or more serious felony.
- (12) Is notified if the offender escapes from custody or is released from custody, if the crime for which the offender was placed in custody is a Class G or more serious felony.
- (13) Has family members of a homicide victim offered all the guarantees in this section, except those in subdivision (1). (1985 (Reg. Sess., 1986), c. 998, s. 1.)

§ 15A-826. Victim and witness assistants.

Victim and witness assistants are responsible for coordinating efforts within the law-enforcement and judicial systems to assure that each victim and witness is treated in accordance with this Article. (1985 (Reg. Sess., 1986), c. 998, s. 1.)

§ 15A-827. Scope.

This Article does not create any civil or criminal liability on the part of the State of North Carolina or any criminal justice agency, employee, or volunteer. (1985 (Reg. Sess., 1986), c. 998, s. 1.)

§§ 15A-828 to 15A-849: Reserved for future codification purposes.

SUBCHAPTER IX. PRETRIAL PROCEDURE.

ARTICLE 48.

Discovery in the Superior Court.

§ 15A-902. Discovery procedure.

CASE NOTES

Imposition of Sanctions Not Mandated. — Neither §§ 15A-902 to 15A-910 nor the case of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), requires the trial court to impose any sanctions for failure to comply with discovery. *State v. McClintick*, — N.C. —, 340 S.E.2d 41 (1986).

Failure to Impose Sanctions Not Improper. — Where although the trial judge did not impose any sanctions for State's failure to comply with discovery, he expressed his displeasure with State's tactics with respect to

discovery, and employed several of the curative actions suggested by § 15A-910, and at no time did he determine that defendant was not provided items to which he was entitled, that defendant was harmed by the delay in receiving them, that defendant was subjected to unfair surprise at trial, or that State had failed to comply with the law, the court's failure to impose sanctions was not an abuse of discretion. *State v. McClintick*, — N.C. —, 340 S.E.2d 41 (1986).

§ 15A-903. Disclosure of evidence by the State — Information subject to disclosure.

CASE NOTES

I. GENERAL CONSIDERATION.

Internal police reports, etc. —

To the extent that defendant's discovery motion seeking notes taken or reports made by investigating officers which would tend to exculpate the defendant, mitigate the degree of the offense, or contradict other evidence to be presented by the State sought information beyond that which the State was required to dis-

close under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), it sought "work product" not subject to discovery. *State v. Bruce*, — N.C. —, 337 S.E.2d 510 (1985).

Exclusion Not Automatically Required. — The State's failure to comply with a discovery order pursuant to this section will not automatically require the exclusion of the undisclosed evidence. *State v. Gladden*, — N.C. —, 340 S.E.2d 673 (1986).

Applied in *State v. Callahan*, — N.C. App. —, 334 S.E.2d 424 (1985).

II. STATEMENT OF DEFENDANT.

As used in subdivision (a)(2), "substance" means essence; the material or essential part of a thing, as distinguished from form; that which is essential. *State v. Bruce*, 315 N.C. 273, 337 S.E.2d 510 (1985).

Facts and Circumstances Surrounding Statement. — Nothing in this section entitles a defendant to have the trial court order the prosecutor to provide him with a description of the facts and circumstances surrounding his statements. *State v. Bruce*, 315 N.C. 273, 337 S.E.2d 510 (1985).

IV. STATE WITNESSES.

Request for Names of Persons Interviewed or Having Information. — Requests by defendant to have the prosecutor ordered to disclose the "names of all persons known by the State to have information regarding the above-captioned matter and/or all persons interviewed regarding the matter" amounted to a request for a list of the state's witnesses and others having knowledge of the cases against the defendant; such information simply is not

discoverable. *State v. Bruce*, 315 N.C. 273, 337 S.E.2d 510 (1985).

Criminal Records of State Witnesses. —

Copies of prior criminal records of any state witness or prospective witness, and any additional information which could reflect on the credibility of such witnesses, is not subject to discovery. *State v. Bruce*, 315 N.C. 273, 337 S.E.2d 510 (1985).

V. DOCUMENTS, TANGIBLE OBJECTS, AND REPORTS.

Bill of Sale and Odometer Statement. —

The court did not err in allowing the State to introduce a document to show that defendant owned car allegedly used in bank robbery, the contents of which had been suppressed by a prior order, where before the trial started the bill of sale and the odometer statement were not within the possession, custody, or control of the State, but when the car dealer arrived in court with the documents they were promptly made available to defendants. Since defendants had no right to learn ahead of time, by discovery, who would testify against them and the substance of their testimony, § 15A-907 was not violated. *State v. Alston*, — N.C. App. —, 342 S.E.2d 573 (1986).

§ 15A-905. Disclosure of evidence by the defendant — Information subject to disclosure.

CASE NOTES

Defendant Not Required To Inform State Why Scientific Evidence Not Offered. — In a prosecution for discharging a firearm into an occupied building, since the defendant never intended to introduce his ballistics report or put the preparer of it on the stand, the judge had no authority to require that a copy of the report be sent to the district attorney, as the

purpose of subsection (b) is not to inform the state why scientific evidence will not be offered by the defendant, but to acquaint it with scientific evidence that will be offered during the trial. *State v. King*, 75 N.C. App. 618, 331 S.E.2d 291, cert. denied, 314 N.C. 545, 335 S.E.2d 24, appeal dismissed, 314 N.C. 672, 335 S.E.2d 900 (1985).

§ 15A-907. Continuing duty to disclose.

CASE NOTES

Section Not Violated. — The court did not err in allowing the State to introduce a document to show that defendant owned car allegedly used in bank robbery, the contents of which had been suppressed by a prior order, where before the trial started the bill of sale and the odometer statement were not within the possession, custody, or control of the State,

but when the car dealer arrived in court with the documents they were promptly made available to defendants. Since defendants had no right to learn ahead of time, by discovery, who would testify against them and the substance of their testimony, this section was not violated. *State v. Alston*, — N.C. App. —, 342 S.E.2d 573 (1986).

§ 15A-910. Regulation of discovery — Failure to comply.

CASE NOTES

While this section provides for several, etc. —

In accord with 1st paragraph in 1985 Cumulative Supplement. See *State v. Waller*, 77 N.C. App. 184, 334 S.E.2d 796 (1985), cert. denied, 315 N.C. 396, 338 S.E.2d 886 (1986).

And not reviewable on appeal in the absence, etc. —

In accord with 1st paragraph in main volume. See *State v. Waller*, 77 N.C. App. 184, 334 S.E.2d 796 (1985), cert. denied, 315 N.C. 396, 338 S.E.2d 886 (1986).

The choice of which sanction to apply, if any, rests in the sound discretion of the trial court and is not reviewable absent a showing of an abuse of that discretion. *State v. Gladden*, — N.C. —, 340 S.E.2d 673 (1986).

Failure to Impose Sanctions Not Improper. — Where although the trial judge did not impose any sanctions for State's failure to comply with discovery, he expressed his displeasure with State's tactics with respect to discovery, and employed several of the curative actions suggested by this section, and at no time did he determine that defendant was not provided items to which he was entitled, that defendant was harmed by the delay in receiving them, that defendant was subjected to unfair surprise at trial, or that State had failed to comply with the law, the court's failure to impose sanctions was not an abuse of discretion. *State v. McClintick*, — N.C. —, 340 S.E.2d 41 (1986).

ARTICLE 49.

Pleadings and Joinder.

§ 15A-924. Contents of pleadings; duplicity; alleging and proving previous convictions; failure to charge crime; surplusage.

CASE NOTES

I. GENERAL CONSIDERATION.

Effect on § 15-144. — North Carolina Const., Art. 1, § 23 and subdivision (a)(5) of this section did not specifically repeal § 15-144, nor did they repeal it by implication. *State v. Avery*, 315 N.C. 1, 337 S.E.2d 786 (1985).

A criminal pleading does not have to state every element of the offense charged, but only facts supporting every element of the offense. *State v. Jordan*, 75 N.C. App. 637, 331 S.E.2d 232, cert. denied, 314 N.C. 544, 335 S.E.2d 23 (1985).

Specifying Felony in Indictment. — An essential element of kidnapping under § 14-39(a)(2) is that the confinement, restraint or removal be for the purpose of facilitating the commission of any felony or facilitating escape following the commission of a felony. The requirements of subsection (a)(5) are met for the purposes of alleging this element by the allegation in the indictment that the confinement, restraint, or removal was carried out for the purpose of facilitating "a felony" or escape fol-

lowing "a felony". It is not required that the indictment specify the felony referred to in § 14-39(a)(2). *State v. Freeman*, 314 N.C. 432, 333 S.E.2d 743 (1985).

An indictment alleging that the defendant kidnapped the victim "by unlawfully confining, restraining, or removing her from one place to another without her consent for the purpose of committing a felony ..." charges the offense in the language of the statute and is sufficient. All of the elements of the crime of kidnapping are clearly alleged in the indictment. The additional "rape or robbery" language in the indictment, following "committing a felony," is mere harmless surplusage and may properly be disregarded in passing upon its validity. *State v. Freeman*, 314 N.C. 432, 333 S.E.2d 743 (1985).

Unlawful Private Use of Publicly Owned Vehicle. — A misdemeanor statement of charges which, when all surplusage was excluded from consideration, asserted that the defendant was a state employee, that she directed her subordinate to pick up a birthday cake and deliver it to her home, and that she did so with knowledge that her private purpose

would be accomplished through the use of a state-owned motor vehicle, was sufficient to support a conviction of unlawful private use of a publicly owned vehicle. *State v. Lilly*, 75 N.C. App. 173, 330 S.E.2d 30 (1985).

In a prosecution for failing to stop at the scene of an accident resulting in property damage, the defendant's knowledge that a collision involving his car had occurred and that

property damage had resulted was clearly inferable from the facts, duly alleged under subsection (a)(4), that while the defendant operated the car it collided with and damaged another vehicle. *State v. Jordan*, 75 N.C. App. 637, 331 S.E.2d 232, cert. denied, 314 N.C. 544, 335 S.E.2d 23 (1985).

Quoted in *State v. Childers*, — N.C. App. —, 341 S.E.2d 760 (1986).

§ 15A-925. Bill of particulars.

CASE NOTES

Applied in *State v. Freeman*, 314 N.C. 432, 333 S.E.2d 743 (1985).

§ 15A-926. Joinder of offenses and defendants.

CASE NOTES

I. GENERAL CONSIDERATION.

Under this section there must be some sort of "transactional" connection. —

In accord with 1st paragraph in main volume. See *State v. Berryman*, 77 N.C. App. 396, 335 S.E.2d 342 (1985).

Consolidation Is Within Discretion, etc. —

A trial court's ruling on the consolidation or severance of cases is discretionary and will not be disturbed absent a showing of abuse of discretion; a trial court may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision. *State v. Hayes*, 314 N.C. 460, 334 S.E.2d 741 (1985).

Ruling on Consolidation, etc. —

In accord with first paragraph in main volume. See *State v. Neal*, 76 N.C. App. 518, 333 S.E.2d 538 (1985), cert. denied, 315 N.C. 394, 338 S.E.2d 884 (1986); *State v. Hayes*, 314 N.C. 460, 334 S.E.2d 741 (1985); *State v. Berryman*, 77 N.C. App. 396, 335 S.E.2d 342 (1985).

Cited in *State v. McGuire*, — N.C. App. —, 337 S.E.2d 620 (1985).

II. JOINDER OF OFFENSES.

A. In General.

Court Should Consider Whether Accused, etc. —

In deciding whether to join offenses, the court must determine whether the accused can receive a fair hearing on more than one charge at the same trial. If joinder will impair the ability to present a defense, the motions should

be denied. *State v. Neal*, 76 N.C. App. 518, 333 S.E.2d 538 (1985), cert. denied, 315 N.C. 394, 338 S.E.2d 884 (1986).

Transactional Connection Necessary for Joinder. — Subsection (a) provides for joinder of two or more offenses when they are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan. It is not enough that a defendant is charged with acts of the same class of crime or offense; there must also be a transactional connection. *State v. Neal*, 76 N.C. App. 518, 333 S.E.2d 538 (1985), cert. denied, 315 N.C. 394, 338 S.E.2d 884 (1986).

B. Illustrative Cases.

Separate Acts of Taking Vehicles. — Similarity of modus operandi and similar circumstance in victims, location, time and motive was present, where the offenses involved two vehicles taken from the same location under similar circumstances four days apart. Viewing these facts as of the time of the order of consolidation, the court properly could find them indicative of a single scheme or plan to deprive members of the YMCA of their property while they used the "Y" facilities. *State v. Neal*, 76 N.C. App. 518, 333 S.E.2d 538 (1985), cert. denied, 315 N.C. 394, 338 S.E.2d 884 (1986).

Burglary and Rape. —

In a prosecution for first-degree burglary and second-degree rape, where the crimes were committed on both occasions against the same victim in the same house at approximately the same time of evening, and on both occasions,

entry was gained through a window and the victim was forced to engage in repeated acts of intercourse, and the perpetrator was not armed on either occasion, such evidence established the requisite transactional connection to permit consolidation of the offenses. *State v. Berryman*, 77 N.C. App. 396, 335 S.E.2d 342 (1985).

Robbery and the malicious throwing of acid were joinable offenses under subsection (a), which permits joinder of offenses based on the same act or transaction or on a series of acts or transactions connected together, and use of the fact that the acid was thrown after the robbery to aggravate sentence for the malicious throwing of acid was prohibited by § 15A-1340.4(a)(1)(o). *State v. Knox*, 78 N.C. App. 493, 337 S.E.2d 154 (1985).

III. JOINDER OF DEFENDANTS.

A. In General.

Defendants Charged with Same Crimes, etc. —

Charges against multiple defendants may be joined for trial, pursuant to subdivision (b)(2) of this section, when each defendant is charged

with accountability for each offense, or when the several offenses were part of a common scheme or plan. *State v. Childers*, — N.C. App. —, 341 S.E.2d 760 (1986).

Common Scheme or Plan. — In light of the fact that the charges against each defendant arose out of a common scheme or plan entered into by the defendants and the evidence against each would be almost identical, the trial judge did not abuse his discretion by joining the defendants' cases for trial. *State v. Hayes*, 314 N.C. 460, 334 S.E.2d 741 (1985).

B. Illustrative Cases.

Conspiracy. — Where both defendants were convicted of conspiracy to commit the same instance of breaking or entering and larceny, joinder was proper under this section and did not deprive defendant of a fair trial. *State v. Fie*, — N.C. App. —, 343 S.E.2d 248 (1986).

False Pretenses. — Joinder of four charges against defendant of obtaining property by false pretenses for trial and consolidation of his cases with those of codefendant upheld. *State v. Childers*, — N.C. App. —, 341 S.E.2d 760 (1986).

§ 15A-927. Severance of offenses; objection to joinder of defendants for trial.

CASE NOTES

This section is intended to protect a defendant's Sixth Amendment rights of confrontation and cross-examination which, because of the privilege against self-incrimination, may be lost when a codefendant's statement, inadmissible against but implicating the defendant, is admitted into evidence against the codefendant at a joint trial. *State v. Sidden*, — N.C. —, 340 S.E.2d 340 (1986).

Discretion of Trial Judge. — A trial court's ruling on the consolidation or severance of cases is discretionary and will not be disturbed absent a showing of abuse of discretion; a trial court may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision. *State v. Hayes*, 314 N.C. 460, 334 S.E.2d 741 (1985).

Subsection (c)(1) codifies substantially the decision in *Bruton v. United States*, etc. —

In accord with main volume. See *State v. Welch*, — N.C. —, 342 S.E.2d 789 (1986).

Subsection (c)(1) Held Inapplicable. —

Where statement was part of the *res gestae* and therefore would have been admissible against both defendant and codefendant had they been tried separately, the trial judge correctly denied defendant's motion for appropriate relief under subdivision (c)(1) of this section. *State v. Sidden*, — N.C. —, 340 S.E.2d 340 (1986).

Admission of Codefendant's Out-of-Court Statements. —

Where the testimony of the wife of defendant's codefendant concerning her husband's extrajudicial statements inculcating the defendant added nothing of significance to the defendant's own testimony, which constituted overwhelming untainted evidence of his guilt, error by the trial court in overruling defendant's objections to such testimony or in denying his motion to sever was harmless beyond a reasonable doubt. *State v. Welch*, — N.C. —, 342 S.E.2d 789 (1986).

Stated in *State v. Waller*, 77 N.C. App. 184, 334 S.E.2d 796 (1985).

§ 15A-928. Allegation and proof of previous convictions in superior court.

CASE NOTES

Quoted in *State v. Denning*, — N.C. —, 342 S.E.2d 855 (1986).

ARTICLE 50.

Voluntary Dismissal.

§ 15A-931. Voluntary dismissal of criminal charges by the State.

CASE NOTES

Subsequent Prosecution Following Voluntary Dismissal by State. — A voluntary dismissal taken by the State pursuant to this section does not preclude the State from insti-

tuting a subsequent prosecution for the same offense if jeopardy has not attached. *State v. Muncy*, — N.C. App. —, 339 S.E.2d 466 (1986).

ARTICLE 51.

Arraignment.

§ 15A-941. Arraignment before judge.

CASE NOTES

Failure to conduct an arraignment on a capital charge does not constitute reversible error per se. *State v. Brown*, 315 N.C. 40, 337 S.E.2d 808 (1985).

The trial court did not commit reversible error by trying defendant on a capital charge without first conducting a formal arraignment, where in view of the fact that the record was

replete with pretrial motions, letters, and orders which were prefaced by listing the charges against defendant, and in view of the fact that defendant was tried as if he had pled "not guilty," defendant was not prejudiced by the lack of a formal arraignment. *State v. Brown*, 315 N.C. 40, 337 S.E.2d 808 (1985).

§ 15A-943. Arraignment in superior court — Required calendaring.

CASE NOTES

I. GENERAL CONSIDERATION.

Cited in *State v. Winstead*, 78 N.C. App. 180, 336 S.E.2d 721 (1985).

III. TRIAL DATE WHERE DEFENDANT PLEADS NOT GUILTY.

And Violation, etc. —

Proceeding with defendant's trial over his objection on the same day as his arraignment on superseding indictment constitutes reversible error and necessitates a new trial. *State v. McCabe*, — N.C. App. —, 342 S.E.2d 580 (1986).

ARTICLE 52.

Motions Practice.

§ 15A-952. Pretrial motions; time for filing; sanction for failure to file; motion hearing date.

CASE NOTES

I. GENERAL CONSIDERATION.

Failure of the trial judge to set a time certain for the presentation of evidence on defendant's motion for a change of venue did not amount to a refusal to give defendant a meaningful opportunity to be heard or to exercise his discretion where the judge indicated that he was ready to hear evidence on the defendant's motion on the day of trial, considering that the judge also said that he would reconsider the substance of the motion if problems appeared during jury selection, and that the defendant showed no prejudice relating to the panel chosen. *State v. Artis*, — N.C. —, 342 S.E.2d 847 (1986).

IV. MOTIONS FOR JOINDER.

Discretion of Trial Court on Motion for Joinder. — Because a motion for joinder is addressed to the trial court's sound discretion, his ruling will not be disturbed absent a showing of abuse of discretion. *State v. Riggs*, — N.C. App. —, 339 S.E.2d 676 (1986).

It was not error for court to allow State's motion to join all offenses on the day defendant's trial began, where defendant made no showing of abuse of discretion or of any resulting prejudice. *State v. Riggs*, — N.C. App. —, 339 S.E.2d 676 (1986).

§ 15A-957. Motion for change of venue.

CASE NOTES

Failure of the trial judge to set a time certain for the presentation of evidence on defendant's motion for a change of venue did not amount to a refusal to give defendant a meaningful opportunity to be heard or to exercise his discretion where the judge indicated that he was ready to hear evidence on the de-

fendant's motion on the day of trial, considering that the judge also said that he would reconsider the substance of the motion if problems appeared during jury selection and that the defendant showed no prejudice relating to the panel chosen. *State v. Artis*, — N.C. —, 342 S.E.2d 847 (1986).

§ 15A-959. Notice of defense of insanity; pretrial determination of insanity.

CASE NOTES

Record established as a matter of law that good cause existed for allowing late filing of the notice of defense of insanity, when on the date of trial counsel responsible for trial of the case was justifiably unavailable due to a medical emergency involving his daughter, and other counsel, who had been employed by defendant's mother, wife and sister was required to assume responsibility for the defendant's defense. *State v. Nelson*, — N.C. —, 341 S.E.2d 561 (1986).

Evidence of Insanity Allowed Even Though Notice Not Given. — The court com-

mitted prejudicial error in refusing to allow defendant to introduce evidence of his insanity, even though a timely notice of "intent to rely on the defense of insanity" had not been filed in accord with this section. Notwithstanding the statutory mandate, an accused may prove any affirmative defense, including insanity, under the general plea of not guilty. *State v. Nelson*, 76 N.C. App. 371, 333 S.E.2d 499, supersedeas granted, 314 N.C. 670, 337 S.E.2d 583 (1985).

Expert Examination of Defendant. — Where a defendant gives notice of his intent to

pursue a defense of insanity, it is not only reasonable, but necessary, that the prosecution be permitted to obtain an expert examination of him. Otherwise there would be no means by which the State could confirm a well-founded claim of insanity, discover fraudulent mental defenses, or offer expert psychiatric testimony to rebut the defendant's evidence where insanity is genuinely at issue. Thus, the trial court has the authority to order such an examination as a part of its inherent power to oversee the proper administration of justice. *State v. Jackson*, 77 N.C. App. 491, 335 S.E.2d 903 (1985).

In cases where a criminal defendant gives notice that he will raise insanity as a defense to the charges against him, the trial court has the inherent power to require the defendant to submit to a mental examination by a state or court-appointed psychiatrist for the purpose of inquiring into his mental status at the time of the alleged offense. *State v. Jackson*, 77 N.C. App. 491, 335 S.E.2d 903 (1985).

Cited in *State v. Davis*, 77 N.C. App. 68, 334 S.E.2d 509 (1985).

ARTICLE 53.

Motion to Suppress Evidence.

§ 15A-974. Exclusion or suppression of unlawfully obtained evidence.

CASE NOTES

I. GENERAL CONSIDERATION.

Applied in *State v. Norris*, 77 N.C. App. 525, 335 S.E.2d 764 (1985).

Stated in *State v. Martin*, — N.C. —, 340 S.E.2d 326 (1986).

§ 15A-975. Motion to suppress evidence in superior court prior to trial and during trial.

CASE NOTES

I. GENERAL CONSIDERATION.

Failure to comply with this section can result in summary denial of the motion. *State v. Hicks*, — N.C. App. —, 339 S.E.2d 806 (1986).

Failure of Trial Judge to Rule Formally. — Ordinarily a party is entitled to a timely ruling on an objection to evidence. However, the failure to rule formally does not generally rise to the level of reversible error unless it is accompanied by other conduct of the trial judge evincing an opinion on the merits. *State v. Hicks*, — N.C. App. —, 339 S.E.2d 806 (1986).

Where, following voir dire hearing on defendant's motion at trial to suppress victim's in-court identification, the court recalled the jury while the witness was on the stand and allowed the State to proceed, the record clearly reflected the court's decision to deny defendant's motion, and the court's subsequent filing of written order out of session did not so prejudice defendant as to require a new trial. *State v. Hicks*, — N.C. App. —, 339 S.E.2d 806 (1986).

§ 15A-977. Motion to suppress evidence in superior court; procedure.

CASE NOTES

I. GENERAL CONSIDERATION.

Evidence concerning the administration of a polygraph test may be admissible in the

absence of the jury on a voir dire hearing to determine the admissibility of a confession. *State v. Harris*, — N.C. —, 340 S.E.2d 383 (1986).

Discretion to Summarily Deny Motion. — The decision to deny summarily a motion which fails to set forth adequate legal grounds is vested in the sound discretion of the trial court. The alternative is to hold a hearing on the motion, despite the facial insufficiency of the motion itself. *State v. Harvey*, 78 N.C. App. 235, 336 S.E.2d 857 (1985).

Hearing Held Where Motion Not Summarily Denied. — Once the discretionary decision is made not to deny summarily a motion which fails to set forth adequate legal grounds, a hearing must be held at which the burden will be on the State to demonstrate the admissibility of the challenged evidence. *State v. Harvey*, 78 N.C. App. 235, 336 S.E.2d 857 (1985).

Failure of Trial Judge to Rule Formally. — Ordinarily a party is entitled to a timely ruling on an objection to evidence. However, the failure to rule formally does not generally rise to the level of reversible error unless it is accompanied by other conduct of the trial judge evincing an opinion on the merits. *State v. Hicks*, — N.C. App. —, 339 S.E.2d 806 (1986).

Where, following voir dire hearing on defendant's motion at trial to suppress victim's in-court identification, the court recalled the jury while the witness was on the stand and allowed the State to proceed, the record clearly reflected the court's decision to deny defendant's motion, and the court's subsequent filing of written order out of session did not so prejudice defendant as to require a new trial. *State v. Hicks*, — N.C. App. —, 339 S.E.2d 806 (1986).

Cited in *State v. Bruce*, 314 N.C. 273, 337 S.E.2d 510 (1985).

II. FINDINGS OF FACT.

When Findings of Fact Not Required. —

As a general rule, after a hearing on a motion to suppress the evidence the trial court must make written findings of fact and conclusions of law. Specific findings of fact are not required, however, where there is no material conflict in the evidence presented at the suppression hearing. *State v. Parks*, 77 N.C. App. 778, 336 S.E.2d 424 (1985).

§ 15A-979. Motion to suppress evidence in superior and district court; orders of suppression; effects of orders and of failure to make motion.

CASE NOTES

I. GENERAL CONSIDERATION.

Applied in *State v. Perkerol*, 77 N.C. App. 292, 335 S.E.2d 60 (1985).

§ 15A-980. Right to suppress use of certain prior convictions obtained in violation of right to counsel.

CASE NOTES

Cited in *State v. Braswell*, 78 N.C. App. 498, 337 S.E.2d 637 (1985); *State v. Haislip*, — N.C. App. —, 339 S.E.2d 832 (1986).

SUBCHAPTER X. GENERAL TRIAL PROCEDURE.

ARTICLE 56.

*Incapacity to Proceed.***§ 15A-1001. No proceedings when defendant mentally incapacitated; exception.**

CASE NOTES

Defendant, who had undergone brain surgery to remove a self-inflicted bullet, which surgery necessitated the removal of the entire left frontal lobe of his brain and a small portion of the right frontal lobe, was competent

to stand trial and to assist in his defense, notwithstanding a memory impairment resulting from organic brain damage or repression. *State v. Avery*, 315 N.C. 1, 337 S.E.2d 786 (1985).

§ 15A-1002. Determination of incapacity to proceed; evidence; temporary commitment; temporary orders.

CASE NOTES

Notice. — While this section expressly permits the prosecutor to question a defendant's capacity to proceed and contains no express provision for notice of the motion, the requirement that the question of capacity to proceed may only be raised by a motion, setting forth the reasons for questioning capacity, implies that some notice must be given. *State v. Jackson*, 77 N.C. App. 491, 335 S.E.2d 903 (1985).

Expert Examination of Defendant. — Where a defendant gives notice of his intent to pursue a defense of insanity, it is not only reasonable, but necessary, that the prosecution be permitted to obtain an expert examination of him. Otherwise there would be no means by which the State could confirm a well-founded claim of insanity, discover fraudulent mental defenses, or offer expert psychiatric testimony to rebut the defendant's evidence where insanity is genuinely at issue. Thus, the trial court has the authority to order such an examination as a part of its inherent power to oversee the proper administration of justice. *State v. Jackson*, 77 N.C. App. 491, 335 S.E.2d 903 (1985).

In cases where a criminal defendant gives notice that he will raise insanity as a defense to the charges against him, the trial court has the inherent power to require the defendant to submit to a mental examination by a state or court-appointed psychiatrist for the purpose of inquiring into his mental status at the time of the alleged offense. *State v. Jackson*, 77 N.C. App. 491, 335 S.E.2d 903 (1985).

Rebuttal by Prosecution's Psychiatrist. — Where a defendant presents expert testimony in support of his claim of insanity, the prosecution's psychiatrist may testify in rebuttal as to statements made by, or information obtained from, the defendant in the course of the examination without violating defendant's rights under the Fifth Amendment to the U.S. Constitution. The trial court must, however, limit the jury's consideration of such statements made during the examination to the issue of insanity and not to the issue of guilt. *State v. Jackson*, 77 N.C. App. 491, 335 S.E.2d 903 (1985).

ARTICLE 57.

*Pleas.***§ 15A-1011. Pleas in district and superior courts; waiver of appearance.**

CASE NOTES

Cited in *State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1985).

ARTICLE 58.

*Procedures Relating to Guilty Pleas in Superior Court.***§ 15A-1021. Plea conference; improper pressure prohibited; submission of arrangement to judge; restitution and reparation as part of plea arrangement agreement, etc.**

CASE NOTES

Cited in *State v. Muncy*, — N.C. App. —, 339 S.E.2d 466 (1986).

§ 15A-1022. Advising defendant of consequences of guilty plea; informed choice; factual basis for plea; admission of guilt not required.

CASE NOTES

Record Must Tend to Show, etc. —

Although the trial court had to determine that there was a "factual basis" that the killing was committed without malice in order to accept the defendant's guilty plea to voluntary manslaughter, there was other evidence before the court, including the fact that the defendant used a deadly weapon to accomplish the killing, to support the finding of the aggravating factor that the killing was committed with malice. *State v. Heidmous*, 75 N.C. App. 488, 331 S.E.2d 200 (1985).

Modification of Involuntary Plea Would

Not Make It Acceptable. — Where the trial judge rejected the plea because it was not free and voluntary, an opportunity to modify the agreement would not have resolved the problem and made the plea acceptable. *State v. Martin*, 77 N.C. App. 61, 334 S.E.2d 459 (1985).

Stated in *State v. Muncy*, — N.C. App. —, 339 S.E.2d 466 (1986).

§ 15A-1023. Action by judge in plea arrangements relating to sentence; no approval required when arrangement does not relate to sentence.

CASE NOTES

Modification of Involuntary Plea Would Not Make It Acceptable. — Where the trial judge rejected the plea because it was not free and voluntary, an opportunity to modify the agreement would not have resolved the problem and made the plea acceptable. *State v.*

Martin, 77 N.C. App. 61, 334 S.E.2d 459 (1985).

Trial court is not required under this section to order continuance on its own motion. *State v. Martin*, 77 N.C. App. 61, 334 S.E.2d 459 (1985).

§ 15A-1024. Withdrawal of guilty plea when sentence not in accord with plea arrangement.

CASE NOTES

Stated in *State v. Oakley*, 75 N.C. App. 99, 330 S.E.2d 59 (1985).

§ 15A-1026. Record of proceedings.

CASE NOTES

Cited in *State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1985).

ARTICLE 61.

Granting of Immunity to Witnesses.

§ 15A-1051. Immunity; general provisions.

(a) A witness who asserts his privilege against self-incrimination in a hearing or proceeding in court or before a grand jury of North Carolina may be ordered to testify or produce other information as provided in this Article. He may not thereafter be excused from testifying or producing other information on the ground that his testimony or other information required of him may tend to incriminate him. Except as provided in G.S. 15A-623(h), no testimony or other information so compelled, or any information directly or indirectly derived from the testimony or other information, may be used against the witness in a criminal case, except a prosecution for perjury or contempt arising from a failure to comply with an order of the court. In the event of a prosecution of the witness he shall be entitled to a record of his testimony. (1973, c. 1286, s. 1; 1985 (Reg. Sess., 1986), c. 843, s. 4.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Sess., 1986), c. 843, s. 6 provides that the act shall become effective October 1, 1986, and shall expire October 1, 1988, but that the expiration date shall not affect the term or authority of a grand jury constituted at that time.

Editor's Note. — Session Laws 1985 (Reg.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective October 1, 1986, rewrote the third sentence of subsection

(a), so as to limit the scope of immunity granted to witnesses to use immunity.

§ 15A-1054. Charge reductions or sentence concessions in consideration of truthful testimony.

CASE NOTES

Applied in *State v. Arnold*, 314 N.C. 301, 333 S.E.2d 34 (1985).

ARTICLE 62.

Mistrial.

§ 15A-1061. Mistrial for prejudice to defendant.

CASE NOTES

When Motion Granted. —

In accord with 2nd paragraph in main volume. See *State v. Stroud*, 78 N.C. App. 599, 337 S.E.2d 873 (1985).

A mistrial is to be declared when conduct takes place inside or outside the courtroom which results in substantial and irreparable prejudice to the defendant. *State v. Brown*, 314 N.C. 40, 337 S.E.2d 808 (1985).

Mistrial Is Matter of Court's, etc. —

In accord with 1st paragraph in main volume. See *State v. Blackstock*, 314 N.C. 232, 333 S.E.2d 245 (1985).

In accord with 3rd paragraph in main volume. See *State v. Watts*, 77 N.C. App. 124, 334 S.E.2d 400 (1985), cert. denied, 315 N.C. 396, 338 S.E.2d 886 (1986).

In accord with 4th paragraph in main volume. See *State v. Glover*, 77 N.C. App. 418, 335 S.E.2d 86 (1985).

The decision of whether to grant a mistrial rests in the sound discretion of the trial judge, and it will not be disturbed absent a showing of an abuse of discretion. *State v. Brown*, 314 N.C. 232, 337 S.E.2d 808 (1985).

Emotional Outburst by Prosecuting Witness. — In light of a trial court's prompt actions in directing the removal of the prosecuting witness after her emotional outburst and in resuming his instructions to the jury and the otherwise compelling case against the defen-

dant, the witness's emotional outburst was not so prejudicial to the defendant as to result in reversible error where the trial judge refused to grant a mistrial. *State v. Blackstock*, 314 N.C. 232, 333 S.E.2d 245 (1985).

Scope of Review. —

A ruling on a motion for a mistrial is not reviewable absent a showing of gross abuse of discretion. *State v. Seagroves*, 78 N.C. App. 69, 336 S.E.2d 684 (1985).

The ruling on a motion for mistrial will be disturbed on appeal only if so clearly erroneous as to amount to a manifest abuse of discretion. *State v. Stroud*, 78 N.C. App. 599, 337 S.E.2d 873 (1985).

Conduct of sheriff, as jury custodian, on the first day of jury selection, in initially taking a seat adjacent to the prosecutor, did not constitute substantial and irreparable prejudice to defendant where, following objection, the trial judge took immediate steps to correct the situation, and where the sheriff engaged in no communications with the jury during the short interval between the time he sat down and the lodging of the objection, and there was no allegation that the sheriff made improper extrajudicial comments to any of the jurors. *State v. Brown*, 314 N.C. 232, 337 S.E.2d 808 (1985).

Stated in *State v. Rogers*, — N.C. —, 341 S.E.2d 713 (1986).

§ 15A-1063. Mistrial for impossibility of proceeding.

CASE NOTES

Discretion of Trial Judge. —

An order of a mistrial on a motion of the court is addressed to the sound discretion of the trial judge, and his ruling on the motion will not be disturbed on appeal absent a gross abuse of that discretion. *State v. Lyons*, 77 N.C. App. 565, 335 S.E.2d 532 (1985).

Mistrial Where Trial Not Fair and Impartial. — Subdivision (1) of this section allows a judge, over the defendant's objection, to grant a

mistrial where he could reasonably conclude that the trial will not be fair and impartial. *State v. Lyons*, 77 N.C. App. 565, 335 S.E.2d 532 (1985).

Plea of former jeopardy will not preclude subsequent trial of a defendant, where the mistrial was ordered, over defendant's objections, due to physical necessity or the necessity of doing justice. *State v. Lyons*, 77 N.C. App. 565, 335 S.E.2d 532 (1985).

§ 15A-1064. Mistrial; finding of facts required.

CASE NOTES

Purpose. — The purpose of this section is to protect the constitutional rights of defendants and to facilitate the process of appellate review. *State v. Lyons*, 77 N.C. App. 565, 335 S.E.2d 532 (1985).

The making of findings sufficient to support the judge's decision to grant a mistrial is mandatory, and the failure to make such findings is error. *State v. Odom*, — N.C. —, 341 S.E.2d 332 (1986).

But Defendant Must Object to Failure to Make Findings. — Where defendant failed to

make any objection at trial to the judge's failure to make findings as required by this section, he failed to preserve any error for appellate review under the requirements of Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure, as the mandatory nature of this section does not relieve defendant of his responsibility to prevent avoidable errors and the resulting unnecessary appellate review by lodging an appropriate objection. *State v. Odom*, — N.C. —, 341 S.E.2d 332 (1986).

SUBCHAPTER XI. TRIAL PROCEDURE IN DISTRICT COURT.

ARTICLE 66.

Procedure for Hearing and Disposition of Infractions.

§ 15A-1111. General procedure for disposition of infractions.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 852, s. 17 amends Session Laws 1985, c. 764, s. 40, so as to change the effective date of this Article from July 1, 1986 to September 1, 1986.

Session Laws 1985, c. 764, s. 40, as amended by Session Laws 1985 (Reg. Sess., 1986), c. 852,

s. 17, provides: "This act shall become effective September 1, 1986, and shall apply to offenses committed on or after that date. Offenses committed before the effective date of this act [September 1, 1986] shall be governed by the law in effect at the time of the offense."

§ 15A-1112. Venue.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 852, s. 17 amends Session Laws 1985, c. 764, s. 40, so as to change the effective date of this Article from July 1, 1986 to September 1, 1986.

Session Laws 1985, c. 764, s. 40, as amended by Session Laws 1985 (Reg. Sess., 1986), c. 852,

s. 17, provides: "This act shall become effective September 1, 1986, and shall apply to offenses committed on or after that date. Offenses committed before the effective date of this act [September 1, 1986] shall be governed by the law in effect at the time of the offense."

§ 15A-1113. Prehearing procedure.

(c) Appearance Bond May Be Required. — A person charged with an infraction may not be required to post an appearance bond if:

- (1) He is licensed to drive by a state that subscribes to the nonresident violator compact as defined in Article 1B of Chapter 20 of the General Statutes, the infraction charged is subject to the provisions of that compact, and he executes a personal recognizance as defined by that compact.

- (2) He is a resident of North Carolina.

Any other person charged with an infraction may be required to post a bond to secure his appearance and a charging officer may require such a person charged to accompany him to a judicial official's office to allow the official to determine if a bond is necessary to secure the person's court appearance, and if so, what kind of bond is to be used. If the judicial official finds that the person is unable to post a secured bond, he must allow the person to be released on execution of an unsecured bond. The provisions of Article 26 of this Chapter relating to issuance and forfeiture of bail bonds are applicable to bonds required pursuant to this subsection.

(1985, c. 764, s. 3; 1985 (Reg. Sess., 1986), c. 852, s. 12.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 852, s. 17 amends Session Laws 1985, c. 764, s. 40, so as to change the effective date of this Article from July 1, 1986 to September 1, 1986.

Session Laws 1985, c. 764, s. 40, as amended by Session Laws 1985 (Reg. Sess., 1986), c. 852, s. 17, provides: "This act shall become effective September 1, 1986, and shall apply to offenses

committed on or after that date. Offenses committed before the effective date of this act [September 1, 1986] shall be governed by the law in effect at the time of the offense."

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective September 1, 1986, rewrote subdivision (c)(1), which read: "He is licensed to drive by a state that subscribes to the nonresident violator compact as defined in Article 1B of Chapter 20 of the General Statutes and the infraction charged is subject to the provisions of that compact; or."

§ 15A-1114. Hearing procedure for infractions.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 852, s. 17 amends Session Laws 1985, c. 764, s. 40, so as to change the effective date of this Article from July 1, 1986 to September 1, 1986.

Session Laws 1985, c. 764, s. 40, as amended by Session Laws 1985 (Reg. Sess., 1986), c. 852,

s. 17, provides: "This act shall become effective September 1, 1986, and shall apply to offenses committed on or after that date. Offenses committed before the effective date of this act [September 1, 1986] shall be governed by the law in effect at the time of the offense."

§ 15A-1115. Review of disposition by superior court.

(a) Appeal of District Court Decision. — A person who denies responsibility and is found responsible for an infraction in the district court, within 10 days of the hearing, may appeal the decision to the criminal division of the superior court for a hearing de novo. Upon appeal, the defendant is entitled to a jury trial unless he consents to have the hearing conducted by the judge. The State must prove beyond a reasonable doubt that the person charged is responsible for the infraction unless the person admits responsibility. Unless otherwise provided by law, the procedures applicable to misdemeanors disposed of in the superior court apply to those infraction hearings. In the superior court, a prosecutor must represent the State. Appeal from the judgment in the superior court is as provided for other criminal actions in superior court, and the Attorney General must represent the State in an appeal of such actions.

(1985, c. 764, s. 3; 1985 (Reg. Sess., 1986), c. 852, s. 10.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 852, s. 17 amends Session Laws 1985, c. 764, s. 40, so as to change the effective date of this Article from July 1, 1986 to September 1, 1986.

Session Laws 1985, c. 764, s. 40, as amended by Session Laws 1985 (Reg. Sess., 1986), c. 852, s. 17, provides: "This act shall become effective September 1, 1986, and shall apply to offenses

committed on or after that date. Offenses committed before the effective date of this act [September 1, 1986] shall be governed by the law in effect at the time of the offense."

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective September 1, 1986, rewrote the second sentence of subsection (a), which read "Upon appeal, either party, upon demand in the manner required by G.S. 1A-1, Rule 38, is entitled to have the issue of responsibility decided by a jury."

§ 15A-1116. Enforcement of sanctions.

(a) Use of Contempt or Fine Collection Procedures: Notification of DMV. — If the person does not comply with a sanction ordered by the court, the court may proceed in accordance with Chapter 5A of the General Statutes. If the person fails to pay a penalty or costs, the court may proceed in accordance with Article 84 of this Chapter. If the infraction is a motor vehicle infraction, the court must report a failure to pay the applicable penalty and costs to the Division of Motor Vehicles as specified in G.S. 20-24.2.

(b) No Order for Arrest. — If a person served with a citation for an infraction fails to appear to answer the charge, the court may issue a criminal summons to secure the person's appearance, but an order for arrest may not be used in such cases. (1985, c. 764, s. 3; 1985 (Reg. Sess., 1986), c. 852, ss. 1, 2, 15.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 852, s. 17 amends Session Laws 1985, c. 764, s. 40, so as to change the effective date of this Article from July 1, 1986 to September 1, 1986.

Session Laws 1985, c. 764, s. 40, as amended by Session Laws 1985 (Reg. Sess., 1986), c. 852, s. 17, provides: "This act shall become effective September 1, 1986, and shall apply to offenses committed on or after that date. Offenses committed before the effective date of this act [September 1, 1986] shall be governed by the law in effect at the time of the offense."

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective September 1, 1986, inserted "or costs" in the second sentence of subsection (a), rewrote the third sentence of subsection (a), which formerly read "If the infraction is a motor vehicle infraction and the person does not pay the applicable penalty and costs within 30 days of the date specified in the court's judgment, the court must notify the Division of Motor Vehicles of the failure to comply", and inserted "criminal" preceding "summons to secure the person's appearance" in subsection (b).

§ 15A-1117: Recodified as § 20-24.2 by Session Laws 1985 (Reg. Sess., 1986), c. 852, s. 3, effective September 1, 1986.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 852, s. 17 amends Session Laws 1985, c. 764, s. 40, so as to change the effective date of this Article from July 1, 1986 to September 1, 1986.

Session Laws 1985, c. 764, s. 40, as amended by Session Laws 1985 (Reg. Sess., 1986), c. 852,

s. 17, provides: "This act shall become effective September 1, 1986, and shall apply to offenses committed on or after that date. Offenses committed before the effective date of this act [September 1, 1986] shall be governed by the law in effect at the time of the offense."

§ 15A-1118. Costs.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 852, s. 17 amends Session Laws 1985, c. 764, s. 40, so as to change the effective date of this Article from July 1, 1986 to September 1, 1986.

Session Laws 1985, c. 764, s. 40, as amended by Session Laws 1985 (Reg. Sess., 1986), c. 852,

s. 17, provides: "This act shall become effective September 1, 1986, and shall apply to offenses committed on or after that date. Offenses committed before the effective date of this act [September 1, 1986] shall be governed by the law in effect at the time of the offense."

SUBCHAPTER XII. TRIAL PROCEDURE IN SUPERIOR COURT.

ARTICLE 72.

Selecting and Impaneling the Jury.

§ 15A-1212. Grounds for challenge for cause.

CASE NOTES

IV. INABILITY TO RENDER VERDICT IN ACCORDANCE WITH LAW.

Inability to Impose Death Penalty. — Jurors who indicated that they could not vote for the death penalty under any circum-

stances were properly excused for cause under the requirements of *Witherspoon v. Illinois*, 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968) and this section. *State v. Avery*, 315 N.C. 1, 337 S.E.2d 786 (1985).

§ 15A-1213. Informing prospective jurors of case.

CASE NOTES

Cited in *State v. Callahan*, 77 N.C. App. 164, 334 S.E.2d 424 (1985).

§ 15A-1214. Selection of jurors; procedure.

Legal Periodicals. —

For article, "Peremptories or Peers? — Rethinking Sixth Amendment Doctrine, Images,

and Procedures," see 64 N.C.L. Rev. 501 (1986).

CASE NOTES

I. GENERAL CONSIDERATION.

Reasonable limitations on peremptory challenge procedure may be fixed, so long as the right itself is not taken away. Indeed, although the matter is one of discretion, the general rule is that after a jury is impaneled, the parties have waived their rights to challenge peremptorily a juror. *State v. McLamb*, 313 N.C. 572, 330 S.E.2d 476 (1985).

Defendant's statutory rights were not infringed merely because State and codefendant had removed jurors before she began her voir dire examination. She still had the right to exercise her 14 peremptory challenges and to exert her right to challenge for cause. *State v. Rogers*, — N.C. —, 341 S.E.2d 713 (1986).

Right to Challenge Juror When Examination Is Reopened. — The decision to reopen the examination of a juror previously accepted by the parties is within the sound discretion of the trial court, and once the examination of a juror has been reopened, the parties have an absolute right to exercise any remaining peremptory challenges to exercise such juror. *State v. Rogers*, — N.C. —, 341 S.E.2d 713 (1986).

Where defendant did not exhaust his peremptory challenges as provided by Subsection (h) of this section, no prejudice was shown in court's refusing to allow him to elicit from a certain juror the opinion expressed to the juror by friends about defendant's guilt or innocence. *State v. Avery*, 315 N.C. 1, 337 S.E.2d 786 (1985).

II. AUTHORITY OF TRIAL JUDGE.

Editor's Note. — *State v. Parton*, 303 N.C. 55, 277 S.E.2d 410 (1981) has been overruled by *State v. Freeman*, 314 N.C. 432, 333 S.E.2d 743 (1985), to the extent that it gave the trial court discretion to allow or refuse permission to defendant to use one of his peremptory challenges once the trial court has decided to reopen the examination.

Discretion of Trial Court. —

The trial judge, who questioned a juror about her relationship with the state's witness, and received assurances that the juror would have no difficulty in rendering a fair and impartial verdict despite that relationship, was acting well within his discretionary powers when he

denied the defendant the opportunity to exercise his remaining peremptory challenge after the jury was impaneled. *State v. McLamb*, 313 N.C. 572, 330 S.E.2d 476 (1985).

After a jury has been impaneled, further challenge of a juror is a matter within the trial judge's discretion. A ruling committed to a trial court's discretion is to be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision. *State v. McLamb*, 313 N.C. 572, 330 S.E.2d 476 (1985).

Discretion of Trial Court in Capital Case.

— In a capital case, both the State and the defendant are entitled to inquire into a prospective juror's beliefs and attitudes regarding capital punishment, so that both sides may be assured a fair trial before an impartial jury. The trial court, however, is vested with broad discretion in controlling the extent and manner of such inquiry, and its decision will not be disturbed absent a showing of an abuse of discretion. *State v. Brown*, 315 N.C. 40, 337 S.E.2d 808 (1985).

Discretion under subsection (j). —

Subsection (j) does not grant either party any absolute right. The decision whether to grant sequestration and individual voir dire of prospective jurors rests in the sound discretion of the trial court and its ruling will not be disturbed absent a showing of abuse of discretion. *State v. Wilson*, 313 N.C. 516, 330 S.E.2d 450 (1985); *State v. Brown*, 315 N.C. 40, 337 S.E.2d 808 (1985).

Reopening Examination after, etc. —

The intent of the Legislature in adopting subdivision (g) was that the trial court have discretion as to whether to reopen examination of a juror under certain specific conditions, but that the parties have an absolute right to exercise any remaining peremptory challenges to excuse such a juror once the trial court in its discretion reopened the examination. *State v. Freeman*, 314 N.C. 432, 333 S.E.2d 743 (1985).

III. QUESTIONING OF PROSPECTIVE JURORS.

Collective Voir Dire. — The defendant's arguments that collective voir dire made the prospective jurors aware of prejudicial matters, inhibited the candor of the jurors, and permitted the prospective jurors to become "educated" as to responses which enabled them to be excused

from the panel were properly rejected as mere speculation. *State v. Wilson*, 313 N.C. 516, 330 S.E.2d 450 (1985).

Likelihood That State Would Carry Out Execution. — Trial court did not err in sustaining the State's objection to defendant's

question as to whether a juror did or did not feel that the State would carry out an execution, as defendant failed to show that the inclusion of such a juror would deprive him of a fair and unbiased jury. *State v. Brown*, 315 N.C. 40, 337 S.E.2d 808 (1985).

§ 15A-1217. Number of peremptory challenges.

Legal Periodicals. — For article, "Peremptories or Peers? — Rethinking Sixth Amend-

ment Doctrine, Images, and Procedures," see 64 N.C.L. Rev. 501 (1986).

CASE NOTES

I. GENERAL CONSIDERATION.

Editor's Note. — *State v. Parton*, 303 N.C. 55, 277 S.E.2d 410 (1981) has been overruled by *State v. Freeman*, 314 N.C. 432, 333 S.E.2d 743 (1985), to the extent that it gave the trial court discretion to allow or refuse permission to defendant to use one of his peremptory challenges once the trial court has decided to reopen the examination.

The right to challenge veniremen peremptorily is equally bestowed on the State and the defendant by this section. *State v. Rogers*, — N.C. —, 341 S.E.2d 713 (1986).

A party's reason, etc. —

A peremptory challenge may be exercised without a stated reason and without being subject to the control of the court. *State v. Rogers*, — N.C. —, 341 S.E.2d 713 (1986).

The use of a peremptory challenge by one party does not unfairly prejudice the opposing party's position in the jury selec-

tion process. *State v. Rogers*, — N.C. —, 341 S.E.2d 713 (1986).

Right to Challenge Juror When Examination Is Reopened. — The decision to reopen the examination of a juror previously accepted by the parties is within the sound discretion of the trial court, and once the examination of a juror has been reopened, the parties have an absolute right to exercise any remaining peremptory challenges to excuse such a juror. *State v. Rogers*, — N.C. —, 341 S.E.2d 713 (1986).

Where defendant did not exhaust his peremptory challenges, as provided by § 15A-1214(h), no prejudice was shown in court's refusing to allow defendant to elicit from a certain juror the opinion expressed to the juror by friends about defendant's guilt or innocence. *State v. Avery*, 315 N.C. 1, 337 S.E.2d 786 (1985).

Applied in *State v. Freeman*, 314 N.C. 432, 333 S.E.2d 743 (1985).

ARTICLE 73.

Criminal Jury Trial in Superior Court.

§ 15A-1222. Expression of opinion prohibited.

CASE NOTES

I. GENERAL CONSIDERATION.

Section Not Applicable in Absence of Jury. — This section, which forbids the expression of an opinion by the trial court, is inapplicable when the jury is not present during the questioning. *State v. Rogers*, — N.C. —, 341 S.E.2d 713 (1986).

Distribution of Copies of Accomplice's Statements to Individual Jurors. — Fact that the trial judge had copies of accomplice's handwritten statements made for distribution

to individual jurors, instead of providing one copy to the 12 jurors and waiting for each one to read the statements and pass them along, was well within his discretion, and the record did not support a finding that defendant was prejudiced by the manner in which the judge chose to publish these exhibits to the jury. *State v. Harris*, — N.C. —, 340 S.E.2d 383 (1986).

Cited in *State v. Blackstock*, 314 N.C. 232, 333 S.E.2d 245 (1985); *State v. Slone*, 76 N.C. App. 628, 334 S.E.2d 78 (1985); *Harris-Teeter*

Supermarkets, Inc. v. Hampton, 76 N.C. App. 649, 334 S.E.2d 81 (1985).

§ 15A-1226. Rebuttal evidence; additional evidence.

CASE NOTES

Reopening of Voir Dire Examination. — Where, after presentation of evidence and arguments of counsel on voir dire on defendant's motion to suppress any statements she made to any investigating officer, but before the court ruled on the motion, the State moved to reopen the evidence for the limited purpose of offering testimony with respect to the nature of the rights furnished by the investigating officer to the defendant under Miranda, the court did not abuse its discretion in reopening the voir dire examination. *State v. Stroud*, 78 N.C. App. 599, 337 S.E.2d 873 (1985).

Trial judge did not err in allowing the State to recall victim after the close of defendant's evidence, where the State requested a bench conference less than 15 minutes after learning that the victim wished to testify after having heard defendant's voice as he testified on the stand, and the trial judge allowed defendant's request for a recess, tendered the victim for voir dire examination, and entered into the record extensive findings of fact. *State v. Torian*, — N.C. —, 340 S.E.2d 465 (1986).

Quoted in *State v. Sidden*, — N.C. —, 340 S.E.2d 340 (1986).

§ 15A-1227. Motion for dismissal.

CASE NOTES

I. GENERAL CONSIDERATION.

Section 15-173 Compared. —

A defendant's motion to dismiss under subdivision (a)(1) of this section for insufficiency of the evidence to go to the jury is tantamount to a motion for nonsuit under § 15-173. *State v. Bruce*, 315 N.C. 273, 337 S.E.2d 510 (1985).

Court Need Not Exclude, etc. —

In accord with main volume. See *State v. Bruce*, 315 N.C. 273, 337 S.E.2d 510 (1985).

Preference for Submission to Jury in Borderline Cases. — In borderline or close cases, courts have consistently expressed a preference for submitting issues to the jury, both in reliance on the common sense and fairness of the 12 and to avoid unnecessary appeals. *State v. Hamilton*, 77 N.C. App. 506, 335 S.E.2d 506 (1985).

Effect of Dismissal. — A motion to dismiss pursuant to this section tests the sufficiency of the evidence to sustain a conviction and, in that respect, is identical to a motion for judgment as in the case of nonsuit under § 15-173. Therefore, following such dismissal defendant cannot again be placed in jeopardy upon these same charges, and the State has no right of appeal from the judgment entered. *State v. Ausley*, 78 N.C. App. 791, 338 S.E.2d 547 (1986).

Cited in *State v. Kinch*, 314 N.C. 99, 331 S.E.2d 665 (1985); *State v. O'Neal*, 77 N.C. App. 600, 335 S.E.2d 920 (1985); *State v. Grainger*, 78 N.C. App. 123, 337 S.E.2d 77 (1985).

II. QUESTION PRESENTED.

Question Presented to Court. —

In accord with 1st paragraph in the main volume. See *State v. Riddick*, — N.C. —, 340 S.E.2d 55 (1986).

When a defendant moves under subdivision (a)(2) of this section or under § 15-173 for dismissal at the close of all of the evidence, the trial court is to determine whether there is substantial evidence (a) of each essential element of the offense charged, or of a lesser offense included therein, and (b) of the defendant's being the perpetrator of the offense. *State v. Bruce*, 315 N.C. 273, 337 S.E.2d 510 (1985).

The question presented on defendant's motion to dismiss is whether, upon consideration of all the evidence, whether competent or incompetent, in the light most favorable to the State, there is substantial evidence that the crime charged in the bill of indictment was committed and that defendant was a perpetrator of that crime. *State v. Perry*, — N.C. —, 340 S.E.2d 450 (1986).

III. EVIDENCE ON MOTION.

A. In General.

Substantial Evidence Must Be Shown. —

In accord with 3rd paragraph in main volume. See *State v. Capps*, 77 N.C. App. 400, 335 S.E.2d 189 (1985).

In accord with 3rd paragraph in 1985 Cumu-

lative Supplement. See *State v. James*, 77 N.C. App. 219, 334 S.E.2d 452 (1985).

Evidence Must Be More Than, etc. —

In accord with second paragraph in main volume. See *State v. Spangler*, 76 N.C. 521, 333 S.E.2d 722 (1985).

It is immaterial whether, etc. —

In accord with 1985 Cumulative Supplement. See *State v. James*, 77 N.C. App. 219, 334 S.E.2d 452 (1985).

Evidence Must Be Considered in Most Favorable, etc. —

In accord with 1st paragraph in main volume. See *State v. Capps*, 77 N.C. App. 400, 335 S.E.2d 189 (1985); *State v. Hamilton*, 77 N.C. App. 506, 335 S.E.2d 506 (1985).

When defendant moves under subdivision (a)(2) of this section or under § 15-173 for dismissal at the close of all the evidence, the trial court is to view all of the evidence in the light most favorable to the state and give the state all reasonable inferences that may be drawn from the evidence supporting the charges against the defendant. The trial court must determine as a matter of law whether the state has offered substantial evidence of all elements of the offense charged so any rational trier of fact could find beyond a reasonable doubt that the defendant committed the offense. *State v. Bruce*, 315 N.C. 273, 337 S.E.2d 510 (1985).

Court is to consider all evidence, etc. —

In accord with main volume. See *State v. Spangler*, 76 N.C. 521, 333 S.E.2d 722 (1985).

All Evidence Favorable to State Must Be, etc. —

In accord with 1st paragraph in main volume. See *State v. Capps*, 77 N.C. App. 400, 335 S.E.2d 189 (1985).

All Evidence Introduced Must Be Considered. — Defendant's motion to dismiss must be considered in light of all the evidence introduced by the State, as well as that introduced by defendant. *State v. Perry*, — N.C. —, 340 S.E.2d 450 (1986).

Contradictions and discrepancies do not warrant dismissal of case. They are for the jury to resolve. *State v. Spangler*, 76 N.C. 521, 333 S.E.2d 722 (1985); *State v. Hamilton*, 77 N.C. App. 506, 335 S.E.2d 506 (1985); *State v. Bruce*, 315 N.C. 273, 337 S.E.2d 510 (1985).

C. Defendant's Evidence.

Defendant's evidence, unless favorable, etc. —

If defendant does present evidence, it is disregarded on his motion to dismiss except to the extent that it is favorable to the State. *State v. Hamilton*, 77 N.C. App. 506, 335 S.E.2d 506 (1985).

IV. APPEAL FROM RULING ON MOTION.

B. Introduction of Evidence at Trial by Defendant.

Waiver, etc. —

Under this section, if defendant introduces evidence following the denial of his motion for nonsuit, he thereby waives any motion for dismissal or judgment as in case of nonsuit which he may have made prior to the introduction of his evidence and cannot urge such prior motion as ground for appeal. *State v. Bruce*, 315 N.C. 273, 337 S.E.2d 510 (1985).

§ 15A-1230. Limitations on argument to the jury.

Legal Periodicals. — For article, "Rummaging Through a Wilderness of Verbiage, The Charge Conference, Jury Argument

and Instructions," see 8 Campbell L. Rev. 269 (1986).

CASE NOTES

Reconstruction of Trial Record. — Because the defendant failed to cooperate with the trial court to provide the appellate court with a reconstructed record of the state's closing argument, which the trial court failed to record, the appellate court was precluded from

reviewing the defendant's argument that the state made improper remarks and referred to matters outside the trial record. *State v. Moore*, 75 N.C. App. 543, 331 S.E.2d 251, cert. denied, — N.C. —, 337 S.E.2d 862 (1985).

§ 15A-1231. Jury instructions.

Legal Periodicals. — For article, "Rummaging Through a Wilderness of Verbiage, The Charge Conference, Jury Argument

and Instructions," see 8 Campbell L. Rev. 269 (1986).

§ 15A-1232. Jury instructions; explanation of law; opinion prohibited.

Legal Periodicals. — For article, "Rummaging Through a Wilderness of Verbiage, The Charge Conference, Jury Argument

and Instructions," see 8 Campbell L. Rev. 269 (1986).

CASE NOTES

I. GENERAL CONSIDERATION.

Editor's Note. — Most of the cases below were decided under this section as it read prior to its amendment in 1985.

This section no longer requires trial judges to state, summarize, or recapitulate the evidence or to explain the application of the law. They may, however, elect to do so through the exercise of their discretion. *State v. Williams*, 315 N.C. 310, 338 S.E.2d 75 (1986).

Applied in *State v. Taylor*, — N.C. App. —, 342 S.E.2d 539 (1986).

Cited in *State v. Bush*, 78 N.C. App. 686, 338 S.E.2d 590 (1986).

II. EXPRESSION OF OPINION.

A. In General.

Where the trial court merely advised the jurors that the recollection of others differed from his own recollection of the evidence and that, in any event, the jurors should rely entirely on their own recollections of the evidence, the trial court did not impermissibly express an opinion as to the evidence. *State v. Sowell*, — N.C. App. —, 342 S.E.2d 541 (1986).

G. Weight and Credibility of Testimony, etc.

Opinion as to Weight of Evidence, etc. —

A trial court is prohibited from expressing an opinion upon the weight and credibility of the evidence during trial or during the course of instructions to the jury. Moreover, a trial court should state the facts to the jury and avoid drawing conclusions for members of the jury. *State v. Hosey*, — N.C. App. —, 339 S.E.2d 414 (1986).

III. JURY INSTRUCTIONS.

A. In General.

Nor upon Subject Not Supported, etc. —

To determine whether an instruction should be given, the court must consider whether there is any evidence in the record which would convince a rational trier of fact to convict the defendant of the offense. *State v. Moore*, 75 N.C. App. 543, 331 S.E.2d 251, cert. denied, — N.C. —, 337 S.E.2d 862 (1985).

And in Context of Trial. —

Instructions must be construed contextually and isolated portions will not be held prejudicial when the charge as a whole is correct. *State v. Lilley*, 78 N.C. App. 100, 337 S.E.2d 89 (1985).

C. Explanation of Law.

3. Lesser and Included Offenses.

When Instruction on Included Offense Required. —

In accord with 7th paragraph in main volume. See *State v. Peacock*, 313 N.C. 554, 330 S.E.2d 190 (1985); *State v. Williams*, 314 N.C. 337, 333 S.E.2d 708 (1985).

Failure to Submit Lesser Degrees. —

Instructions on the lesser included offenses of first-degree rape are warranted only when there is some doubt or conflict concerning the crucial element of penetration. *State v. Williams*, 314 N.C. 337, 333 S.E.2d 708 (1985).

Instruction on Included Offense Held Not Required. —

Where the State's evidence is clear and positive as to each element of the offense charged and there is no evidence showing the commission of a lesser included offense, it is not error for the judge to refuse to instruct on the lesser offense. *State v. Peacock*, 313 N.C. 554, 330 S.E.2d 190 (1985).

When the State's evidence is clear and positive with respect to each element of the offense

charged and there is no evidence showing the commission of a lesser included offense, it is not error for the trial judge to refuse to instruct on the lesser offense. *State v. Williams*, 314 N.C. 337, 333 S.E.2d 708 (1985).

Instruction on Included Offense Held Required. — Since a rational trier of fact could have found that the drugged and intoxicated defendant did not form an intent to commit larceny before breaking and entering, the trial court prejudicially erred in failing to instruct on misdemeanor breaking and entering. *State v. Peacock*, 313 N.C. 554, 330 S.E.2d 190 (1985).

D. Summary of Evidence.

Verbatim Recital Not Required. —

In accord with main volume. See *State v. Gladden*, — N.C. —, 340 S.E.2d 673 (1986).

Objection to Slight Inaccuracies, etc. —

In accord with 4th paragraph in the main volume. See *State v. Gladden*, — N.C. —, 340 S.E.2d 673 (1986).

§ 15A-1233. Review of testimony; use of evidence by the jury.

CASE NOTES

This statute imposes two duties upon trial court when it receives request from jury to review evidence. First, the court must conduct all jurors to the courtroom. Second, the trial court must exercise its discretion in determining whether to permit requested evidence to be read to or examined by the jury together with other evidence relating to the same factual issue. *State v. Ashe*, 314 N.C. 28, 331 S.E.2d 652 (1985).

All Jurors to Be In Courtroom for Request To Review Testimony. — Both Art. I, § 24 of the North Carolina Constitution and subsection (a) require the trial court to summon all jurors into the courtroom before hearing and addressing a jury request to review testimony and to exercise its discretion in denying or granting the request. Failure of the trial court to comply with these statutory mandates entitles defendant to press these points on appeal, notwithstanding a failure to object at trial. *State v. Ashe*, 314 N.C. 28, 331 S.E.2d 652 (1985).

While the statute does not expressly say that the trial judge must have the jurors conducted to the courtroom, the legislature intended to place this responsibility on the judge presiding at the trial. *State v. Ashe*, 314 N.C. 28, 331 S.E.2d 652 (1985).

The statute means that all jurors must be

All Jurors to be in Courtroom for Request to Review Testimony. — Both Art. I, § 24 of the North Carolina Constitution and § 15A-1233(a) require the trial court to summon all jurors into the courtroom before hearing and addressing a jury request to review testimony and to exercise its discretion in denying or granting the request. Failure of the trial court to comply with these statutory mandates entitles defendant to press these points on appeal, notwithstanding a failure to object at trial. *State v. Ashe*, 314 N.C. 28, 331 S.E.2d 652 (1985).

I. ERROR IN INSTRUCTIONS.

Failure to instruct upon a substantive, etc. —

Failure of the court to correctly instruct the jury on substantial features of case arising on the evidence was error for which defendant is entitled to a new trial. *State v. Watson*, — N.C. App. —, 341 S.E.2d 366 (1986).

present not only when the request is made, but also when the trial court responds to the request, whatever that response might be. *State v. Ashe*, 314 N.C. 28, 331 S.E.2d 652 (1985).

For the trial court to hear the jury foreman's inquiry and to respond to it without first requiring the presence of all jurors was an error in violation of this section. *State v. Ashe*, 314 N.C. 28, 331 S.E.2d 652 (1985).

Court Not Exercising Discretion Entitled Defendant To New Trial. — The trial court's errors in not exercising its discretion in determining whether to permit the jury to review some of the evidence and in hearing the foreman's request and responding to it in the absence of the remaining jurors, entitled defendant to a new trial. *State v. Ashe*, 314 N.C. 28, 331 S.E.2d 652 (1985).

The trial court erred in not exercising its discretion in denying the request to review testimony, where he said, "There is no transcript at this point. You and the other jurors will have to take your recollection of the evidence. . . ." *State v. Ashe*, 314 N.C. 28, 331 S.E.2d 652 (1985).

Standard of Review on Appeal. —

In accord with main volume. See *State v. Green*, 77 N.C. App. 429, 335 S.E.2d 176 (1985).

§ 15A-1234. Additional instructions.

CASE NOTES

Court is not required to repeat instructions which were previously given to the jury in the absence of some error in the charge but

may do so in its discretion. *State v. Bartow*, 77 N.C. App. 103, 334 S.E.2d 480 (1985).

§ 15A-1235. Length of deliberations; deadlocked jury.

CASE NOTES

I. GENERAL CONSIDERATION.

Section Provides Standards, etc. —

In accord with main volume. See *State v. Williams*, 315 N.C. 310, 338 S.E.2d 75 (1986).

Giving of Some Instructions under Subsections (a) or (b) Necessitates Giving All.

— When a trial judge attempts to give any of the instructions of subsections (a) and (b) of this section to a deadlocked jury, he must give all those instructions. However, where defendant did not object at trial, the evidence of defendant's guilt was very strong, and the instructions given were in substantial conformity with the statute, the error committed did not amount to "plain error". *State v. Logan*, — N.C. App. —, 339 S.E.2d 449 (1986).

Whenever the trial judge gives the jury any of the instructions authorized by subsection (b) of this section, whether given before the jury initially retires for deliberation or after the trial judge concludes that the jury is deadlocked, he must give all of them. *State v. Williams*, 315 N.C. 310, 338 S.E.2d 75 (1986).

Trial judge committed error when, after forming the opinion that the jury was deadlocked, he gave the instructions set out in subdivisions (b)(1) and (b)(2) of this section, but failed to give the instructions set out in (b)(3) and (b)(4). *State v. Williams*, 315 N.C. 310, 338 S.E.2d 75 (1986), holding, however, that this error was not "plain error" entitling defendant to a new trial.

Instruction under Subsection (c) within Discretion of Trial Judge. — It is clearly within the sound discretion of the trial judge as to whether to give an instruction pursuant to subsection (c) of this section. *State v. Williams*, 315 N.C. 310, 338 S.E.2d 75 (1986).

Verbatim Adherence to Section, etc. —

In accord with main volume. See *State v. Moore*, 77 N.C. App. 553, 335 S.E.2d 535 (1985).

Trial judge has no right to coerce a verdict. —

In accord with main volume. See *State v. Moore*, 77 N.C. App. 553, 335 S.E.2d 535 (1985).

Cited in *State v. Mann*, 77 N.C. App. 654, 335 S.E.2d 772 (1985).

III. COMMENT ON EXPENSE OF RETRIAL.

Instruction Held Error. —

Where not only did the trial judge have a statement from the foreman that the jury was unable to reach a verdict, but in addition the court was advised of the 11 to one numerical division of the jury, his instruction which clearly mentioned the potential inconvenience and use of the court's time incident to the jury's failure to reach a verdict constituted prejudicial error. *State v. Johnson*, — N.C. App. —, 341 S.E.2d 770 (1986).

§ 15A-1236. Admonitions to jurors; regulation and separation of jurors.

CASE NOTES

Counsel for defendant must object, etc. —

While subdivision (a)(4) of this section requires the trial judge to admonish jurors to avoid contact with any accounts of the trial

outside the courtroom, and the trial judge's failure to do so was error, defendant must show prejudice, and furthermore, he must object to any failure to properly instruct the jury. *State v. Harris*, — N.C. —, 340 S.E.2d 383 (1986).

§ 15A-1238. Polling the jury.

CASE NOTES

Right to Have Jury Polled. — This section gives any party the right to have the jury polled after a verdict is returned before the jury has dispersed. *State v. Baynard*, — N.C. App. —, 339 S.E.2d 810 (1986).

This section does not give defendant a right to an unlimited number of polls. *State v. Martin*, — N.C. —, 340 S.E.2d 326 (1986).

Waiver of Right to Poll. —

In accord with main volume. See *State v. Baynard*, — N.C. App. —, 339 S.E.2d 810 (1986).

Request for Repolling Properly Denied.

— Defendant's request for a repolling of the jury, occasioned by the attempt of the forelady to change her vote based on testimony presented at the sentencing phase of the trial, was correctly denied, as a juror may not impeach the verdict of the jury after it has been rendered and received in open court, and defendant's request to repoll the jury amounted to an attempt to impeach the jury's verdict. *State v. Martin*, — N.C. —, 340 S.E.2d 326 (1986).

§ 15A-1240. Impeachment of the verdict.

CASE NOTES

Applicability. — This section applies only to criminal cases and has no applicability to a paternity proceeding. *Smith v. Price*, — N.C. —, 340 S.E.2d 408 (1986).

Subsection (c), etc. —

In accord with the main volume. See *State v. Costner*, — N.C. App. —, 343 S.E.2d 241 (1986).

Affidavits of three jurors, asserting that

the jury's verdict, as reported by the foreman, was not a true verdict, but represented their answer to the foreman's question of whether defendant might have been guilty of some other like offense, but that all 12 jurors, when polled, agreed with the verdict of guilty, were not admissible to impeach the verdict. *State v. Costner*, — N.C. App. —, 343 S.E.2d 241 (1986).

§ 15A-1241. Record of proceedings.

CASE NOTES

Quoted in *State v. Watts*, 77 N.C. App. 124, 334 S.E.2d 400 (1985).

§ 15A-1242. Defendant's election to represent himself at trial.

CASE NOTES

The provisions of this section are mandatory. —

In accord with 1985 Cumulative Supplement. See *State v. Lyons*, 77 N.C. App. 565, 335 S.E.2d 532 (1985); *State v. White*, 78 N.C. App. 741, 338 S.E.2d 614 (1986).

Compliance with this section fully satisfies, etc. —

In accord with the main volume. See *State v. Wells*, 78 N.C. App. 769, 338 S.E.2d 573 (1986).

Applicability of Section. — Nothing in this section makes it inapplicable to defen-

dants who are magistrates, attorneys or judges. Inquiry under this section is necessary whenever a defendant either implicitly or explicitly indicates a desire to waive the right to counsel. *State v. Bullock*, — N.C. —, 340 S.E.2d 106 (1986).

A written waiver of counsel is no substitute for actual compliance by the trial court with this section. *State v. Wells*, 78 N.C. App. 769, 338 S.E.2d 573 (1986).

What Record Must Show. —

Absent evidence that defendant was in-

formed of the nature of the charges and the range of permissible punishments or that he understood and appreciated the consequences of proceeding without counsel, the court should not permit him to proceed pro se. *State v. Graham*, 76 N.C. App. 470, 333 S.E.2d 547 (1985); *State v. Gordon*, — N.C. App. —, 339 S.E.2d 836 (1986).

Failure to Conduct Inquiry. — Where defendant employed counsel who were ready to proceed to trial and in fact demanded trial when the State requested a second continuance, but thereafter, when differences between defendant and his counsel necessitated counsel's withdrawal, defendant attempted to employ other counsel but understandably could not find anyone who would attempt to defend him, with only a few days' preparation time, on charges as serious as the ones he faced, it was prejudicial error for the trial court to proceed to trial without conducting the statutory inquiry in order to clearly establish whether defendant voluntarily, knowingly and intelligently waived his right to counsel. *State v. Bullock*, — N.C. —, 340 S.E.2d 106 (1986).

In the absence of (1) a clear indication by defendant that he wished to proceed pro se, and (2) the inquiry required by this section, it was error to permit defendant to go to trial without the assistance of counsel. *State v. White*, 78 N.C. App. 741, 338 S.E.2d 614 (1986).

Absent a clear indication by defendant that he desired to proceed pro se, and absent the

inquiries required by this section, the court erred in requiring defendant to proceed pro se at suppression hearing. *State v. Gordon*, — N.C. App. —, 339 S.E.2d 836 (1986).

Remand for Noncompliance. — Where the record reflected that this section was not complied with, the judgment would be vacated and the case remanded for a determination of whether defendant was entitled to have counsel appointed to represent her. *State v. Wells*, 78 N.C. App. 769, 338 S.E.2d 573 (1986).

New Trial Where Judge Did Not Advise Defendant. — Where the trial judge did not advise defendant of the consequences of her decision to proceed pro se, or the nature of the charges and proceedings and the range of permissible punishments, defendant was entitled to a new trial. *State v. Lyons*, 77 N.C. App. 565, 335 S.E.2d 532 (1985).

Judgment Vacated Where Transcript Showed Failure to Follow Procedure. — Where although the court signed a certification indicating that the procedure set out under this section had been followed, the transcripts, taken at the time the waiver was signed and at the time at which defendant entered his guilty plea, show that the proper procedure was not followed, the judgment entered would be vacated and the case would be remanded for a determination of whether defendant was entitled to have counsel appointed to represent him in the action. *State v. Hardy*, 78 N.C. App. 175, 336 S.E.2d 661 (1985).

SUBCHAPTER XIII. DISPOSITION OF DEFENDANTS.

ARTICLE 81.

General Sentencing Provisions.

§ 15A-1334. The sentencing hearing.

Legal Periodicals. —

For 1984 survey, "Denying Mitigating In-

structions in Capital Cases on Grounds of Relevancy," see 63 N.C.L. Rev. 1122 (1985).

CASE NOTES

I. GENERAL CONSIDERATION.

Good Cause Must Be Shown for Continuance. —

In accord with the main volume. See *State v. Bush*, 78 N.C. App. 686, 338 S.E.2d 590 (1986).

Stated in *State v. Jones*, 314 N.C. 644, 336 S.E.2d 385 (1985).

Cited in *State v. Haislip*, — N.C. App. —, 339 S.E.2d 832 (1986).

§ 15A-1335. Resentencing after appellate review.

CASE NOTES

Manner of Consolidating Convictions May Be Changed on Remand. — While this section prohibits trial courts from imposing stiffer sentences upon remand than were originally imposed, nothing prohibits the trial court from changing the way in which it consolidated convictions during a sentencing hearing prior to remand. *State v. Ransom*, — N.C. App. —, 343 S.E.2d 232 (1986).

Resentencing Upheld. — Where defendant was originally given a 20 year prison sentence, based on 13 counts of breaking or entering and 13 counts of larceny, and after the 20 year sentence was overturned on grounds that the orig-

inal sentence was in error because it consolidated crimes punishable by a maximum sentence of ten years yet sentenced defendant to 20 years in violation of § 15A-1340.4(b), defendant was sentenced to six three year prison sentences or a total of 18 years imprisonment, it was held that the trial court did not err in changing the way defendant's convictions were consolidated and that the sentence imposed did not violate this section. *State v. Ransom*, — N.C. App. — 343 S.E.2d 232 (1986).

Applied in *State v. Hanes*, 77 N.C. App. 222, 334 S.E.2d 444 (1985); *State v. Jones*, 314 N.C. 644, 336 S.E.2d 385 (1985).

ARTICLE 81A.

Sentencing Persons Convicted of Felonies.

§ 15A-1340.1. Applicability of Article 81A; life sentence.

CASE NOTES

The Fair Sentencing Act originated in a movement away, etc. —

In accord with 2nd paragraph in 1985 supplement. See *State v. Parker*, 314 N.C. 249, 337 S.E.2d 497 (1985).

The trial court should find nonstatutory mitigating factor when defense counsel has made specific request therefor, and when the evidence is substantial, uncontradicted and manifestly credible. *State v. Corley*, 75 N.C. App. 245, 330 S.E.2d 819, supersedeas granted, 314 N.C. 119, 332 S.E.2d 485 (1985).

The weight to be given any particular aggravating or mitigating factor rests in the trial court's sound discretion, and the balance struck by the court will not be disturbed if there is support in the record for the determination. *State v. Corley*, 75 N.C. App. 245, 330 S.E.2d 819, supersedeas granted, 314 N.C. 119, 332 S.E.2d 485 (1985).

Consolidated Offenses. — In order to support a sentence for consolidated offenses varying from the presumptive, each offense had to be treated by the trial court separately, and

separately supported by findings tailored to the individual offense and applicable only to that offense. *State v. Corley*, 75 N.C. App. 245, 330 S.E.2d 819, supersedeas granted, 314 N.C. 119, 332 S.E.2d 485 (1985).

A failure to make separate findings in aggravation and mitigation for each of several consolidated offenses will be deemed harmless error when the factors as found apply equally to each of the consolidated offenses. *State v. Corley*, 75 N.C. App. 245, 330 S.E.2d 819, supersedeas granted, 314 N.C. 119, 332 S.E.2d 485 (1985).

Consideration of Defendant's Prison Conduct Between Original and Resentencing Hearings. — It was reversible error for the trial court to fail to consider the defendant's prison conduct between his original sentencing hearing and his resentencing hearing, for purposes of mitigation. *State v. Corley*, 75 N.C. App. 245, 330 S.E.2d 819, supersedeas granted, 314 N.C. 119, 332 S.E.2d 485 (1985).

Cited in *State v. Ledford*, — N.C. —, 340 S.E.2d 309 (1986).

§ 15A-1340.2. Definitions.

CASE NOTES

Convictions in which prayer for judgment was continued and no fines or other conditions imposed constituted "prior convictions" under the Fair Sentencing Act. *State v. Southern*, 314 N.C. 110, 331 S.E.2d 688 (1985).

Applied in *State v. Benfield*, 76 N.C. App. 453, 333 S.E.2d 753 (1985).

§ 15A-1340.3. Purposes of sentencing.

CASE NOTES

To allow trial court to ignore uncontradicted, credible evidence of either an aggravating or a mitigating factor would render the requirement that he consider the statutory factors meaningless, and would be counter to the objective that the punishment imposed take "into account factors that may diminish or increase the offender's culpability," as required under this section. *State v. Parker*, 315 N.C. 249, 337 S.E.2d 497 (1985).

An aggravating factor can properly be found only if the defendant has exhibited some behavior which serves to increase the of-

fender's culpability. *State v. Bates*, 76 N.C. App. 676, 334 S.E.2d 73 (1985).

It is error for aggravating factor to be based on circumstances which are part of very essence of crime, because it can be presumed that the legislature was guided by this unfortunate fact when it established presumptive sentences. *State v. Bates*, 76 N.C. App. 676, 334 S.E.2d 73 (1985).

Cited in *State v. Avery*, 315 N.C. 1, 337 S.E.2d 786 (1985); *State v. Perry*, — N.C. —, 340 S.E.2d 450 (1986).

§ 15A-1340.4. Presumptive punishment for felony other than Class A or Class B felony; prior felony convictions; consideration of aggravating and mitigating factors; written findings.

CASE NOTES

I. GENERAL CONSIDERATION.

Legislature Determines Factors to Be Considered. — The power to determine those statutory mitigating and aggravating factors which must be considered by the sentencing judge lies solely within the discretion of the Legislature. *State v. Cameron*, 314 N.C. 516, 335 S.E.2d 9 (1985).

Weighing of aggravating and mitigating factors, etc. —

In accord with 1st paragraph in main volume. See *State v. Freeman*, 313 N.C. 539, 330 S.E.2d 465 (1985).

As Is Decision to Increase Sentence. — Once the trial judge determines that the aggravating factors outweigh the mitigating factors, the extent by which the sentence exceeds the presumptive sentence is within his discretion, so long as it does not exceed the maximum punishment set by the Legislature. *State v. Freeman*, 313 N.C. 539, 330 S.E.2d 465 (1985).

And Will Not Be Disturbed, etc. —

In accord with main volume. See *State v. Parker*, 315 N.C. 249, 337 S.E.2d 497 (1985).

This Article Did Not Remove, etc. —

In accord with 1st paragraph in main volume. See *State v. Parker*, 315 N.C. 249, 337 S.E.2d 497 (1985).

Lack of Rational Basis Is Abuse of Discretion. — When there is no rational basis for the manner in which the aggravating and mitigating factors were weighed by the sentencing judge, his decision will amount to an abuse of discretion. *State v. Parker*, 315 N.C. 249, 337 S.E.2d 497 (1985).

Weighing Factors Where Only Aggravating Found. — Since only aggravating factors were found, it would have been an exercise in futility to require the trial judge to make a specific finding that those factors outweighed nonexistent mitigating factors. *State v. Freeman*, 313 N.C. 539, 330 S.E.2d 465 (1985).

All Factors Must Be Considered. — Under subsection (a) of this section judges must consider all aggravating and mitigating factors before imposing a prison term other than the presumptive term. *State v. Parker*, 315 N.C. 249, 337 S.E.2d 497 (1985).

Trial Judge Not Bound By Jury's Finding. — The trial judge, in the sentencing phase of crimes coming within this section, was not bound by the jury's finding in the sentencing phase of a capital charge that the defendant had a reputation for good character in the community in which he lived and led a law abiding life for a substantial period of time prior to his present convictions, especially in the light of the fact that these mitigating factors were not supported by uncontradicted evidence. *State v. Freeman*, 313 N.C. 539, 330 S.E.2d 465 (1985).

Deterrence factor is embodied within each presumptive term, and courts should not consider it further in sentencing offenders. *State v. McGuire*, 78 N.C. App. 285, 337 S.E.2d 620 (1985).

Duty of Judge to Examine Evidence. — A duty is placed upon the judge to examine the evidence to determine if it would support any of the statutory factors even absent a request by counsel. *State v. Cameron*, 314 N.C. 516, 335 S.E.2d 9 (1985).

Proceedings Do Not Involve Finding of Elemental Facts. — The proceedings under the Fair Sentencing Act do not involve the finding of elemental facts beyond a reasonable doubt in the nature of a guilt or innocence trial. *State v. Jones*, 314 N.C. 644, 336 S.E.2d 385 (1985).

Findings Required. — The sentencing judge is required to make written findings in aggravation and mitigation, which findings must be proved by a preponderance of the evidence; that is, by the greater weight of the evidence. *State v. Parker*, 315 N.C. 249, 337 S.E.2d 497 (1985).

Weight Attached to Particular Factor Need Not Be Justified. — While the trial judge is required to justify a sentence which deviates from a presumptive term to the extent that he must make findings in aggravation and mitigation properly supported by the evidence and in accordance with the Act, a trial judge need not justify the weight he attaches to any factor. He may properly determine that one factor in aggravation outweighs more than one factor in mitigation and vice versa. *State v. Lane*, 77 N.C. App. 741, 336 S.E.2d 410 (1985).

Separate Findings Required for Each Offense. — In every case in which the sentencing judge is required to make findings in aggravation and mitigation to support a sentence which varies from the presumptive term, each offense, whether consolidated for hearing or not, must be treated separately, and separately

supported by findings tailored to the individual offense and applicable only to that offense. *State v. Parker*, 315 N.C. 249, 337 S.E.2d 497 (1985).

Separate findings must be made for each offense, even if the cases are consolidated for hearing. *State v. Ledford*, — N.C. —, 340 S.E.2d 309 (1986).

Failure to Make Findings on Lesser Offenses Consolidated for Judgment. — When cases are consolidated for judgment and the trial judge finds aggravating and mitigating factors as to the most serious offense, but fails to make such findings as to the lesser offenses consolidated, the defendant is not prejudiced, so long as the sentence given does not exceed the maximum sentence permissible for the most serious offense. *State v. Miller*, — N.C. —, 341 S.E.2d 531 (1986).

On resentencing, the trial court must make a new and fresh determination of the sufficiency of the evidence underlying each factor in aggravation and mitigation, including those factors previously found and affirmed by the appellate court. *State v. Daye*, 78 N.C. App. 753, 338 S.E.2d 557 (1986).

Finding of Different Factors at Later Hearing. — In proceedings under the Fair Sentencing Act the principles of double jeopardy do not bar the finding of aggravating and mitigating factors different from those found at an earlier sentencing hearing. *State v. Jones*, 314 N.C. 644, 336 S.E.2d 385 (1985).

At a de novo resentencing hearing brought about by a defendant, the trial court may find altogether new aggravating and mitigating factors, without regard to the findings in the prior sentencing hearings. *State v. Daye*, 78 N.C. App. 753, 338 S.E.2d 557 (1986).

A resentencing hearing is a de novo proceeding at which the trial judge may find aggravating and mitigating factors without regard to the findings made at the prior sentencing hearing. *State v. Swimm*, — N.C. —, 340 S.E.2d 65 (1986).

Finding in Earlier Hearing Not Law of Case. — The trial court erred during resentencing by treating the prior finding in aggravation that defendant was a danger to others, found in the original sentencing hearing and approved on appeal, as the law of the case. *State v. Daye*, 78 N.C. App. 753, 338 S.E.2d 557 (1986).

But May Be Binding Precedent. — If an appellate court has squarely ruled that certain evidence does not support a certain factor in aggravation or mitigation, and the identical evidence is offered at the resentencing hearing to support the same factor, the trial court on resentencing is bound by the appellate ruling, not because it is the law of the case, but because it is binding precedent directly on point.

This is not a limitation on the de novo nature of the resentencing proceeding; rather, it is a recognition that the trial court's rulings are always governed by applicable appellate decisions. *State v. Daye*, 78 N.C. App. 753, 338 S.E.2d 557 (1986).

Behavior Prior to Original Trial and Sentencing Hearing. — An inmate's good behavior prior to his original trial and/or sentencing hearing may be found as a nonstatutory mitigating factor, and his bad conduct during the same time frame may be found as a nonstatutory aggravating factor. *State v. Swimm*, — N.C. —, 340 S.E.2d 65 (1986).

Behavior Prior to Resentencing. — As § 15A-1335 prohibits the trial court from resentencing a defendant to a term of imprisonment greater than the prior sentence less the portion of the prior sentence previously served, a trial judge in North Carolina may not consider a defendant's bad conduct during the period between his conviction and his resentencing hearing to increase his sentence. However, bad conduct may be found by the trial judge as a nonstatutory aggravating factor to be utilized by the judge in deciding the sentence to be imposed, so long as the new sentence is no more severe than the original one. *State v. Swimm*, — N.C. —, 340 S.E.2d 65 (1986).

Failure to Do So Is Error. —

In accord with 1985 Cumulative Supplement. See *State v. Cameron*, 314 N.C. 516, 335 S.E.2d 9 (1985).

Sentence Below Presumptive Term. — Upon a finding of one or more mitigating factors and no aggravating factors, the question of whether to reduce the sentence below the presumptive term, and if so, to what extent, is within the trial court's discretion. *State v. Cain*, — N.C. App. —, 338 S.E.2d 898 (1986).

Presumptive Sentence Set by Criminal Statute. — In cases in which a statute mandates that an offender be punished as a felon of one of the classifications of subsection (f) of this section, but sets a minimum sentence greater than the presumptive sentence established in subsection (f), the minimum sentence set out in the criminal statute becomes the presumptive sentence for purposes of sentencing under the Fair Sentencing Act. *State v. Perry*, — N.C. —, 340 S.E.2d 450 (1986).

Burden of Showing Invalidity of Sentence in Excess of Presumptive Term. — Defendant sentenced to a term in excess of the presumptive sentence bears the burden of showing that the sentence imposed is invalid due to an abuse of discretion on the part of the trial judge or on the basis of procedural conduct or other circumstances prejudicial to him. *State v. Swimm*, — N.C. —, 340 S.E.2d 65 (1986).

Review. —

The Fair Sentencing Act does not allow appeal of a presumptive sentence as of right. *State v. Cain*, — N.C. App. —, 338 S.E.2d 898 (1986).

Scope of Review. —

A ruling committed to a trial judge's discretion will be upset only upon a showing that it could not have been the result of a reasoned decision. *State v. Cameron*, 314 N.C. 516, 335 S.E.2d 9 (1985).

Remand for New Hearing. —

In accord with second paragraph in main volume. See *State v. Bates*, 76 N.C. App. 676, 334 S.E.2d 73 (1985); *State v. Hayes*, 314 N.C. 460, 334 S.E.2d 741 (1985).

Where the trial judge was clearly acting under a misapprehension of the law when he determined that the penalty for first degree burglary, a Class C felony, was a mandatory life sentence, the trial judge could not have exercised his discretion in passing sentence, and it would be necessary to remand defendant's burglary conviction for a new sentencing hearing. *State v. Long*, — N.C. —, 340 S.E.2d 392 (1986).

Fair Sentencing Act has not taken away trial judge's discretion to impose either consecutive or concurrent sentences. *State v. Freeman*, 313 N.C. 539, 330 S.E.2d 465 (1985).

Consolidated Offenses. — Since the trial judge imposed prison terms which exceeded the total of the presumptive terms of each several consolidated offenses of murder and kidnapping, the statutory aggravating and mitigating factors had to be considered for both the murder and the kidnapping offenses. *State v. Miller*, 74 N.C. 760, 330 S.E.2d 71 (1985).

Applied in *State v. Ruiz*, 72 N.C. App. 425, 335 S.E.2d 32 (1985); *State v. Riggs*, — N.C. App. —, 339 S.E.2d 676 (1986).

Quoted in *State v. Corley*, 75 N.C. App. 245, 330 S.E.2d 819 (1985); *State v. Hensley*, 77 N.C. App. 192, 334 S.E.2d 783 (1985).

Cited in *State v. Harrington*, 78 N.C. App. 39, 336 S.E.2d 852 (1985); *Hicks v. Reese*, 624 F. Supp. 1116 (W.D.N.C. 1986); *State v. Ransom*, — N.C. App. —, 343 S.E.2d 232 (1986).

II. AGGRAVATING FACTORS.

Drug Activities Reasonably Related to Sentencing for Offense under § 90-95. — Where the evidence of defendant's bad character related in part to his activities in the illegal drug trade, it bore a reasonable relationship to the purposes of sentencing for offenses under § 90-95 by demonstrating his increased culpability and was a proper aggravating factor. *State v. Perry*, — N.C. —, 340 S.E.2d 450 (1986).

Conviction of offense covered may not

be aggravated by contemporaneous convictions of offenses joined with such offense. *State v. Westmoreland*, 314 N.C. 442, 334 S.E.2d 223 (1985); *State v. Hanes*, 77 N.C. App. 222, 334 S.E.2d 444 (1985).

It is error for an aggravating factor to be based on circumstances which are part of the very essence of a crime, because it can be presumed that the legislature was guided by this unfortunate fact when it established presumptive sentences. *State v. Bates*, 76 N.C. App. 676, 334 S.E.2d 73 (1985).

Where assault with a deadly weapon was a joined offense of which defendant was contemporaneously convicted, to aggravate armed robbery offense based on evidence of the assault would be improper. *State v. Bush*, 78 N.C. App. 686, 338 S.E.2d 590 (1986).

Failure to Perform a Mitigating Act Is Not an Aggravating Factor. — It is improper to aggravate a defendant's sentence for his failure to perform an act when the doing of the act would support the finding of a factor in mitigation. *State v. Coleman*, — N.C. App. —, 341 S.E.2d 750 (1986).

Since evidence which shows that defendant exhibited remorse for the crime could support finding the statutory mitigating factor that defendant voluntarily acknowledged wrongdoing prior to the arrest or at an early stage of the criminal process, assuming arguendo that the record contained evidence showing that defendant exhibited no remorse prior to arrest or at an early stage of the criminal process, this lack of remorse could not be the basis for an additional written finding of a factor in aggravation. *State v. Coleman*, — N.C. App. —, 341 S.E.2d 750 (1986).

An aggravating factor can properly be found only if the defendant has exhibited some behavior which serves to increase the offender's culpability. *State v. Bates*, 76 N.C. App. 676, 334 S.E.2d 73 (1985).

Same Factor May Aggravate More Than One Conviction. — The same factor may be used to aggravate more than one conviction. *State v. McCullers*, 77 N.C. App. 433, 335 S.E.2d 348 (1985).

Burden of Proof. — The state bears the burden of persuasion on aggravating factors. *State v. Parker*, 315 N.C. 249, 337 S.E.2d 497 (1985).

The state bears the burden of proof to establish the existence of aggravating factors if it seeks a term of imprisonment greater than the presumptive sentence. *State v. Thompson*, 314 N.C. 618, 336 S.E.2d 78 (1985).

Standard of Proof. — The existence of aggravating factors must be proved by a preponderance of the evidence. *State v. Thompson*, 314 N.C. 618, 336 S.E.2d 78 (1985).

Factual Allegations in Indictment Other-

wise Deemed Admitted. — Where a defendant pleads guilty to an indictment which contains factual allegations which could be the basis for the finding of an aggravating circumstance, and fails to challenge or present any evidence to rebut these factual allegations, they are deemed admitted and may be utilized by the trial court to establish the existence of the aggravating factor. *State v. Thompson*, 314 N.C. 618, 336 S.E.2d 78 (1985).

Defendant May Present Evidence Despite Guilty Plea. — Even where a defendant pleads guilty, he may challenge and present evidence at the sentencing hearing to rebut any factual allegations in the indictment or other criminal process which could be used to establish the existence of an aggravating circumstance. *State v. Thompson*, 314 N.C. 618, 336 S.E.2d 78 (1985).

Lack of Remorse. — For the state to prove lack of remorse as an aggravating circumstance, it is not enough to show merely that there was no remorse at the very time the crime was being committed. If, sometime after the commission of the crime, when defendant has had an opportunity to reflect on his criminal deed, remorse does not come, and there is evidence of this fact, then lack of remorse may properly be found by the sentencing judge as an aggravating circumstance. *State v. Parker*, 315 N.C. 249, 337 S.E.2d 497 (1985).

Evidence That Defendant Was Paid or Hired. — Under the Fair Sentencing Act there must be evidence that the defendant was paid or hired to commit the offense before the aggravating factor of pecuniary gain may be found. *State v. Hayes*, 314 N.C. 760, 334 S.E.2d 741 (1985).

Especially Heinous, Atrocious or Cruel — Focus Is on Brutality, Pain, or Suffering. — In determining whether an offense is especially heinous, atrocious or cruel, the focus should be on whether the facts of the case disclose excessive brutality, or physical pain, psychological suffering, or dehumanizing aspects not normally present in that offense. *State v. Brown*, 314 N.C. 588, 336 S.E.2d 388 (1985); *State v. Bush*, 78 N.C. App. 686, 338 S.E.2d 590 (1986).

In determining whether an offense is especially heinous, atrocious, or cruel, the focus should be on whether the facts disclose excessive brutality, or physical pain, psychological suffering, or dehumanizing aspects not normally present in that offense; the presence of multiple acts of the same offense is relevant in determining the question. *State v. Blalock*, 77 N.C. App. 201, 334 S.E.2d 441 (1985).

Same — Parent-Child Relationship. — The especially heinous, atrocious or cruel factor cannot be based on a parent-child relationship when, as for example in incest, the rela-

tionship is an element of the offense. *State v. Bush*, 78 N.C. App. 686, 338 S.E.2d 590 (1986).

Same — Armed Robbery of Mother by Son. — The armed robbery of a mother by her son involves those emotions which the parent-child relationship evokes and thus produces psychological suffering and victim dehumanization beyond that normally present in armed robbery offenses. Thus the finding that such an armed robbery offense was especially heinous, atrocious or cruel was proper. *State v. Bush*, 78 N.C. App. 686, 338 S.E.2d 590 (1986).

Same — Assault with Deadly Weapon. — Since only a single blow was necessary to prove an element of the offense of assault with a deadly weapon, and the evidence established the infliction of multiple blows with a hatchet, the court could properly find as to the assault offense that the offense was especially heinous, atrocious, or cruel. *State v. Bush*, 78 N.C. App. 686, 338 S.E.2d 590 (1986).

Time Between Acts of Violence and Death. — A factor bearing on physical and psychological suffering is the length of time between a defendant's acts of violence and the victim's death. *State v. Brown*, 314 N.C. 588, 336 S.E.2d 388 (1985).

Whether death resulted from multiple acts of violence and was immediate are factors properly considered in determining whether a murder is especially heinous, atrocious or cruel. *State v. Hines*, 314 N.C. 522, 335 S.E.2d 6 (1985).

Multiple Acts of Same Offense. — Where proof of one act constituting an offense is sufficient to sustain a defendant's conviction, multiple acts of the same offense are relevant to the question of sentencing, including whether the offense charged was especially heinous, atrocious, or cruel. *State v. Blalock*, 77 N.C. App. 201, 334 S.E.2d 441 (1985).

Impact on Victim. —

In accord with 1985 Cumulative Supplement. See *State v. Hines*, 314 N.C. 522, 335 S.E.2d 6 (1985).

The impact of the crime on the victim is relevant to the question of sentencing, and where the trial court properly finds physical or emotional injury in excess of that normally present in an offense, it may consider the injury as an additional factor in aggravation or as proof that the offense was especially heinous, atrocious, or cruel. *State v. Cofield*, 77 N.C. App. 699, 336 S.E.2d 439 (1985).

Evidence held to show both psychological and physical suffering beyond that normally present in the offense of second degree murder, so as to justify finding that the offense was especially heinous, atrocious, or cruel. *State v. Brown*, 314 N.C. 588, 336 S.E.2d 388 (1985).

The Age of the Victim. —

In accord with 3rd paragraph in 1985 Cumulative Supplement. See *State v. Hines*, 314 N.C. 522, 335 S.E.2d 6 (1985).

Although the State relied on evidence showing that the second-degree murder victim suffered from "battered child syndrome" in order to obtain a conviction (i.e., the age of the victim and the caretaker role of the defendant), the court did not err in sentencing by finding as aggravating circumstances that the victim was very young and that the defendant took advantage of a position of trust or confidence, as these factors are not elements of the offense. *State v. Hitchcock*, 75 N.C. App. 65, 330 S.E.2d 237, cert. denied, 314 N.C. 334, 333 S.E.2d 493 (1985).

Victim's Age Considered Only if Defendant Made More Blameworthy. — Age should not be considered as an aggravating factor in sentencing unless it makes the defendant more blameworthy than he or she already is as a result of committing a violent crime against another person. *State v. Hines*, 314 N.C. 522, 335 S.E.2d 6 (1985).

Age Must Make Victim More Vulnerable. — A victim's age does not make a defendant more blameworthy unless the victim's age causes the victim to be more vulnerable than he or she otherwise would be to the crime committed against him or her, as where age impedes a victim from fleeing, fending off attack, recovering from its effects, or otherwise avoiding being victimized; unless age has such an effect, it is not an aggravating factor under the Fair Sentencing Act. *State v. Hines*, 314 N.C. 522, 335 S.E.2d 6 (1985).

The vulnerability of the victim due to age and mental or physical infirmity is the concern addressed by the aggravating factor established by subdivision (a)1 j of this section that the victim was very young, or very old or mentally or physically infirm. *State v. Long*, — N.C. —, 340 S.E.2d 392 (1986).

It was error for the trial judge to aggravate sentence for felonious assault with the factor that the 11 and 14 year-old victims were very young, as the victims were not at the beginning of the age spectrum and the state failed to show that they were rendered more vulnerable to defendant's assault than the average person would be by reason of their age. *State v. Long*, — N.C. —, 340 S.E.2d 392 (1986).

Victim's Age Irrelevant in Theft from Unoccupied House. — Where the defendant simply entered and stole from an unoccupied house, the victim's age had nothing to do with it and the trial court erred in finding the victim's age as an aggravating factor. *State v. Fair*, 77 N.C. App. 681, 335 S.E.2d 783 (1985).

Pregnancy. — On conviction of assault with a deadly weapon inflicting serious injury, it

was not error for the trial judge to find the victim's advanced stage of pregnancy as a nonstatutory aggravating factor and based thereon to sentence the defendant to a term of years greater than the presumptive term provided for the offense. *State v. Artis*, — N.C. —, 342 S.E.2d 847 (1986).

Finding of Infirmary of Victim Not Proper Where Victim Had No Opportunity to Escape. — Where, at the time of the offense, the victim was wearing a heavy cast from her toes to her knee and could walk only with the assistance of crutches, and immediately after the victim opened her front door the defendant shot her four times and she had no opportunity, with or without a cast, to escape, it was improper for the trial court to find that the victim was infirm. *State v. Vaught*, — N.C. App. —, 342 S.E.2d 536 (1986).

"Prior Conviction" Defined. — This section contains no language to support the argument that the Legislature intended to define "prior conviction" as a conviction obtained before a later offense was committed; a fair reading of the statute defines "prior conviction" as one that is obtained before the defendant is sentenced for another offense. *State v. McCullers*, 77 N.C. App. 433, 335 S.E.2d 348 (1985).

An offense is a "prior conviction" under the Fair Sentencing Act only if the judgment has been entered and the time for appeal has expired, or the conviction has been upheld on appeal. When an accused is convicted with prayer for judgment continued, no judgment is entered, and no appeal is possible (until judgment is entered). Such a conviction therefor may not support a finding of an aggravating circumstance under subdivision (a)(1)o. *State v. Benfield*, 76 N.C. App. 453, 333 S.E.2d 753 (1985).

In finding prior convictions as an aggravating factor, it is improper for the court to consider his convictions in cases in which prayer for judgment was continued. *State v. Benfield*, 76 N.C. App. 453, 333 S.E.2d 753 (1985).

Convictions in which prayer for judgment was continued and no fines or other conditions imposed did not constitute "prior convictions" under the Fair Sentencing Act. *State v. Southern*, 314 N.C. 110, 331 S.E.2d 688 (1985).

Subdivision (a)(1)o does not include any time limit within which convictions must have occurred. *State v. Lane*, 77 N.C. App. 741, 336 S.E.2d 410 (1985); *State v. Moxley*, 78 N.C. App. 551, 338 S.E.2d 122 (1985).

Nor does it make any distinction among crimes of violence, property crimes and traffic offenses. *State v. Lane*, 77 N.C. App. 741, 336 S.E.2d 410 (1985).

Use of Offenses Not Charged but Admitted on Cross-Examination. — The trial

court's finding, as a nonstatutory aggravating factor at sentencing, that the defendant admitted during cross-examination that he had committed four criminal offenses punishable by more than 60 days' confinement, for which he was never charged, was not error, as if the fact of a defendant's prior convictions punishable by 60 days' confinement is reasonably related to the purposes of sentencing, the fact of a defendant's admitted commission of prior criminal offenses also punishable by 60 days' confinement is also so related. *State v. Moore*, 78 N.C. App. 77, 337 S.E.2d 66 (1985).

The prosecutor's unsworn statements as to defendant's criminal record were not competent evidence to support a finding of an aggravating factor that defendant had prior convictions. *State v. Frazier*, — N.C. App. —, 342 S.E.2d 534 (1986).

Failure to Provide Child Support. — The sentencing judge did not err in treating defendant's plea of nolo contendere to a charge of failure to provide child support as a prior conviction for a crime punishable by imprisonment for more than 60 days and an additional aggravating factor under subdivision (a)(1)o. *State v. Brown*, 314 N.C. 588, 336 S.E.2d 388 (1985).

Joinable Offenses Not Considered. — Subdivision (a)(1)o specifically prohibits, as an aggravating factor, the use of convictions for offenses joinable, under Chapter 15A, with the crime or crimes for which the defendant is currently being sentenced. *State v. McGuire*, 78 N.C. App. 285, 337 S.E.2d 620 (1985).

The commission of a joinable offense may not be used as an aggravating factor under the Fair Sentencing Act. *State v. Cofield*, 77 N.C. App. 699, 336 S.E.2d 439 (1985).

A conviction of an offense covered by the Fair Sentencing Act may not be aggravated by contemporaneous convictions of offenses joined with such offense. *State v. Jackson*, 77 N.C. App. 491, 335 S.E.2d 903 (1985).

Joinable Offense Not Charged May Not Be Used. — It is error to use as an aggravating factor evidence of an element of a joinable offense with which defendant has not been charged. In order for the trial court to impose a prison sentence on defendant for committing such an act, the State must charge the defendant and prove beyond a reasonable doubt that he committed the offense. *State v. McGuire*, 78 N.C. App. 285, 337 S.E.2d 620 (1985).

Joinable Offense May Not Form Basis for Nonstatutory Factor. — To permit the trial judge to find as a nonstatutory aggravating factor that the defendant committed the joinable offense would virtually eviscerate the purpose and policy of the statutory prohibition. *State v. Knox*, 78 N.C. App. 493, 337 S.E.2d 154 (1985); *State v. McGuire*, 78 N.C. App. 285, 337 S.E.2d 620 (1985).

Choking of Victim Who Stated She Would Report Crime Held Joinable. —

Finding of the trial court that after committing the offense of second-degree rape and thereafter stating to the victim that she was going to tell on him and have him hung, defendant choked the victim until she was unconscious involved an offense separate but joinable with the rape charge, which could not be used as an aggravating factor. *State v. Cofield*, 76 N.C. App. 699, 336 S.E.2d 439 (1985).

Robbery and malicious throwing of acid were joinable offenses under § 15A-926(a), which permits joinder of offenses based on the same act or transaction or on a series of acts or transactions connected together, and use of the fact that the acid was thrown after the robbery to aggravate sentence for the malicious throwing of acid was prohibited by subdivision (a)(1) of this section. *State v. Knox*, 78 N.C. App. 493, 337 S.E.2d 154 (1985).

Underlying Felony Not Considered Where Murder Verdict Did Not Specify Theory. — When a defendant is charged with both felony murder and premeditated and deliberate murder, but the jury returns a verdict of guilty for first-degree murder without specifying upon which theory it relied, the court is to treat the verdict as a conviction for felony murder. The merger rule would then prohibit the court from considering the underlying felony in the sentencing hearing. However, when the jury's verdict specifies both theories in its verdict of murder in the first degree, it is the court's decision, not that of the jury, to select the theory on which the sentence for the homicide is to be based. And where the sentence for homicide rests upon the premeditated and deliberate murder conviction, the merger rule does not apply. *State v. Fields*, 315 N.C. 191, 337 S.E.2d 518 (1985).

Defendant has burden of proving that his prior convictions may not be used as a factor in aggravation because of his indigency or representation by counsel at the time thereof. *State v. Benfield*, 76 N.C. App. 453, 333 S.E.2d 753 (1985).

Defendant has burden of proving that records of prior convictions are not in fact his. *State v. Benfield*, 76 N.C. App. 453, 333 S.E.2d 753 (1985).

A defendant's bad character and reputation can be a proper nonstatutory aggravating factor. *State v. Perry*, — N.C. —, 340 S.E.2d 450 (1986).

Use of Deadly Weapon — Manslaughter. —

Because it appears that the court erred in finding, in sentencing the defendant for voluntary manslaughter, as an aggravating factor, that the defendant killed her husband with a deadly weapon, the case was remanded for re-

sentencing. *State v. Heidmous*, 75 N.C. App. 488, 331 S.E.2d 200 (1985).

Same — Murder. — Court erred in finding as a statutory aggravating factor that defendant, who pleaded guilty to second degree murder, used a deadly weapon at the time of the crime. *State v. Coleman*, — N.C. App. —, 341 S.E.2d 750 (1986).

Same — Larceny. — It was not improper for the court to find the use of a deadly weapon at the time of the crime as a factor in aggravation of the larceny offense, even though evidence of its use was necessary to prove an essential element of the joinable offense of second-degree murder. *State v. Coleman*, — N.C. App. —, 341 S.E.2d 750 (1986).

It is proper to find as an aggravating factor in cases of assault inflicting serious injury that the offense involved damage causing great monetary loss, because the evidence of the great monetary loss is not an element of the offense itself and makes the crime worse than it would otherwise have been. *State v. Bryant*, — N.C. App. —, 341 S.E.2d 358 (1986).

"Damage causing great monetary loss" as an aggravating factor is not restricted to damage to property. *State v. Bryant*, — N.C. App. —, 341 S.E.2d 358 (1986).

Amount of Medical Expenses. — In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury, where the State did not offer evidence of the amount of the victim's medical expense until the sentencing hearing, and thus, the amount of monetary loss occasioned by the defendant's criminal acts was clearly not used by the State to prove any element of the offenses, it was not error for the trial court to find and consider, as a factor in aggravation of punishment, that the offense involved damage causing great monetary loss. *State v. Sowell*, — N.C. App. —, 342 S.E.2d 541 (1986).

Victim's uncontradicted testimony that he had personally seen medical bills totalling from \$30,000.00 to \$40,000.00 and that he had been informed that the total costs of his medical treatment would be between \$75,000.00 and \$100,000.00 was sufficient to support the trial court's finding of great monetary loss. *State v. Sowell*, — N.C. App. —, 342 S.E.2d 541 (1986).

Hospitalization and Lost Wages. — Since it is not necessary to prove hospitalization to show a serious injury, an assault resulting in serious injury becomes a worse crime if the injury results in hospitalization and absence from work which has a serious economic impact, a great monetary loss, to the victim. *State v. Bryant*, — N.C. App. —, 341 S.E.2d 358 (1986).

Where victim was supporting two minor

children on a gross income of about \$134.00 a week, hospital bill of \$5,000 and lost wage of \$1,000 occasioned by serious injury inflicted by defendant, who shot her, was a great monetary loss, making the crime worse than it would otherwise have been. Thus the trial court correctly found as an aggravating factor that the offense involved damages causing great monetary loss. *State v. Bryant*, — N.C. App. —, 341 S.E.2d 358 (1986).

Value of Stolen Property. — Trial court did not err in finding as a factor in aggravation that offense of felonious larceny involved the taking of property of great monetary value, where evidence tended to show that the value of the taxi cab taken was approximately \$3,000.00. *State v. Coleman*, — N.C. App. —, 341 S.E.2d 750 (1986).

Great Value of Personal Property. — The gist of subdivision (a)(1)m is the value of the property and not whether there was a taking or attempted taking of property. The aspect of the designated aggravating factor which permits enhancing the punishment is the great value of the personal property in possession of the defendant. *State v. Aldridge*, 76 N.C. App. 638, 334 S.E.2d 107 (1985), finding no error in the sentencing judge's marking as an aggravating factor in sentencing defendant for possession of stolen goods and being a habitual felon that the offense involved an attempted taking of property of great monetary value.

Failure to Aid Victim. — The trial court erred, in sentencing defendant on his plea to voluntary manslaughter, in finding as an aggravating factor defendant's failure to aid his victim, whom he left dying in a field. *State v. Bates*, 76 N.C. App. 676, 334 S.E.2d 73 (1985).

Especially Cruel Shooting. — The trial court erred in finding as a factor in aggravation that the offense was especially cruel, where the evidence in the case was that the unsuspecting victim was shot one time in the back. This shooting was no crueler than any other fatal shooting; indeed, since the victim did not know he was going to be shot it might have been less cruel than the usual face-to-face shooting. *State v. Nelson*, 76 N.C. App. 371, 333 S.E.2d 499, supersedeas granted, 314 N.C. 670, 337 S.E.2d 583 (1985).

Evidence that defendant, without provocation, went to victim's house and shot her four times with a .22 caliber pistol, leaving her seriously wounded, was not sufficient to support a finding that the assault was especially heinous, atrocious or cruel. *State v. Vaught*, — N.C. App. —, 342 S.E.2d 536 (1986).

Brutality in Second Degree Murder. — The State's evidence, which tended to show that the murder victims were pushed alive down a mine shaft and were alive for a very short while at the time of impact, failed to

show excessive brutality, physical pain, or psychological suffering not normally present in a second degree murder. *State v. Miller*, 74 N.C. App. 760, 330 S.E.2d 71, supersedeas granted, 313 N.C. 608, 332 S.E.2d 84 (1985).

Dangerous and Mentally Abnormal. — The trial court's finding as a factor in aggravation that defendant was a dangerous and mentally abnormal person would be upheld where the evidence showed that defendant suffered from Post Traumatic Stress Disorder at the time of the incident for which he was convicted, and the expert testimony also revealed strong indications that defendant had psychotic potential when he was under emotional stress. *State v. Avery*, 315 N.C. 1, 337 S.E.2d 786 (1985).

Absent evidence that a defendant poses a greater threat to the public than any other defendant convicted of assault with a deadly weapon with intent to kill inflicting serious injury, it is error to find this factor in aggravation. It must be assumed that in setting the presumptive sentence the General Assembly was aware that a person convicted of assault with a deadly weapon with intent to kill inflicting serious injury is a person who is dangerous to others. *State v. Vaught*, — N.C. App. —, 342 S.E.2d 536 (1986).

Pattern or Course of Violent Conduct. — Where, in addition to evidence relating to the violent acts committed by defendant at the date of the crimes in question, there was evidence that prior to that date defendant had hit several members of his family during attacks of rage, shot a gun while angry at one of his neighbors, hit his boss at another company where he once worked, and was involved in two fist fights, there was sufficient evidence that defendant had engaged in a pattern or course of violent conduct to support the judge's finding of that factor in aggravation, separate and apart from evidence of psychiatrist which supported the additional aggravating factor relating to defendant being a dangerous and mentally abnormal person. Thus the trial court's findings in aggravation were not based on the same term of evidence in violation of paragraph (a)1 p of this section. *State v. Avery*, 315 N.C. 1, 337 S.E.2d 786 (1985).

Position of Dominance. — Aggravating factor found by the trial court, that defendant occupied a position of leadership or dominance over the other participants in the commission of the offense and that defendant induced others to commit the crime, was supported by the evidence. *State v. Miller*, — N.C. —, 340 S.E.2d 290 (1986).

Intent to Sell Controlled Substance as Aggravating Factor. — Intent to sell is not an element of manufacturing, transporting or possessing 28 grams or more of heroin, the rea-

son a person possesses, manufactures or transports the heroin being irrelevant; therefore, the trial judge properly found as an aggravating factor that defendant had the specific intent to sell the heroin that he possessed. *State v. Perry*, — N.C. —, 340 S.E.2d 450 (1986).

Perjury. — Defendant's testimony must be undeniably perjured to constitute an "extreme case" and to warrant a finding of the aggravating factor that he committed perjury. *State v. Rogers*, — N.C. —, 341 S.E.2d 713 (1986).

Conspiracy. — Aggravating factor that defendant, although not charged with the crime of conspiracy, entered into a conspiracy to aid and abet another person in the commission of a felony held not supported by a preponderance of the evidence. *State v. Rogers*, — N.C. —, 341 S.E.2d 713 (1986).

Harmless Error in Factors Found. — Where defendant's sentence of 10 years imprisonment for four consolidated convictions of first degree kidnapping was less than the presumptive sentence for that crime, and trial judge found no mitigating factors to exist, any error in the aggravating factors found was harmless so far as defendant's sentence for kidnapping was concerned. *State v. Long*, — N.C. —, 340 S.E.2d 392 (1986).

New Hearing Required, etc. —

Where no evidence was presented which tended to show that defendant, convicted of obtaining and attempting to obtain a controlled substance by fraud and forgery, knew that her accomplice was armed, the nonstatutory aggravating factor that accomplice and deputy engaged in a gun battle in which accomplice was killed and the deputy was wounded, as found by the trial judge, was improper and a new sentencing hearing would be required. *State v. Baynard*, — N.C. App. —, 339 S.E.2d 810 (1986).

III. MITIGATING FACTORS.

Failure to find a mitigating factor, etc. —

In accord with 2nd paragraph in the 1985 Cumulative Supp. See *State v. Freeman*, 313 N.C. 539, 330 S.E.2d 465 (1985); *State v. Parker*, 315 N.C. 249, 337 S.E.2d 497 (1985).

Although failure to find a statutory mitigating factor supported by uncontradicted, substantial and manifestly credible evidence is reversible error, a trial judge's consideration of a nonstatutory factor which is (1) requested by the defendant, (2) proven by uncontradicted, substantial and manifestly credible evidence, and (3) mitigating in effect, is a matter entrusted to the sound discretion of the sentencing judge under subsection (a). *State v. Spears*, 314 N.C. 319, 333 S.E.2d 242 (1985); *State v. Cameron*, 314 N.C. 516, 335 S.E.2d 9 (1985).

The failure of the court to find a factor in mitigation urged by defendant will not be over-

turned on appeal unless the evidence in support of the factor is uncontradicted, substantial, and there is no reason to doubt its credibility. *State v. Lane*, 77 N.C. App. 741, 336 S.E.2d 410 (1985).

Where the evidence in support of a mitigating factor is uncontradicted and manifestly credible, it is error for the trial court to fail to find such mitigating factor. *State v. Bullard*, — N.C. App. —, 339 S.E.2d 664 (1986).

Court did not err in failing to find as a mitigating factor in sentencing defendant for felonious larceny and armed robbery that defendant was suffering from a physical condition which reduced his culpability, even though the court found this factor in mitigation of his second-degree murder offense, as when one sentencing hearing addresses multiple offenses, the trial judge must treat each offense separately and make separate findings as to the aggravating and mitigating factors for each. *State v. Coleman*, — N.C. App. —, 341 S.E.2d 750 (1986).

Failure to Find Nonstatutory Factor. —

A trial judge's failure to find a nonstatutory mitigating factor will not be disturbed on appeal absent a showing of abuse of discretion. *State v. Cameron*, 314 N.C. 516, 335 S.E.2d 9 (1985).

While a failure to find a statutory mitigating factor which is supported by uncontradicted, substantial and manifestly credible evidence is reversible error, a trial judge's failure to find a nonstatutory mitigating factor, even when that factor is (1) requested by defendant; (2) proven by uncontradicted, substantial and manifestly credible evidence; and (3) mitigating in effect, will not be disturbed absent a showing of abuse of discretion. *State v. Swimm*, — N.C. —, 340 S.E.2d 65 (1986).

The duty of the trial judge to find a mitigating factor that has not been submitted, etc. —

The trial judge only has a duty to find a statutory mitigating factor that was not submitted by defendant when the evidence offered at the sentencing hearing in support of the factor in mitigation is both uncontradicted and manifestly credible. *State v. Torres*, 77 N.C. App. 345, 335 S.E.2d 34 (1985).

The duty of the trial judge to find a statutory mitigating factor that has not been submitted by defendant arises only when defendant meets the burden of proof established in *State v. Jones*, 309 N.C. 214, 306 S.E.2d 451 (1983), i.e., the evidence in support of the statutory factor must be substantial, uncontradicted and manifestly credible. *State v. Rathbone*, — N.C. App. —, 336 S.E.2d 702 (1985).

Court Required to Find Factor Proved by Preponderance of Evidence. — The trial court is required to find a statutory mitigating

factor if proved by a preponderance of the evidence, even in the absence of a specific request. *State v. Thompson*, 314 N.C. 618, 336 S.E.2d 78 (1985).

A trial court must find a factor in mitigation if it is supported by uncontroverted, substantial and inherently credible evidence; on the other hand, should the defendant fail to produce such evidence, the trial judge may reject the proposed factors. *State v. Bare*, 77 N.C. App. 516, 335 S.E.2d 748 (1985), cert. denied, 315 N.C. 392, 338 S.E.2d 881 (1986).

The sentencing judge is required to find in mitigation any factor proved by uncontradicted, manifestly credible evidence. *State v. Seagroves*, 78 N.C. App. 49, 336 S.E.2d 684 (1985).

Nonstatutory Factors May Be Considered. — Regarding nonstatutory factors that are proven by a preponderance of the evidence and are reasonably related to the purposes of sentencing, such as conduct while awaiting sentencing, the trial judge may consider them, but such consideration is not required. *State v. Cameron*, 314 N.C. 516, 335 S.E.2d 9 (1985).

Defendant Bears Burden of Persuasion. —

In accord with 1st paragraph in 1985 Cumulative Supp. See *State v. Freeman*, 313 N.C. 539, 330 S.E.2d 465 (1985).

The defendant has the burden of proving mitigating factors by a preponderance of the evidence. *State v. Bare*, 77 N.C. App. 516, 335 S.E.2d 748 (1985), cert. denied, 315 N.C. 392, 338 S.E.2d 881 (1986).

The defendant bears the burden of proof to establish the existence of mitigating factors. *State v. Thompson*, 314 N.C. 618, 336 S.E.2d 78 (1985).

The defendant bears the burden of persuasion on mitigating factors. *State v. Parker*, 315 N.C. 249, 337 S.E.2d 497 (1985).

Defendant bears the burden of persuasion on mitigating factors if he seeks a term less than the presumptive. Thus, when a defendant argues that the trial court erred in failing to find a mitigating factor proved by uncontradicted evidence, his position is analogous to that of a party with the burden of persuasion seeking a directed verdict. *State v. Braswell*, 78 N.C. App. 498, 337 S.E.2d 637 (1985).

Evidence did not so clearly establish that defendant was a passive participant in murder that no reasonable inferences to the contrary could be drawn, and trial judge therefore did not err in failing to find this mitigating circumstance. *State v. Parker*, 315 N.C. 249, 337 S.E.2d 497 (1985).

A mental or physical condition, etc. —

Defendant's contention that as a result of having been shot he suffered from a mental or physical condition that reduced his culpability

was without merit, where he was wounded after he initiated a shootout. Mental and physical conditions recognized as possible mitigating factors have been those which existed prior to a defendant's criminal act. Since his own culpable conduct led to his being shot, he could not properly claim diminished responsibility on that account. *State v. Benfield*, 76 N.C. App. 453, 333 S.E.2d 753 (1985).

While a mental or physical condition, such as drug abuse, may be capable of reducing a defendant's culpability for an offense, evidence that the condition exists, without more, does not mandate consideration as a mitigating factor. *State v. Bush*, 78 N.C. App. 686, 338 S.E.2d 590 (1986).

Paid police informant who volunteered to purchase cocaine in furtherance of a police investigation was not a "victim" within the meaning of subsection (a)(2)g of this section. *State v. David*, — N.C. App. —, 342 S.E.2d 50 (1986).

Burden of Proof under Subdivision (a)(2)g. — Though under subdivision (a)(2)g of this section, a defendant is entitled to a factor in mitigation when the victim was more than 16 years of age and defendant's conduct was "consented to," the burden of establishing both the conditions stated is on the defendant. *State v. Elliott*, 77 N.C. App. 647, 335 S.E.2d 774 (1985).

Aid to Police after Repeated Refusals to Admit Wrongdoing. — Where police obtained a search warrant which led to the discovery of victim's body on the basis of defendant's statement, but they extracted this statement from defendant only after substantial time and effort and repeated refusals on the part of defendant to admit wrongdoing in connection with the offense, the sentencing judge could have found that whatever consideration defendant earned by helping police locate the body was offset by his earlier persistent denials of wrongdoing; thus judge's failure to find defendant's statement to be an early acknowledgment of wrongdoing was not an abuse of discretion. *State v. Brown*, 314 N.C. 588, 336 S.E.2d 388 (1985).

Prevention of Jailbreak. — The trial court did not err in failing to find defendant's possible prevention of a jailbreak as a mitigating factor. *State v. Cameron*, 314 N.C. 516, 335 S.E.2d 9 (1985).

Strong Provocation. — When evidence is offered to support a claim of a mitigating factor of strong provocation, the trial judge first must determine what facts are established by the preponderance of the evidence, and then determine whether those facts support a conclusion of strong provocation. Only if the evidence offered at the sentencing hearing so clearly establishes the fact in issue that no reasonable

inferences to the contrary can be drawn is the court compelled to find that the mitigating factor exists. *State v. Clark*, 314 N.C. 638, 336 S.E.2d 83 (1985).

Threat or Challenge Must Be Shown under Subdivision (a)(2)i. — Provision of subdivision (a)(2)i that an offense must be mitigated if "defendant acted under strong provocation, or the relationship between the defendant and the victim was otherwise extenuating" requires a showing of a threat or challenge by the victim to the defendant. *State v. Braswell*, 78 N.C. App. 498, 337 S.E.2d 637 (1985).

Provocation within the meaning of subdivision (a)(2)i requires a showing of a threat or challenge by the victim to the defendant. *State v. Benfield*, 76 N.C. App. 453, 333 S.E.2d 753 (1985).

One purpose of the mitigating factor of voluntarily acknowledging wrongdoing prior to arrest or at an early stage is to allow a sentencing judge to give some credit to a defendant who by early confession spares law enforcement officers expense and trouble which might otherwise be required to resolve the crime. Another purpose is to allow a sentencing judge to recognize that the earlier one admits responsibility, the better one's chance of rehabilitation. *State v. Brown*, 314 N.C. 588, 336 S.E.2d 388 (1985).

Defendant Must Admit Culpability to Prove Acknowledgment of Wrongdoing. — To prove the mitigating factor of acknowledging wrongdoing at an early stage, defendant must have admitted culpability, responsibility or remorse, as well as guilt. *State v. Rathbone*, 78 N.C. App. 58, 336 S.E.2d 702 (1985).

The court was not required to find as a mitigating factor that defendant voluntarily acknowledged wrongdoing at an early stage of the criminal process, based upon evidence that, following his arrest, he told officers of the location of knife and admitted striking victim, where the evidence failed to affirmatively show that defendant acknowledged wrongdoing and while he acknowledged striking victim, he denied that he cut and killed him, attributing the fatal blow to someone else. *State v. Bullard*, — N.C. App. —, 339 S.E.2d 664 (1986).

Acknowledgment Not at Early Stage. — Where warrants for defendant's arrest were issued on November 16, 1984, defendant was arrested 11 days later on November 27, 1984, and he did not admit his guilt until the day after his arrest, defendant was not entitled to a finding that he acknowledged his guilt at an early stage of the criminal process. *State v. Long*, — N.C. —, 340 S.E.2d 392 (1986).

"Criminal Process" Defined. — With regard to the mitigating factor of voluntarily acknowledging wrongdoing at an early stage of

the criminal process, "criminal process" begins upon either the issuance of a warrant or information, upon the return of a true bill of indictment or presentment, or upon arrest. A defendant is entitled to a finding of this statutory mitigating factor if his confession was made prior to the issuance of a warrant or information, prior to the return of a true bill of indictment or presentment, or prior to arrest, whichever comes first. Otherwise, it is for the trial judge to determine, in his discretion, whether a statement was made at a sufficiently early stage of the criminal process as to qualify as a mitigating circumstance. *State v. Thompson*, 314 N.C. 618, 336 S.E.2d 78 (1985).

With regard to subdivision (a)(2)l of this section, "criminal process" begins upon either the issuance of a warrant or information, upon the return of a true bill of indictment or presentment, or upon arrest; a defendant is entitled to a finding of this statutory mitigating factor if his confession was made prior to the issuance of a warrant or information, the return of a true bill of indictment or presentment, or prior to arrest, whichever comes first. *State v. Hayes*, 314 N.C. 760, 334 S.E.2d 741 (1985).

Confession after arrest is not automatically disqualified as a voluntarily acknowledgment of wrongdoing at an early stage of the criminal process. Rather, it is for the trial judge to decide, in his discretion, whether the statement was made at a sufficiently early stage of the criminal process to qualify as a mitigating factor. *State v. Brown*, 314 N.C. 588, 336 S.E.2d 388 (1985).

Retraction of Inculpatory Statement. — The mitigating factor set out in subdivision (a)(2)l of this section reflects the assumption that a person who admits guilt and acknowledges a responsibility for his actions shows a possibility of rehabilitation which should be rewarded; however, when a defendant later retracts an inculpatory statement, this assumption of the potential for rehabilitation disappears, and it is as though no inculpatory statement was ever made. Thus, if a defendant repudiates his inculpatory statement, he is not entitled to a finding of this mitigating circumstance. *State v. Hayes*, 314 N.C. 760, 334 S.E.2d 741 (1985).

Admission by defendant after arrest that he killed the victim did not constitute an admission of wrongdoing, where defendant denied culpability by contending that the shooting was justified by self-defense. *State v. Clark*, 314 N.C. 638, 336 S.E.2d 83 (1985).

Seventeen-Year-Old Is Aware That Murder Wrongful. — A person at 17 years of age should be as well aware as any person of the wrong involved in the commission of murder, and the court did not abuse its discretion in failing to find defendant's age a mitigating fac-

tor. *State v. Moore*, 78 N.C. App. 77, 337 S.E.2d 66 (1985).

Good moral character, etc. —

In accord with 2nd paragraph in 1985 Cumulative Supp. See *State v. Freeman*, 313 N.C. 539, 330 S.E.2d 465 (1985).

The trial judge justifiably concluded that four years without a conviction did not amount to leading a law-abiding life for a substantial period of time. *State v. Freeman*, 313 N.C. 539, 330 S.E.2d 465 (1985).

Testimony of defendant's character witness that, in essence, defendant was well behaved around her did not establish the fact of his good character or reputation in his community so clearly as to compel a finding of this mitigating circumstance. *State v. Brown*, 314 N.C. 588, 336 S.E.2d 388 (1985).

Evidence of defendant's good reputation was not "substantial, uncontradicted and manifestly credible," so as to compel the trial court to find it as a mitigating factor. *State v. Clark*, 314 N.C. 638, 336 S.E.2d 83 (1985).

Failure to Consider Military Service Was Error. — The failure of the trial judge to consider the defendant's honorable military service as a mitigating factor constituted error requiring that defendant be afforded a new sentencing hearing. *State v. Heath*, 77 N.C. App. 264, 335 S.E.2d 350 (1985).

The trial judge's refusal to even consider evidence of the defendant's honorable discharge from military service without documentary proof was error. *State v. Hanes*, 77 N.C. App. 222, 334 S.E.2d 444 (1985).

Rendering aid to victim is not statutory mitigating factor. — The Supreme Court of North Carolina stated that actions by a defendant in rendering aid to his victim should be encouraged and legislative consideration of making such circumstances a statutory mitigating factor would be appropriate, but declined to reach this goal under the guise of judicial construction. *State v. Blackstock*, 314 N.C. 232, 333 S.E.2d 245 (1985).

Good Work Record. — This section does not require the judge to find nonstatutory factors that the evidence establishes, it merely permits him to do so; thus, when the judge declined to find as a factor in mitigation that the defendant had a good work record, he was but exercising his discretion, for which there is no appellate relief in the absence of abuse. *State v. Elliott*, 77 N.C. App. 647, 335 S.E.2d 774 (1985).

Relationship Between Defendant and Victim. — In a prosecution for murder, although the evidence that defendant and victim had been arguing over an extended period of time was not contradicted, this evidence did not compel a finding that their relationship was "otherwise extenuating," because such evi-

dence did not necessarily lessen the seriousness of the crime committed. *State v. Bullard*, — N.C. App. —, 339 S.E.2d 664 (1986).

Insubstantial Loss to Victim. — The trial court did not err in failing to find, as a nonstatutory mitigating factor on sentencing defendant on convictions of felonious breaking or entering and felonious larceny, that victim suffered only insubstantial loss, where victim's loss was insubstantial merely because the police stopped defendant's accomplice in the middle of the larceny. *State v. Litchford*, 78 N.C. App. 722, 338 S.E.2d 575 (1986).

Behavior Pending Resentencing Hearing. — A defendant's good conduct while incarcerated during the period from his conviction until the time of his resentencing hearing may, in the discretion of the trial judge, be found as a nonstatutory mitigating factor under the Fair Sentencing Act. *State v. Swimm*, — N.C. —, 340 S.E.2d 65 (1986).

Defense Counsel's Statements Not Evidence of Mitigating Factors. — Absent a stipulation by the prosecution, statements made by defense counsel during argument at the sentencing hearing do not constitute evidence which would support a finding of nonstatutory mitigating factors. *State v. Swimm*, — N.C. —, 340 S.E.2d 65 (1986).

Factors Found by Jury in Capital Case Need Not Be Found by Judge in Non-Capital Case. — Fact that the trial court did not find as mitigating factors in noncapital felony cases all of the mitigating factors specifically found by the jury in the sentencing phase of capital case did not constitute error. *State v. Avery*, 315 N.C. 1, 337 S.E.2d 786 (1985).

IV. FACTORS CONSTITUTING ELEMENTS OF OFFENSE.

Since "malice" is not an element of voluntary manslaughter, the finding of malice as an aggravating factor did not violate the principle that evidence necessary to prove an element of the offense cannot be used to support a factor in aggravation. *State v. Heidmous*, 75 N.C. App. 488, 331 S.E.2d 200 (1985).

Possession of Firearm, etc. —

In a prosecution for first degree burglary, where the defendant broke into and entered a motel room by pointing a gun at the victim's head and driving him into the room, wherein he committed armed robbery, the trial court erred in sentencing him by considering as a factor in aggravation the use of a deadly weapon. If the evidence of the deadly weapon was removed, the state would have failed to prove three elements of the burglary: breaking, entering, and intent to commit a felony. *State v. Edwards*, 75 N.C. App. 588, 331 S.E.2d 183 (1985).

§ 15A-1340.7. Service of term of imprisonment; credit for good behavior; prisoner conduct rules; informing prisoner of release date; reentry parole and committed youthful offender parole.

CASE NOTES

Conduct Prior to Original Trial and Sentencing Hearing. — An inmate's good behavior prior to his original trial and/or sentencing hearing may be found as a nonstatutory mitigating factor, and his bad conduct during the same time frame may be found as a nonstatutory aggravating factor. *State v. Swimm*, — N.C. —, 340 S.E.2d 65 (1986).

Conduct Between Conviction and Presentencing. — As § 15A-1335 prohibits the trial court from resentencing a defendant to a term of imprisonment greater than the prior sentence less the portion of the prior sentence previously served, a trial judge in North Carolina may not consider a defendant's bad conduct during the period between his conviction and the resentencing hearing to increase his sentence. However, bad conduct may be found by the trial judge as a nonstatutory aggravating factor to be utilized by the judge in deciding the sentence to be imposed, so long as the new sentence is no more severe than the original one. *State v. Swimm*, — N.C. —, 340 S.E.2d 65 (1986).

A defendant's good conduct while incarcerated during the period from his conviction until the time of his resentencing hearing may, in the discretion of the trial judge, be found as a nonstatutory mitigating factor under the Fair Sentencing Act. *State v. Swimm*, — N.C. —, 340 S.E.2d 65 (1986).

Trial judge's remarks concerning the effect of "good time" and "gain time" were not an expression of dissatisfaction with the length of time convicted criminals must serve in prison, but were made in an effort to respond to defense counsel's impassioned argument concerning the fact that the defendant would be required to serve other sentences totalling four years at the expiration of the sentence at issue; thus, it could not be said from such remarks that the trial court was using the sentencing process to thwart the Fair Sentencing Act. *State v. Swimm*, — N.C. —, 340 S.E.2d 65 (1986).

ARTICLE 82.

Probation.

§ 15A-1341. Probation generally.

CASE NOTES

Probation or suspension of sentence, etc. —

In accord with main volume. See *State v. Hunter*, 315 N.C. 371, 338 S.E.2d 99 (1986).

Court has inherent power, etc. —

The adoption of this Article did not affect the inherent power of the court to suspend sentences in criminal cases upon reasonable and just conditions. This Article establishes cumulative and concurrent procedures which supplement rather than limit the inherent sentencing power of the court. This Article only provides the courts with additional authority concurrent with the inherent power of the court. *State v. Stallings*, — N.C. —, 342 S.E.2d 519 (1986).

And May Dictate Conditions of Probation. — Because a court has the inherent power to suspend a judgment upon reasonable and just conditions, the trial court need not rely on its additional statutory authority to dictate the conditions of probation. *State v. Stallings*, — N.C. —, 342 S.E.2d 519 (1986).

Due Process to Be Afforded Before Probation Is Revoked. — Under subsection (c) of this section, a defendant is given the election between imprisonment and probation in the first instance; and once he chooses probation, § 15A-1345 guarantees full due process before there can be a revocation of probation and a resulting prison sentence. *State v. Hunter*, 315 N.C. 371, 338 S.E.2d 99 (1986).

§ 15A-1342. Incidents of probation.

(a) Period. — The court may place a convicted offender on probation for a maximum of five years. The court may place a defendant as to whom prosecution has been deferred on probation for a maximum of two years. The probation remains conditional and subject to revocation during the period of probation imposed, unless terminated as provided in subsection (b) or G.S. 15A-1341(c).

The court with the consent of the defendant may extend the period of probation beyond five years (i) for the purpose of allowing the defendant to complete a program of restitution, or (ii) to allow the defendant to continue medical or psychiatric treatment ordered as a condition of the probation. The period of extension shall not exceed three years beyond the original period of probation. The special extension authorized herein may be ordered only in the last six months of the probation term.

(1977, c. 711, s. 1; 1977, 2nd Sess., c. 1147, ss. 6, 7; 1981, c. 377, ss. 4-6; 1983, c. 435, s. 5.1; c. 561, s. 7; 1985 (Reg. Sess., 1986), c. 960, s. 1.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 10,

1986, and applicable to persons placed on probation on or after July 10, 1986, and to persons on probation on July 10, 1986, added the second paragraph of subsection (a).

§ 15A-1343. Conditions of probation.

(b) Regular Conditions. — As regular conditions of probation, a defendant must:

- (1) Commit no criminal offense in any jurisdiction.
- (2) Remain within the jurisdiction of the court unless granted written permission to leave by the court or his probation officer.
- (3) Report as directed by the court or his probation officer to the officer at reasonable times and places and in a reasonable manner, permit the officer to visit him at reasonable times, answer all reasonable inquiries by the officer and obtain prior approval from the officer for, and notify the officer of, any change in address or employment.
- (4) Satisfy child support and other family obligations as required by the court.
- (5) Possess no firearm, explosive device or other deadly weapon listed in G.S. 14-269 without the written permission of the court.
- (6) Pay ten dollars (\$10.00) per month for probation supervision to the clerk of superior court. The clerk of superior court must transmit this money to the State of North Carolina to be deposited in the General Fund. No person placed on supervised probation may be required to pay more than one supervision fee per month.
- [(6) (See Editor's Note) Pay a supervision fee as specified in subsection (c1).]
- (7) Remain gainfully and suitably employed or faithfully pursue a course of study or of vocational training that will equip him for suitable employment.
- (8) Notify the probation officer if he fails to obtain or retain satisfactory employment.
- (9) Pay the costs of court, any fine ordered by the court, and make restitution or reparation as provided in subsection (d).

(10) Pay the State of North Carolina for the costs of appointed counsel, public defender, or appellate defender to represent him in the case(s) for which he was placed on probation.

(11) At a time to be designated by his probation officer, visit with his probation officer a facility maintained by the Division of Prisons.

In addition to these regular conditions of probation, a defendant required to serve an active term of imprisonment as a condition of special probation pursuant to G.S. 15A-1344(e) or G.S. 15A-1351(a) shall, as additional regular conditions of probation, obey the rules and regulations of the Department of Correction governing the conduct of inmates while imprisoned and report to a probation officer in the State of North Carolina within 72 hours of his discharge from the active term of imprisonment.

Regular conditions of probation apply to each defendant placed on supervised probation unless the presiding judge specifically exempts the defendant from one or more of the conditions in open court and in the judgment of the court. It is not necessary for the presiding judge to state each regular condition of probation in open court, but the conditions must be set forth in the judgment of the court.

Defendants placed on unsupervised probation are subject to the provisions of this subsection, except that defendants placed on unsupervised probation are not subject to the regular conditions contained in subdivisions (2), (3), (6), (8), and (11).

(c1) **Supervision Fee.** — Any person placed on supervised probation pursuant to subsection (a) shall pay a supervision fee of ten dollars (\$10.00) per month, unless exempted by the court. The court may exempt a person from paying the fee only for good cause and upon written motion of the person placed on supervised probation. No person shall be required to pay more than one supervision fee per month. The court may require that the fee be paid in advance or in a lump sum or sums, and a probation officer may require payment by such methods if he is authorized by subsection (g) to determine the payment schedule. Supervision fees must be paid to the clerk of court for the county in which the judgment was entered or the deferred prosecution agreement was filed. Fees collected under this subsection shall be transmitted to the State for deposit into the State's General Fund.

(1977, c. 711, s. 1; 1977, 2nd Sess., c. 1147, ss. 8-10; 1979, c. 662, s. 1; c. 801, s. 3; c. 830, s. 12; 1981, c. 530, ss. 1, 2; 1983, c. 135, s. 1; c. 561, ss. 1-6; c. 567, s. 2; c. 712, s. 1; 1983 (Reg. Sess., 1984), c. 972, ss. 1, 2; 1985, c. 474, ss. 1, 7, 8; 1985 (Reg. Sess., 1986), c. 859, ss. 1, 2.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 859, s. 1, provided: "G.S. 15A-1343(a)(6) is rewritten to read: '(6) Pay a supervision fee as specified in subsection (c1)'." However, subsection (a) of this section is not divided into subdivisions, and it is apparent that the amendment was intended to be made to subdivision (b)(6). At the direction of the Re-

visor of Statutes, the quoted language has been set out above in brackets immediately following the existing version of subdivision (b)(6).

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective October 1, 1986, and applicable only to offenses committed on or after that date, added subsection (c1). The amendment also purported to rewrite subdivision (a)(6). The rewritten language has been inserted in brackets following existing subdivision (b)(6). See the Editor's Note above.

CASE NOTES

I. GENERAL CONSIDERATION.

Discretion of Court. — The court has substantial discretion in devising conditions under subdivision (b1)(9) of this section. *State v. Harrington*, 78 N.C. App. 39, 336 S.E.2d 852 (1985).

A trial court need not make specific findings in support of its recommendation of work release. *State v. Hunt*, — N.C. App. —, 341 S.E.2d 350 (1986).

II. VALID CONDITIONS.

Where defendant was convicted of driving while impaired, the court did not err in imposing, as a condition of probation, the requirement that defendant not go upon the premises of any business or private club licensed by the state for the sale or the on-premises consumption of alcoholic beverages between 8:00 p.m. and 6:00 a.m. the following day, as such condition was reasonably aimed at preventing recurrence of the subject misconduct by keeping defendant away from alcohol in public places during the hours when he would most likely be tempted to drink and drive. *State v. Harrington*, 78 N.C. App. 39, 336 S.E.2d 852 (1985).

Money expended and not recovered by undercover agents of the State Bureau of Investigation making a buy to obtain evidence necessary to an arrest for illicit drug operations is a "particular damage or loss to it" and not part of the agency's "normal operating costs." "Normal operating costs" would include the salaries and compensation of agents, acquisition and maintenance of vehicles and other equipment, and office and administrative expenses but not money used by undercover agents to purchase illicit drugs. *State v. Stallings*, 77 N.C. App. 375, 335 S.E.2d 344, supersedeas and temporary stay denied, 314 N.C. 674, 335 S.E.2d 901 (1985).

Restitution of Amount Paid by State. — Where defendant was convicted of possession and delivery of cocaine, and the trial court offered him the option of serving a three-year active sentence or serving six months and paying \$600.00 restitution, and the amount ordered was patently relevant to the pecuniary injury inflicted upon the State by defendant's criminal activities, in that \$600.00 was paid by an agent of the State for the purchase of cocaine, the restitution ordered was reasonably related to the rehabilitative objectives of probation, and the condition was reasonable and just under the circumstances of the case. *State v. Stallings*, — N.C. —, 342 S.E.2d 519 (1986).

Constitutionality. — The provision in subsection (d) of this section "that no third party

shall benefit by way of restitution or reparation as a result of liability of that third party to pay indemnity to an aggrieved party for the damage or loss caused by the defendant" does not violate the equal protection clause of the federal Constitution or N.C. Const., Art. I, § 19 or Art. I, § 32. *State v. Stanley*, — N.C. —, 339 S.E.2d 668 (1986).

Subsection (d) merely precludes an indemnitor from receiving court-ordered restitution as a condition of a criminal defendant's probation. An indemnitor's right to pursue civil remedies against the criminal defendant, or against the insured to recover funds paid by the criminal defendant to the insured, remains intact. *State v. Stanley*, — N.C. App. —, 339 S.E.2d 668 (1986).

Restitution Order Precluded Where Victim Was Fully Compensated by Insurer. — Where the evidence established that the insurer paid the owner the largest fair market value figure contained in the evidence for vehicle destroyed by defendant, and since subsection (d) of this section prohibits restitution to the insurer, the court was without authority to order restitution as a condition of defendant's probation. *State v. Maynard*, — N.C. App. —, 338 S.E.2d 609 (1986).

Order Must Be Supported, etc. —

A recommendation of restitution must be supported by the evidence before the trial court. *State v. Hunt*, — N.C. App. —, 341 S.E.2d 350 (1986).

Amount of Restitution Must Be Supported by Evidence. — Regardless of whether restitution is ordered or recommended by the trial court, the amount must be supported by the evidence. *State v. Daye*, 78 N.C. App. 753, 338 S.E.2d 557 (1986).

Fair Market Value as Measure of Restitution. — The court could order defendant to pay to victim a sum no higher than the largest figure contained in the evidence representing fair market value as a condition of probation, where defendant destroyed victim's automobile in the course of unauthorized use of it. *State v. Maynard*, — N.C. App. —, 339 S.E.2d 666 (1986).

This section does not require the trial judge to find and enter facts when imposing a judgment of probation. Rather, it requires the court to take into consideration the resources of defendant, her ability to earn, her obligation to support dependents, and such other matters as shall pertain to her ability to make restitution or reparation. *State v. Hunter*, 315 N.C. 371, 338 S.E.2d 99 (1986).

Neither the Parole Commission, etc. —

A recommendation of restitution as a condition of work-release is not binding on the Pa-

role Commission or Department of Corrections. *State v. Daye*, 78 N.C. App. 753, 338 S.E.2d 557 (1986).

Review of Court's Recommendation. — Where there is some evidence as to the appro-

priate amount of restitution, the trial court's recommendation will not be overruled on appeal. *State v. Hunt*, — N.C. App. —, 341 S.E.2d 350 (1986).

§ 15A-1344.1. Procedure to insure payment of child support.

(d) When a defendant in a non-IV-D case, as defined in G.S. 110-129, fails to make required payments of child support and is in arrears, the clerk of superior court may mail by regular mail to the last known address of the defendant a notice of delinquency which shall set out the amount of child support currently due and which shall demand immediate payment of said amount. Failure to receive the delinquency notice shall not be a defense in any probation violation hearing or other proceeding thereafter. If the arrearage is not paid in full within 21 days after the mailing of the delinquency notice, or is not paid within 30 days after the defendant becomes delinquent if the clerk has elected not to send a delinquency notice, the clerk shall certify the amount due to the district attorney and probation officer, who shall initiate proceedings for revocation of probation pursuant to Article 82 of Chapter 15A or make a motion in the criminal case for income withholding pursuant to G.S. 110-136.5 or both.

When a defendant in a IV-D case, as defined in G.S. 110-129, fails to make required payments of child support and is in arrears, at the request of the IV-D obligee the clerk shall certify the amount due to the district attorney and probation officer, who shall initiate proceedings for revocation of probation pursuant to Article 82 of Chapter 15A or make a motion in the criminal case for income withholding pursuant to G.S. 110-136.5 or both. (1983, c. 567, s. 1; 1983 (Reg. Sess., 1984), c. 1100, ss. 1, 2; 1985 (Reg. Sess., 1986), c. 949, s. 7.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Section 9 of Session Laws 1985 (Reg. Sess., 1986), c. 949, provides: "Nothing in this act shall be construed as affecting

any garnishment proceeding heretofore or hereafter instituted." The act is effective October 1, 1986, pursuant to s. 10 of c. 949.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective October 1, 1986, rewrote subsection (d).

§ 15A-1345. Arrest and hearing on probation violation.

CASE NOTES

I. GENERAL CONSIDERATION.

Due Process to Be Afforded Prior to Revocation. — Under § 15A-1341(c), a defendant is given the election between imprisonment and probation in the first instance; and once he chooses probation, this section guarantees full due process before there can be a revocation of probation and a resulting prison sentence. *State v. Hunter*, 315 N.C. 371, 338 S.E.2d 99 (1986).

III. BURDEN AND STANDARD OF PROOF.

Burden of Proving Inability to Pay Fine or Restitution. — In a probation revocation proceeding based upon defendant's failure to pay a fine or restitution which was a condition of his probation, the burden is upon the defendant to offer evidence of his inability to pay money according to the terms of the probationary judgment. *State v. Jones*, 78 N.C. App. 507, 337 S.E.2d 195 (1985).

ARTICLE 83.

*Imprisonment.***§ 15A-1351. Sentence of imprisonment; incidents; special probation.**

(f) **Work Release.** — When sentencing a person convicted of a felony, the sentencing court may recommend that the sentenced offender be granted work release as authorized in G.S. 148-33.1. When sentencing a person convicted of a misdemeanor, the sentencing court may recommend or, with the consent of the person sentenced, order that the sentenced offender be granted work release as authorized in G.S. 148-33.1.

(1977, c. 711, s. 1; 1977, 2nd Sess., c. 1147, ss. 15-17; 1979, c. 749, ss. 5-7; c. 760, s. 4; 1985 (Reg. Sess., 1986), c. 1014, s. 201(a).)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 243, contains a severability clause.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 15, 1986, rewrote subsection (f).

§ 15A-1352. Commitment to Department of Correction or local confinement facility.

(d) Notwithstanding any other provision of law, when the sentencing court, with the consent of the person sentenced, orders that a person convicted of a misdemeanor be granted work release, the court may commit the person to a specific prison facility or local confinement facility within the county of the sentencing court in order to facilitate the work release arrangement. When appropriate to facilitate the work release arrangement, the sentencing court may, with the consent of the sheriff or board of commissioners, commit the person to a specific local confinement facility in another county, or, with the consent of the Department of Correction, commit the person to a specific prison facility in another county. The Department of Correction may transfer a prisoner committed to a specific prison facility to a different facility when necessary to alleviate overcrowding or for other administrative purposes. (1977, c. 711, s. 1; 1977, 2nd Sess., c. 1147, s. 18; 1979, c. 456, s. 1; c. 787, ss. 1, 2; 1985 (Reg. Sess., 1986), c. 1014, s. 201(b).)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 243, contains a severability clause.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 15, 1986, added subsection (d).

§ 15A-1353. Order of commitment when imprisonment imposed; release pending appeal.

(f) When the sentencing court, with the consent of the person sentenced, orders that a person convicted of a misdemeanor be granted work release, the following provisions must be included in the commitment, or in a separate order referred to in the commitment:

- (1) The date work release is to begin;
- (2) The prison or local confinement facility to which the offender is to be committed;
- (3) A provision that work release terminates the date the offender loses his job or violates the conditions of the work-release plan established by the Department of Correction; and
- (4) A determination whether the earnings of the offender are to be disbursed by the Department of Correction or the clerk of the sentencing court in the manner that the court in its order directs. (1977, c. 711, s. 1; 1979, c. 758, s. 1; 1983, c. 389; 1985 (Reg. Sess., 1986), c. 1014, s. 201(c).)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 243, contains a severability clause.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 15, 1986, added subsection (f).

§ 15A-1354. Concurrent and consecutive terms of imprisonment.

CASE NOTES

Fair Sentencing Act Did Not Remove, etc. —

The General Assembly, by leaving this section substantially intact when it enacted the Fair Sentencing Act, must have intended that

the sentencing judge retain discretion to impose consecutive sentences. *State v. Benfield*, 76 N.C. App. 453, 333 S.E.2d 753 (1985).

Applied in *State v. Grier*, 314 N.C. 59, 331 S.E.2d 669 (1985).

§ 15A-1355. Calculation of terms of imprisonment.

CASE NOTES

Conduct Prior to Original Trial and Sentencing. — An inmate's good behavior prior to his original trial and/or the sentencing hearing may be found as a nonstatutory mitigating factor, and his bad conduct during the same time frame may be found as a nonstatutory aggravating factor. *State v. Swimm*, — N.C. —, 340 S.E.2d 65 (1986).

Conduct Between Conviction and Resentencing. — As § 15A-1335 prohibits the trial court from resentencing a defendant to a term of imprisonment greater than the prior sentence less the portion of the prior sentence previously served, a trial judge in North Carolina

may not consider a defendant's bad conduct during the period between his conviction and the resentencing hearing to increase his sentence. However, bad conduct may be found by the trial judge as a nonstatutory aggravating factor to be utilized by the judge in deciding the sentence to be imposed, so long as the new sentence is no more severe than the original one. *State v. Swimm*, — N.C. —, 340 S.E.2d 65 (1986).

A defendant's good conduct while incarcerated during the period from his conviction until the time of his resentencing hearing may, in the discretion of the trial judge, be found as

a nonstatutory mitigating factor under the Fair Sentencing Act. *State v. Swimm*, — N.C. —, 340 S.E.2d 65 (1986).

Trial judge's remarks concerning the effect of "good time" and "gain time" were not an expression of dissatisfaction with the length of time convicted criminals must serve in prison, but were made in an effort to respond to defense counsel's impassioned argument

concerning the fact that the defendant would be required to serve other sentences totalling four years at the expiration of the sentence at issue; thus it could not be said by such remarks that the trial court was using the sentencing process to thwart the Fair Sentencing Act. *State v. Swimm*, — N.C. —, 340 S.E.2d 65 (1986).

ARTICLE 84.

Fines.

§ 15A-1361. Authorized fines and penalties.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 852, s. 17 amends Session Laws 1985, c. 764, s. 40, so as to change the effective date of the amendment to this section by c. 764 from July 1, 1986 to September 1, 1986.

Session Laws 1985, c. 764, s. 40, as amended by Session Laws 1985 (Reg. Sess., 1986), c. 852,

s. 17, provides: "This act shall become effective September 1, 1986, and shall apply to offenses committed on or after that date. Offenses committed before the effective date of this act [September 1, 1986] shall be governed by the law in effect at the time of the offense.

§ 15A-1364. Response to nonpayment.

CASE NOTES

Burden of Proving Inability to Pay. — In a probation revocation proceeding based upon defendant's failure to pay a fine or restitution which was a condition of his probation, the

burden is upon the defendant to offer evidence of his inability to pay money according to the terms of the probationary judgment. *State v. Jones*, 78 N.C. App. 507, 337 S.E.2d 195 (1985).

ARTICLE 85.

Parole.

§ 15A-1371. Parole eligibility, consideration, and refusal.

(h) **Community Service Parole.** — Notwithstanding the provisions of any other subsection herein, certain prisoners specified herein shall be eligible for community service parole, in the discretion of the Parole Commission.

Community service parole is early parole for the purpose of participation in a program of community service under the supervision of a probation/parole officer. A parolee who is paroled under this subsection must perform as a condition of parole 32 hours of community service for every month of his remaining active sentence, until at least his minimum sentence (if he was sentenced prior to July 1, 1981), or one-half of his sentence imposed under G.S. 15A-1340.4 has been completed by such community service, at which time parole may be terminated.

The probation/parole officer and the community service coordinator shall develop a program of community service for the parolee. The parolee must as a condition of parole complete at least 32 hours of community service per 30-day period. The community service coordinator shall report any willful failure

to perform community service work to the probation/parole officer. Parole may be revoked for any parolee who willfully fails to perform community service work as directed by a community service coordinator. The provisions of G.S. 15A-1376 shall apply to this violation of a condition of parole.

Community service parole eligibility shall be available to a prisoner:

- (1) Who is serving his first active sentence the term of which exceeds one year; and
- (2) Who, in the opinion of the Parole Commission, is unlikely to engage in further criminal conduct; and
- (3) Who agrees to complete service of his sentence as herein specified; and
- (4) Who has served one-half of his minimum sentence (if he was sentenced prior to July 1, 1981), or one-fourth of a sentence imposed under G.S. 15A-1340.4.

In computing the service requirements of subdivision (4) of this subsection, credit shall be given for good time and gain time credit earned pursuant to G.S. 148-13. Nothing herein is intended to create or shall be construed to create a right or entitlement to community service parole in any prisoner.

(i) A fee of one hundred dollars (\$100.00) shall be paid by all persons who participate in the Community Service Parole Program. That fee must be paid to the clerk of court in the county in which the parolee is released. The fee must be paid in full within two weeks unless the Parole Commission, upon a showing of hardship by the person, allows him additional time to pay the fee. The parolee may not be required to pay the fee before he begins the community service unless the Parole Commission specifically orders that he do so. Fees collected under this subsection shall be deposited in the General Fund. The fee imposed under this section may be paid as prescribed by the supervising parole officer. (1977, c. 711, s. 1; 1977, 2nd Sess., c. 1147, ss. 19A-22; 1979, c. 749, ss. 9, 10; 1979, 2nd Sess., c. 1316, s. 42; 1981, c. 63, s. 1; c. 179, s. 14; 1983 (Reg. Sess., 1984), c. 1098, s. 1; 1985, c. 453, ss. 1, 2; 1985 (Reg. Sess., 1986), c. 960, s. 2; c. 1012, ss. 2, 5.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendments, it is not set out.

Effect of Amendments. — Session Laws 1985 (Reg. Sess., 1986), c. 960, s. 2, effective July 10, 1986, and applicable to persons who are prisoners on or after July 10, 1986, added the first sentence of the last paragraph of subsection (h).

Session Laws 1985 (Reg. Sess., 1986), c. 1012, ss. 2 and 5, effective August 1, 1986, substituted "one hundred dollars (\$100.00)" for "fifty dollars (\$50.00)" in the first sentence of subsection (i) and added the last sentence of subsection (i).

ARTICLE 85A.

Parole of Certain Convicted Felons.

§ 15A-1380.2. Reentry parole of felons.

(c) The term of parole for a prisoner paroled under this section shall be 90 days. In the case of an inmate eligible for parole under G.S. 148-4.1 who has less than 180 days remaining on the maximum sentence, the Parole Commission may simultaneously parole and terminate supervision of the prisoner when the Commission finds that such action will not be incompatible with the public interest. In the case of an inmate eligible for parole under G.S. 148-4.1 who has 180 to 270 days remaining on the maximum sentence, the Parole

Commission may simultaneously parole and terminate supervision of the prisoner when the Secretary of Correction certifies that in his opinion the prisoner poses no threat to society and when the Commission finds that such action will not be incompatible with the public interest.

(d) The provisions of G.S. 15A-1373, 15A-1375, and 15A-1376 regarding incidents of parole, commencement of parole, and arrest and hearing on parole violation, shall be applicable to reentry parole of felons, except that G.S. 15A-1373(d) regarding the effect of violation shall not apply. The only conditions of reentry parole shall be those provided by G.S. 15A-1374(b)(6), (7), (8), (9), and (10) and G.S. 15A-1374(c). However, if it appears to the Parole Commission that the prisoner's return to the community poses a threat or danger to the health or safety of the public or the prisoner, the Parole Commission may require as additional conditions of reentry parole those provided by G.S. 15A-1374(b)(2) and (12). Provided, that where the Commission feels that supervision is appropriate for a person eligible for parole under the terms of G.S. 148-4.1 of the North Carolina General Statutes, the conditions applicable to such early parole shall be those provided for by G.S. 15A-1374(b) as specified by the Parole Commission.

(h) Community Service Parole. — Notwithstanding the provisions of any other subsection herein, certain prisoners specified herein shall be eligible for community service parole, in the discretion of the Parole Commission.

Community service parole is early parole for the purpose of participation in a program of community service under the supervision of a probation/parole officer. A parolee who is paroled under this subsection must perform as a condition of parole 32 hours of community service for every month of his remaining active sentence, until at least his minimum sentence (if he was sentenced prior to July 1, 1981), or one-half of his sentence imposed under G.S. 15A-1340.4 has been completed by such community service, at which time parole may be terminated.

The probation/parole officer and the community service coordinator shall develop a program of community service for the parolee. The parolee must as a condition of parole complete at least 32 hours of community service per 30-day period. The community service coordinator shall report any willful failure to perform community service work to the probation/parole officer. Parole may be revoked for any parolee who willfully fails to perform community service work as directed by a community service coordinator. The provisions of G.S. 15A-1376 shall apply to this violation of a condition of parole.

Community service parole eligibility shall be available to a prisoner:

- (1) Who is serving his first active sentence the term of which exceeds one year; and
- (2) Who, in the opinion of the Parole Commission, is unlikely to engage in further criminal conduct; and
- (3) Who agrees to complete service of his sentence as herein specified; and
- (4) Who has served one-half of his minimum sentence (if he was sentenced prior to July 1, 1981), or one-fourth of a sentence imposed under G.S. 15A-1340.4.

In computing the service requirements of subdivision (4) of this subsection, credit shall be given for good time and gain time credit earned pursuant to G.S. 148-13. Nothing herein is intended to create or shall be construed to create a right or entitlement to community service parole in any prisoner.

(i) A fee of one hundred dollars (\$100.00) shall be paid by all persons who participate in the Community Service Parole Program. That fee must be paid to the clerk of court in the county where the parolee is released. The fee must be paid in full within two weeks unless the Parole Commission, upon a showing of hardship by the person, allows him additional time to pay the fee. The

parolee may not be required to pay the fee before he begins the community service unless the Parole Commission specifically orders that he do so. Fees collected under this subsection shall be deposited in the General Fund. The fee imposed under this section may be paid as prescribed by the supervising parole officer. (1979, c. 760, s. 4; 1981, c. 662, s. 5; 1983, c. 547; c. 557, ss. 2, 3; 1983 (Reg. Sess., 1984), c. 1098, s. 1; 1985, c. 453, ss. 3, 4; 1985 (Reg. Sess., 1986), c. 859, s. 3; c. 960, s. 2; c. 1012, ss. 3, 6; c. 1014, s. 197(b).)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendments, it is not set out.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 243, contains a severability clause.

Effect of Amendments. — Session Laws 1985 (Reg. Sess., 1986), c. 859, s. 3, effective October 1, 1986, and applicable to persons released on parole on or after that date, substituted "G.S. 15A-1374(b)(6), (7), (8), (9), and (10) and G.S. 15A-1374(c)" for "G.S. 15A-1374(b)(6), (7), (8), (9), (10)" at the end of the second sentence of subsection (d).

Session Laws 1985 (Reg. Sess., 1986), c. 960, s. 2, effective July 10, 1986, and applicable to

persons who are prisoners on or after July 10, 1986, added the first sentence of the last paragraph of subsection (h).

Session Laws 1985 (Reg. Sess., 1986), c. 1012, ss. 3 and 6, effective August 1, 1986, substituted "one hundred dollars (\$100.00)" for "fifty dollars (\$50.00)" in the first sentence of subsection (i) and added the last sentence of subsection (i).

Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 197(b), effective July 15, 1986, substituted the present second and third sentences of subsection (c) for the former second sentence thereof, pertaining to parole and termination of supervision of prisoners eligible for parole under § 148-4.1.

SUBCHAPTER XIV. CORRECTION OF ERRORS AND APPEAL.

ARTICLE 89.

Motion for Appropriate Relief and Other Post-Trial Relief.

§ 15A-1411. Motion for appropriate relief.

CASE NOTES

Court's Authority To Strike Guilty Plea. — Neither the statutory nor the case law empowers the trial court with the absolute discretion to strike a guilty plea once it has been unconditionally accepted and entered. Thus, a trial court's discretion to strike a guilty plea and set a case for trial derives, if at all, from its

comparable authority to overturn a jury verdict and order a new trial. *State v. Oakley*, 75 N.C. App. 99, 330 S.E.2d 59 (1985).

Cited in *State v. Kinch*, 314 N.C. 99, 331 S.E.2d 665 (1985); *Rook v. Rice*, 783 F.2d 401 (4th Cir. 1986).

§ 15A-1414. Motion by defendant for appropriate relief made within 10 days after verdict.

CASE NOTES

Discretion of Court. —

In accord with 1985 Cumulative Supplement. See *State v. Ruiz*, 77 N.C. App. 425, 335 S.E.2d 32 (1985), cert. denied, 315 N.C. 395, 338 S.E.2d 885 (1986).

Refusal to Set Aside Verdict Within Court's Discretion. — A motion to set aside the verdict is a post-trial motion pursuant to this section, the disposition of which is within the discretion of the trial court. Therefore, re-

fusal to grant a motion to set aside the verdict is not error absent a showing of abuse of that discretion. *State v. Lilley*, 78 N.C. App. 100, 337 S.E.2d 89 (1985).

Trial court properly denied motion to set aside verdict under subsection (b)(2). — See *State v. Bates*, 313 N.C. 580, 330 S.E.2d 200 (1985).

§ 15A-1415. Grounds for appropriate relief which may be asserted by defendant after verdict and without limitation as to time.

Legal Periodicals. —

For note, "Prosecutor's Duty to Disclose Evidence," see 15 N.C. Cent. L.J. 128 (1984).

CASE NOTES

Granting of New Trial Is In, etc. —

In accord with main volume. See *State v. Oakley*, 75 N.C. App. 99, 330 S.E.2d 59 (1985); *State v. Hoots*, 76 N.C. App. 616, 334 S.E.2d 74 (1985).

And is not subject to review, etc. —

In accord with main volume. See *State v. Hoots*, 76 N.C. App. 616, 334 S.E.2d 74 (1985).

Showing Required for New Trial Based, etc. —

In accord with main volume. See *State v. Hoots*, 76 N.C. App. 616, 334 S.E.2d 74 (1985).

Applied in *State v. Kinch*, 314 N.C. 99, 331 S.E.2d 665 (1985).

§ 15A-1416. Motion by the State for appropriate relief.

CASE NOTES

State had no statutory right to make motion to set aside judgment on basis of newly discovered evidence. But, because the trial court could have set aside the judgment

on its own authority, allowing the State's motion was harmless error. *State v. Oakley*, 75 N.C. App. 99, 330 S.E.2d 59 (1985).

§ 15A-1417. Relief available.

CASE NOTES

No Authority To Grant Appropriate Relief Benefitting State. — The court, upon motion by the State, exceeded its authority in striking a guilty plea and setting the case for trial. The court did not have the authority to

grant "appropriate relief," pursuant to § 15A-1420(d), which benefitted the State. *State v. Oakley*, 75 N.C. App. 99, 330 S.E.2d 59 (1985).

§ 15A-1419. When motion for appropriate relief denied.

CASE NOTES

Cited in *Williams v. Gupton*, 627 F. Supp. 669 (W.D.N.C. 1986).

§ 15A-1420. Motion for appropriate relief; procedure.

CASE NOTES

No Authority To Grant Appropriate Relief Benefitting State. — The court, upon motion by the State, exceeded its authority in striking a guilty plea and setting the case for

trial. The court did not have the authority to grant "appropriate relief," pursuant to subsection (d), which benefitted the State. *State v. Oakley*, 75 N.C. App. 99, 330 S.E.2d 59 (1985).

ARTICLE 91.

Appeal to Appellate Division.

§ 15A-1443. Existence and showing of prejudice.

CASE NOTES

I. GENERAL CONSIDERATION.

Test for "Plain Error" Compared. — The test for "plain error" places a much heavier burden upon the defendant than that imposed by this section upon defendants who have preserved their rights by timely objection. *State v. Walker*, — N.C. —, 340 S.E.2d 80 (1986); *State v. Morgan*, — N.C. —, 340 S.E.2d 84 (1986); *State v. Gardner*, — N.C. —, 340 S.E.2d 701 (1986).

Burden of Proof. — On appeal the burden shifts: Once the motion to dismiss has been denied, defendant-appellant assumes the twin burdens of assuring that the record is properly made up and showing that error has occurred to his or her prejudice; if the record is deficient or silent upon a particular point, the reviewing court will presume that the trial judge acted correctly. *State v. White*, 77 N.C. App. 45, 334 S.E.2d 786, cert. denied, 315 N.C. 190, 337 S.E.2d 864 (1985).

Failure to Rule Formally on Objection to Evidence. — Ordinarily a party is entitled to a timely ruling on an objection to evidence. However, the failure to rule formally does not generally rise to the level of reversible error unless it is accompanied by other conduct of the trial judge evincing an opinion on the merits. *State v. Hicks*, — N.C. App. —, 339 S.E.2d 806 (1986).

Applied in *State v. Burgess*, 76 N.C. App. 534, 333 S.E.2d 563 (1985); *State v. Watts*, 77 N.C. App. 124, 334 S.E.2d 400 (1985); *State v. Hayes*, 314 N.C. 460, 334 S.E.2d 741 (1985); *State v. Hensley*, 77 N.C. App. 192, 334 S.E.2d 783 (1985); *State v. White*, 77 N.C. App. 45, 334 S.E.2d 786 (1985); *State v. Watkins*, 77 N.C. App. 325, 335 S.E.2d 232 (1985); *State v. Head*, — N.C. App. —, 338 S.E.2d 908 (1986); *State v. Satterfield*, — N.C. —, 340 S.E.2d 52

(1986); *State v. Ledford*, — N.C. —, 340 S.E.2d 309 (1986); *State v. Wrenn*, — N.C. —, 340 S.E.2d 443 (1986); *State v. Gordon*, — N.C. —, 342 S.E.2d 509 (1986).

Quoted in *State v. Heath*, — N.C. —, 341 S.E.2d 565 (1986).

Cited in *State v. Clark*, 314 N.C. 638, 336 S.E.2d 83 (1985); *State v. Smith*, 315 N.C. 76, 337 S.E.2d 833 (1985); *State v. Gregory*, 78 N.C. App. 565, 338 S.E.2d 110 (1985); *State v. Bush*, 78 N.C. App. 686, 338 S.E.2d 590 (1986); *State v. Hooper*, — N.C. App. —, 339 S.E.2d 70 (1986); *State v. McClintick*, — N.C. —, 340 S.E.2d 41 (1986); *State v. Riddick*, — N.C. —, 340 S.E.2d 55 (1986); *State v. DeLeonardo*, — N.C. —, 340 S.E.2d 350 (1986); *State v. Gardner*, — N.C. —, 340 S.E.2d 701 (1986); *State v. Triplett*, — N.C. —, 340 S.E.2d 736 (1986); *State v. Woods*, — N.C. —, 341 S.E.2d 545 (1986); *State v. Welch*, — N.C. —, 342 S.E.2d 789 (1986).

II. PREJUDICIAL ERROR.

When Error Not Relating to Constitutional Rights Is Prejudicial. — Errors relating to rights that do not arise under the federal Constitution are prejudicial when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at trial. *State v. Freeland*, — N.C. —, 340 S.E.2d 35 (1986); *State v. Gardner*, — N.C. —, 342 S.E.2d 872 (1986).

All Circumstances Considered. — Not every impropriety on the part of the judge results in prejudicial error; whether the judge's actions amount to reversible error is a question to be considered in light of all of the circumstances. *State v. Heath*, 77 N.C. App. 264, 335 S.E.2d 350 (1985).

Burden, etc. —

The burden is on the defendant to show prejudice. *State v. Heath*, 77 N.C. App. 264, 335 S.E.2d 350 (1985).

The defendant bears the additional burden, when challenging a jury instruction, to show that the jury was misled or misinformed by the charge as given, or that a different result would have been reached had the requested instruction been given. *State v. Carson*, — N.C. App. —, 343 S.E.2d 275 (1986).

Introduction of Evidence "Out of Turn". — Although the trial court committed error by allowing the State to introduce evidence of defendant's history of prior criminal activity "out of turn," the error was not prejudicial under the circumstances. *State v. Brown*, 315 N.C. 40, 337 S.E.2d 808 (1985).

III. HARMLESS ERROR.

Prosecutor's Question as to Details of Prior Conviction. — Where defendant testified on direct examination that he had been convicted of assault, the prosecutor's question

as to whether the assault involved a shooting was basically no more than an inquiry into whether the conviction was, in reality, one for a more serious offense, i.e., assault with a deadly weapon, and even if the inquiry was error, the error was not of such magnitude as to require a new trial under the test of prejudicial error contained in subsection (a). *State v. Rathbone*, 78 N.C. App. 58, 336 S.E.2d 702 (1985).

IV. RIGHTS UNDER U.S. CONSTITUTION.

Reading of Search Warrant Affidavit to Jury. — The trial court committed reversible error in permitting the witness in cocaine prosecution to read the entire search warrant affidavit to the jury, because the statements and allegations contained in the affidavit were hearsay statements which deprived the accused of his rights of confrontation and cross-examination. *State v. Edwards*, 315 N.C. 304, 337 S.E.2d 508 (1985).

§ 15A-1444. When defendant may appeal; certiorari.

CASE NOTES

The Fair Sentencing Act does not allow appeal of a presumptive sentence as of right. *State v. Cain*, — N.C. App. —, 338 S.E.2d 898 (1986).

Appeal under subsection (a)(1), etc. —

Where defendant was entitled to appeal as of right only in the case in which the sentence

exceeds the presumptive, the court neither erred nor abused its discretion in refusing to allow him to appeal in forma pauperis in the other cases. *State v. Benfield*, 76 N.C. App. 453, 333 S.E.2d 753 (1985).

Applied in *State v. Heath*, 77 N.C. App. 264, 335 S.E.2d 350 (1985).

§ 15A-1445. Appeal by the State.

CASE NOTES

I. GENERAL CONSIDERATION.

State had no statutory right to make motion to set aside judgment on basis of newly discovered evidence. But, because the trial court could have set aside the judgment on its own authority, allowing the State's motion was harmless error. *State v. Oakley*, 75 N.C. App. 99, 330 S.E.2d 59 (1985).

Cited in *State v. Harvey*, 78 N.C. App. 235, 336 S.E.2d 857 (1985).

II. NONAPPEALABLE ORDERS AND JUDGMENTS.

No Right to Appeal from Dismissal, etc. — A motion to dismiss pursuant to § 15A-1227 tests the sufficiency of the evidence to sustain a conviction and, in that respect, is identical to a motion for judgment as in the case of nonsuit under § 15-173. Therefore, following such dismissal defendant cannot again be placed in jeopardy upon these same charges, and the State has no right of appeal from the judgment entered. *State v. Ausley*, 78 N.C. App. 791, 338 S.E.2d 547 (1986).

§ 15A-1446. Requisites for preserving the right to appellate review.

CASE NOTES

Subdivision (d)(6) Unconstitutional. —

In accord with main volume. See *State v. O'Neal*, 77 N.C. App. 600, 335 S.E.2d 920 (1985).

Construction with Rule 10 of Appellate Procedure Rules. — When a conflict arises between a subsection of this section and Rule 10 of the Rules of Appellate Procedure, the Rules of Appellate Procedure should control. *State v. O'Neal*, 77 N.C. App. 600, 335 S.E.2d 920 (1985).

Failure to Note Exceptions, etc. —

Where there was no improperly overruled objection to the witness's competence due to

defendant's failure to object to the court's finding that she was competent, the defendant was precluded from using the exception in subdivision (d)(9) to assign error to her testimony on the ground that she was incompetent. *State v. Gordon*, — N.C. —, 342 S.E.2d 509 (1986).

Assignment of error dismissed for failure to make timely objection. — See *State v. Moore*, 75 N.C. App. 543, 331 S.E.2d 251, cert. denied, 315 N.C. 188, 337 S.E.2d 862 (1985).

Applied in *State v. Jackson*, 77 N.C. App. 491, 335 S.E.2d 903 (1985); *State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1985); *State v. Bunn*, — N.C. App. —, 339 S.E.2d 673 (1986).

SUBCHAPTER XV. CAPITAL PUNISHMENT.

ARTICLE 100.

Capital Punishment.

§ 15A-2000. Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.

Legal Periodicals. —

For 1984 survey, "Denying Mitigating Instructions in Capital Cases on Grounds of Relevancy," see 63 N.C.L. Rev. 1122 (1985).

For 1984 survey, "The Improper Use of Prosecutorial Discretion in Capital Punishment Cases," see 63 N.C.L. Rev. 1136 (1985).

For 1984 survey, "The Evolution of North Carolina's Comparative Proportionality Review in Capital Cases," see 63 N.C.L. Rev. 1146 (1985).

For symposium address on the death penalty in North Carolina, see 8 Campbell L. Rev. 1 (1985).

For article, "Prosecutorial Abuse of Peremptory Challenges in Death Penalty Litigation: Some Constitutional and Ethical Considerations," see 8 Campbell L. Rev. 71 (1985).

For article, "Rummaging Through a Wilderness of Verbiage, The Charge Conference, Jury Argument and Instructions," see 8 Campbell L. Rev. 269 (1986).

CASE NOTES

I. GENERAL CONSIDERATION.

Constitutionality. —

The Supreme Court would decline to reconsider its prior holdings upholding the constitutionality of the death penalty statute. *State v. Brown*, 315 N.C. 40, 337 S.E.2d 808 (1985).

The North Carolina jury process in first degree murder cases is constitutional. *State v. Rogers*, — N.C. —, 341 S.E.2d 713 (1986).

Procedure Held Constitutionally Ade-

quate. — Procedure during sentencing phase, whereby the jury was instructed to determine (1) whether there were aggravating circumstances; (2) whether the aggravating circumstances were sufficient to warrant a death sentence; (3) whether there were mitigating circumstances; and (4) whether the aggravating circumstances outweighed the mitigating ones, satisfied all requirements to which defendant was constitutionally entitled. *Rook v. Rice*, 783 F.2d 401 (4th Cir. 1986).

"Death Qualified" Jury, etc. —

Defendant was not deprived of her right to a fair trial because her jury was "death qualified." *State v. Spangler*, 314 N.C. 374, 333 S.E.2d 722 (1985).

Supreme Court would decline to reconsider its holdings on the matter of death-qualifying jury. *State v. Woods*, — N.C. —, 341 S.E.2d 545 (1986).

Discretion of Court in Questioning of Jury. — Both the State and defendant have a right to question prospective jurors about their views on the death penalty so as to insure a fair and impartial verdict. However, the trial court is vested with broad discretion in controlling the extent and manner of the inquiry into prospective jurors' qualifications in a capital case. *State v. Rogers*, — N.C. —, 341 S.E.2d 713 (1986).

Jury's Consideration Not to Be Restricted. — The jury's consideration of any factor relevant to the circumstances of the crime or the character of the defendant may not be restricted. *State v. Brown*, 315 N.C. 40, 337 S.E.2d 808 (1985).

Defendant Not Entitled To Make Both First and Last Final Argument. — While clearly providing the defendant with the opportunity to make the final argument at the penalty phase of the trial, neither subsection (a)(4) nor any other statutory provision gave the defendant the right to make both the first and last arguments. Furthermore, even had this been error, the fact that the defendant received a life sentence rather than the death penalty made the error harmless. *State v. Wilson*, 315 N.C. 516, 330 S.E.2d 450 (1985).

Cited in *State v. Westmoreland*, 314 N.C. 442, 334 S.E.2d 223 (1985); *State v. Jones*, 314 N.C. 644, 336 S.E.2d 385 (1985); *State v. Williams*, 315 N.C. 310, 338 S.E.2d 75 (1986); *State v. King*, — N.C. —, 340 S.E.2d 71 (1986); *State v. Sidden*, — N.C. —, 340 S.E.2d 340 (1986); *State v. Miller*, — N.C. —, 341 S.E.2d 531 (1986); *State v. Massey*, — N.C. —, 342 S.E.2d 811 (1986).

II. REVIEW OF JUDGMENT AND SENTENCE.

Court did not err in permitting murder case to be tried capitally and in permitting death qualification of the jury on grounds that the evidence was insufficient to obtain either a murder conviction or the death penalty. *State v. Moxley*, 78 N.C. App. 551, 338 S.E.2d 122 (1985).

Facts held to support the jury's decision to recommend a sentence of death. *State v. Gladden*, — N.C. —, 340 S.E.2d 673 (1986).

In light of the horrendous nature of the crimes perpetrated upon victim by defendant, who was found guilty of abducting, beating,

raping and running over victim with an automobile, the death sentence was not excessive as applied to him. *Rook v. Rice*, 783 F.2d 401 (4th Cir. 1986).

Pool of "Similar Cases," etc. —

In accord with 1985 Cumulative Supplement. See *State v. Brown*, 315 N.C. 40, 337 S.E.2d 808 (1985).

Death sentence held excessive and disproportionate. *State v. Rogers*, — N.C. —, 341 S.E.2d 713 (1986).

III. AGGRAVATING CIRCUMSTANCES.

A. In General.

The prosecution must be permitted to present any competent, relevant evidence relating to the defendant's character or record which will substantially support the imposition of the death penalty, so as to avoid an arbitrary or erratic imposition of the death penalty. *State v. Brown*, 315 N.C. 40, 337 S.E.2d 808 (1985).

Evidence of Violence Despite Stipulation to Same. — The prosecution may establish the use or threat of violence to the person in the commission of a prior felony by the testimony of witnesses, notwithstanding defendant's stipulation of the record of conviction, even where defendant was prepared to stipulate not just to the existence of convictions, but also to the fact that each involved the use or threat of violence. *State v. Brown*, 315 N.C. 40, 337 S.E.2d 808 (1985).

Perjury as Aggravating Factor. — The trial court did not err in finding as an aggravating factor as to armed robbery conviction that defendant took the stand and under oath repudiated his acknowledged wrongdoing, where the evidence established by a preponderance that the defendant committed perjury in so doing. *State v. Brown*, 315 N.C. 40, 337 S.E.2d 808 (1985).

E. Especially Heinous, Atrocious, or Cruel Act.

Propriety of Submitting Factor, etc. —

Aggravating factor that the killing was especially heinous, atrocious or cruel is appropriate when the killing demonstrates an unusual depravity of mind on the part of the defendant beyond that normally present in first-degree murder. *State v. Brown*, 315 N.C. 40, 337 S.E.2d 808 (1985); *State v. Gladden*, — N.C. —, 340 S.E.2d 673 (1986).

Subdivision (e)(9) Not Applicable to Every Homicide. —

In accord with 2nd paragraph in main volume. See *State v. Brown*, 315 N.C. 40, 337 S.E.2d 808 (1985); *State v. Gladden*, — N.C. —, 340 S.E.2d 673 (1986).

Although every murder may be character-

ized as heinous, atrocious, and cruel, this aggravating factor is not to be applied in every first-degree murder case, but only in cases in which the first-degree murder committed was especially heinous, especially atrocious, or especially cruel. *State v. Brown*, 315 N.C. 40, 337 S.E.2d 808 (1985).

Evidence to be Considered in Light Most Favorable to State. — In determining whether the evidence is sufficient to support a finding of essential facts which would support a determination that a murder was especially heinous, atrocious, or cruel, the evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn therefrom. *State v. Brown*, 315 N.C. 40, 337 S.E.2d 808 (1985); *State v. Gladden*, — N.C. —, 340 S.E.2d 673 (1986).

Evidence Held Sufficient. — Evidence that defendant robbed Zip Mart convenience store and forced the clerk to accompany him in her car to a secluded area approximately five miles away, where she was shot six times, that victim's hands had been bound, and that the principal cause of death was a gunshot wound to the right central lower back, but that the victim may have lived as long as 15 minutes after being shot, although she would have gone into shock during the last phases of life and would have lost consciousness in the later stages of shock, was sufficient to support submission of the aggravating factor that the murder was especially heinous, atrocious or cruel to the jury. *State v. Brown*, 315 N.C. 40, 337 S.E.2d 808 (1985).

Evidence held sufficient for trial judge to find that victims endured psychological and physical suffering beyond that normally present in a second degree murder, and thus to find as an aggravating factor that the murders were especially heinous, atrocious, or cruel. *State v. Miller*, — N.C. —, 341 S.E.2d 531 (1986).

Evidence Held Insufficient. — Where one wound was inflicted, to the jugular vein, and victim walked approximately 45 feet and collapsed, losing consciousness soon after the wound was inflicted, finding that murder was especially heinous, atrocious or cruel was not sufficiently supported by the evidence. *State v. Coleman*, — N.C. App. —, 341 S.E.2d 750 (1986).

F. Course of Conduct.

Evidence Held Sufficient. — Where the State presented substantial evidence that after

killing victim, defendant fired his weapon at another individual, intending to kill him, and the jury, by returning guilty verdicts, found beyond a reasonable doubt that defendant had committed this murder and assault, the trial court properly submitted the aggravating circumstance that the murder for which defendant stood convicted was part of a course of conduct in which defendant engaged and which included the commission by defendant of other crimes of violence against another person or persons to the jury for its consideration. *State v. Rogers*, — N.C. —, 341 S.E.2d 713 (1986).

IV. MITIGATING CIRCUMSTANCES.

A. In General.

The trial court did not err in refusing to peremptorily instruct the jury under subdivision (f)(3) of this section that victim was a voluntary participant in defendant's homicidal act, where the State produced ample evidence to contradict defendant's claim that victim initially attacked him with a knife. *State v. Gladden*, — N.C. —, 340 S.E.2d 673 (1986).

Rebuttal of Evidence of Mitigating Factors. — The prosecution is entitled to offer evidence designed to rebut mitigating circumstances only after defendant offers evidence in support of such mitigating factors. *State v. Brown*, 315 N.C. 40, 337 S.E.2d 808 (1985).

B. No Significant Prior Criminal Activity.

"Prior criminal activity" is not limited, etc. —

In accord with the main volume. See *State v. Gladden*, — N.C. —, 340 S.E.2d 673 (1986).

Submission of Mitigating Factor over Defendant's Objection. — The trial court did not commit prejudicial error by submitting to the jury, over his objection, the mitigating factor that defendant had no significant history of prior criminal activity, where despite evidence concerning his convictions on six counts of felony breaking or entering, six counts of felonious larceny, five counts of armed robbery, and one count of felonious assault in 1963 and 1965, defense counsel had strenuously argued that there was no evidence that defendant had committed any violent acts or violated any prison rules during the 18 years that he was incarcerated following such convictions, and where there was also evidence that defendant was only 20 years old when convicted of the 1965 offenses. *State v. Brown*, 315 N.C. 40, 337 S.E.2d 808 (1985).

§ 15A-2002. Capital offenses; jury verdict and sentence.**CASE NOTES**

The trial court has no power to overturn jury's sentencing recommendation. *State v. Brown*, 315 N.C. 40, 337 S.E.2d 808 (1985).

Chapter 18B.

Regulation of Alcoholic Beverages.

Article 6.

Elections.

Sec.

18B-600. Places eligible to hold alcoholic beverage elections.

Article 8.

Operation of ABC Stores.

Sec.

18B-805. Distribution of revenue.

ARTICLE 1.

General Provisions.

§ 18B-100. Purpose of Chapter.

Local Modification. — (As to this Chapter)

City of Concord: 1985 (Reg. Sess., 1986), c. 861, s. 1.

ARTICLE 2.

State Administration.

§ 18B-208. ABC Commission bonds and funds.

CASE NOTES

Bailment surcharge imposed on each case of distilled spirits shipped from ABC warehouse to ABC stores is not a tax; the cost of liquor enforcement is a burden incident to the privilege of buying spirituous liquors in the state and such a surcharge is not unconstitutional as a tax imposed in violation of N.C. Const., Art. II, § 23 or of N.C. Const., Art. V, § 2. *North Carolina Ass'n of ABC Bds. v. Hunt*, 76 N.C. App. 290, 332 S.E.2d 693, cert. denied, 314 N.C. 667, 336 S.E.2d 400 (1985).

tutional as a tax imposed in violation of N.C. Const., Art. II, § 23 or of N.C. Const., Art. V, § 2. *North Carolina Ass'n of ABC Bds. v. Hunt*, 76 N.C. App. 290, 332 S.E.2d 693, cert. denied, 314 N.C. 667, 336 S.E.2d 400 (1985).

ARTICLE 5.

Law Enforcement.

§ 18B-500. Alcohol law-enforcement agents.

CASE NOTES

Cited in North Carolina Ass'n of ABC Bds. v. Hunt, 76 N.C. App. 290, 332 S.E.2d 693 (1985).

§ 18B-501. Local ABC officers.

Local Modification. — Greensboro Alcoholic Beverage Control Board: 1985 (Reg. Sess., 1986), c. 886.

CASE NOTES

Cited in North Carolina Ass'n of ABC Bds.
v. Hunt, 76 N.C. App. 290, 332 S.E.2d 693 (1985).

ARTICLE 6.

Elections.

§ 18B-600. Places eligible to hold alcoholic beverage elections.

(g) Beautification District Elections. In a county where ABC stores have been approved by an election and a beautification district has been created after May, 1984, and prior to June 30, 1986, an election authorized by subsection (a) of this section may be called in the beautification district. The election shall be called in accordance with G.S. 18B-601(b), conducted, and the results determined in the same manner as county elections held under this Article. For purposes of this Article, beautification districts holding any election shall be treated on the same basis as counties, and municipalities located within those beautification districts shall be treated on the same basis as cities. (1937, c. 49, ss. 25, 26; c. 431; 1947, c. 1084, ss. 1, 2, 4; 1951, c. 999, ss. 1, 2; 1957, c. 816; 1963, c. 265, ss. 1-3; 1965, c. 506; 1969, c. 647, s. 1; 1971, c. 872, s. 1; 1973, cc. 32, 33; 1977, c. 149, s. 1; c. 182, s. 2; 1977, 2nd Sess., c. 1138, s. 15; 1979, c. 140, ss. 2, 3; c. 609, s. 1; c. 683, s. 13; 1979, 2nd Sess., c. 1174; 1981, c. 412, s. 2; c. 747, s. 49; 1983, c. 113, s. 1; 1983, c. 457, s. 2; 1985 (Reg. Sess., 1986), c. 919, s. 1.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 7, 1986, added subsection (g).

ARTICLE 7.

Local ABC Boards.

§ 18B-700. Appointment and organization of local ABC boards.

Local Modification. — City of Lumberton: 1985 (Reg. Sess., 1986), c. 811.

ARTICLE 8.

Operation of ABC Stores.

§ 18B-805. Distribution of revenue.

(b) Primary Distribution. — Before making any other distribution, a local board shall first pay the following from its gross receipts:

- (1) The board shall pay the expenses, including salaries, of operating the local ABC system.
- (2) Each month the local board shall pay to the Department of Revenue the taxes due the Department. In addition to the taxes levied under Chapter 105 of the General Statutes, the local board shall pay to the Department one third of the mixed beverages surcharge required by G.S. 18B-804(b)(8).
- (3) Each month the local board shall pay to the Department of Human Resources six and two-thirds percent ($6\frac{2}{3}\%$) of the mixed beverages surcharge required by G.S. 18B-804(b)(8). The Department of Human Resources shall spend those funds for the treatment of alcoholism or substance abuse, or for research or education on alcohol or substance abuse.
- (4) Each month the local board shall pay to the county commissioners of the county where the charge is collected the proceeds from the bottle charge required by G.S. 18B-804(b)(6), to be spent by the county commissioners for the purposes stated in subsection (h) of this section.

(h) Expenditure of Alcoholism Funds. — Funds distributed under subdivisions (b)(4) and (c)(3) of this section shall be spent for the treatment of alcoholism or substance abuse, or for research or education on alcohol or substance abuse. The minutes of the board of county commissioners or local board spending funds allocated under this subsection shall describe the activity for which the funds are to be spent. Any agency or person receiving funds from the county commissioners or local board under this subsection shall submit an annual report to the board of county commissioners or local board from which funds were received, describing how the funds were spent.

(1981, c. 412, s. 2; c. 747, s. 52; 1983, c. 713, ss. 102-104; 1985 (Reg. Sess., 1986), c. 1014, s. 116.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 243, contains a severability clause.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 1, 1986, rewrote the second sentence of subdivision

(b)(3), which read "The Department of Human Resources shall spend those funds on treatment of alcoholism or for research or education on alcohol abuse", and rewrote the first sentence of subsection (h), which read "Funds distributed under subdivisions (b)(4) and (c)(3) of this section shall be spent for treatment of alcoholism, or for research or education on alcohol abuse."

CASE NOTES

Cited in North Carolina Ass'n of ABC Bds. v. Hunt, 76 N.C. App. 290, 332 S.E.2d 693 (1985).

ARTICLE 10.

Retail Activity.

§ 18B-1005. Conduct on licensed premises.

CASE NOTES

Cited in *State v. Campbell*, — N.C. App. —,
339 S.E.2d 674 (1986).

Chapter 19.

Offenses Against Public Morals.

ARTICLE 1.

Abatement of Nuisances.

§ 19-2.1. Action for abatement; injunction.

CASE NOTES

Quoted in *State v. Felts*, — N.C. App. —, 339 S.E.2d 99 (1986).

Chapter 20.

Motor Vehicles.

Article 2.

Uniform Driver's License Act.

Sec.

20-24.1. Revocation for failure to appear or pay fine, penalty or costs for motor vehicle offenses.

20-24.2. Court to report failure to appear or pay fine, penalty or costs.

Article 3.

Motor Vehicle Act of 1937.

Part 3. Registration and Certificates of Titles of Motor Vehicles.

20-66. Renewal of registration; semipermanent plates issued; renewal sticker annually; fees.

Part 5. Issuance of Special Plates.

20-81.1. Special plates for amateur radio operators.

Part 7. Title and Registration Fees.

20-88.1. Driver training and safety education.

Part 9. The Size, Weight, Construction and Equipment of Vehicles.

20-115. Scope and effect of regulations in this title.

20-122. Restrictions as to tire equipment.

20-127. Windshields must be unobstructed.

20-130.1. Use of red or blue lights on vehicles prohibited; exceptions.

Part 10. Operation of Vehicles and Rules of the Road.

20-138.3. Driving by provisional licensee after consuming alcohol or drugs.

Part 12. Sentencing; Penalties.

20-176. Penalty for misdemeanor or infraction.

20-179. Sentencing hearing after conviction

Sec.

for impaired driving; determination of grossly aggravating and aggravating and mitigating factors; punishments.

20-179.2. Alcohol and drug education traffic school programs; guidelines and implementation by Commission for Mental Health, Mental Retardation and Substance Abuse Services; approval of Department of Human Resources; fees.

Article 3A.

Motor Vehicle Law of 1947.

Part 2. Equipment Inspection of Motor Vehicles.

20-183.7. Charges for inspections and certificates; safety equipment inspection station records.

Article 4.

State Highway Patrol.

20-189. Patrolmen assigned to Governor's office.

Article 9A.

Motor Vehicle Safety and Financial Responsibility Act of 1953.

20-279.21. "Motor vehicle liability policy" defined.

Article 17.

Motor Carrier Safety Regulation Unit.

Part 2. Authority and Powers of Division.

20-384. Safety regulations applicable to motor carrier and private carrier vehicles.

ARTICLE 1.

Division of Motor Vehicles.

§ 20-4.01. Definitions.

CASE NOTES

Constitutionality. — For case reaffirming the constitutionality of § 20-138.1(a)(2) and subdivision (33a) of this section, see *State v. Denning*, — N.C. —, 342 S.E.2d 855 (1986).

Alcohol Concentration. — Police officer who had been issued a permit to perform chemical analysis under the authority of § 20-139.1(b) by the Department of Human Resources was permitted by Subdivision (0.2) of this section to express alcohol concentration in terms of 210 liters of breath, as well as 100 milliliters of blood. *State v. Midgett*, 78 N.C. App. 387, 337 S.E.2d 117 (1985).

Driver. —

In accord with the 1985 Cumulative Supplement. See *State v. Fields*, 77 N.C. App. 304, 335 S.E.2d 69 (1985).

Public Vehicular Area. Evidence held to permit a finding that at the time in question

portion of park grounds legally in use as a parking lot was a "public vehicular area" within the meaning and intent of that phrase as used in subdivision (32), so as to permit a conviction under § 20-138.1(a) for impaired driving thereon. *State v. Carawan*, — N.C. App. —, 341 S.E.2d 96 (1986).

Under Influence of Impairing Substance.

— The offense of impaired driving is proven by evidence that defendant drove a vehicle on any highway in this State while his physical or mental faculties, or both, were "appreciably impaired by an impairing substance." *State v. George*, 77 N.C. App. 580, 335 S.E.2d 768 (1985).

Applied in *Indiana Lumbermens Mut. Ins. Co. v. Unigard Indem. Co.*, 76 N.C. App. 88, 331 S.E.2d 741 (1985); *Roseboro Ford, Inc. v. Bass*, 77 N.C. App. 363, 335 S.E.2d 214 (1985).

ARTICLE 2.

Uniform Driver's License Act.

§ 20-9. What persons shall not be licensed.

CASE NOTES

Statutes Governing Driving Privileges Civil in Nature. — Administration of statutes governing the issuance, revocation, suspension and cancellation of driving privileges is civil, rather than penal, in nature. *Smith v. Wilkins*, 75 N.C. App. 483, 331 S.E.2d 159 (1985).

Purpose of Subsection (f). — Subsection (f) is clearly designed to promote public safety on the highways and to protect motorists on North Carolina's highways from the hazards created by a person who has demonstrated disregard for the rules of safety while operating a motor vehicle. The enactment of laws to assure public safety on the state's highways is a valid exercise of the police power by the legislature. *Smith v. Wilkins*, 75 N.C. App. 483, 331 S.E.2d 159 (1985).

Subsection (f) imposes no durational res-

idency requirement to obtain a North Carolina driver's license, but requires only that the individual's license not be in a revoked status in another jurisdiction, and, consequently, does not violate the right to travel under the federal constitution. *Smith v. Wilkins*, 75 N.C. App. 483, 331 S.E.2d 159 (1985).

Persons Whose Licenses Are Revoked Elsewhere and Then Move to State. — All people who, as the result of traffic convictions, have their licenses revoked in other jurisdictions and then move to North Carolina are treated similarly under subsection (f), which is all that is required by the equal protection clause of the Fourteenth Amendment. *Smith v. Wilkins*, 75 N.C. App. 483, 331 S.E.2d 159 (1985).

§ 20-16. Authority of Division to suspend license.

CASE NOTES

I. IN GENERAL.

Stated in *State v. MaGee*, 75 N.C. App. 357, 330 S.E.2d 825 (1985).

§ 20-16.2. Implied consent to chemical analysis; mandatory revocation of license in event of refusal; right of driver to request analysis.

CASE NOTES

I. IN GENERAL.

Unconscious Driver. — Requiring the arrest of an unconscious driver would serve no sensible purpose; in such a case, the formal requirements of subsection (a) of this section are not meant to apply. *State v. Hollingsworth*, 77 N.C. App. 36, 334 S.E.2d 463 (1985).

In a prosecution for involuntary manslaughter and driving under the influence, the performance of a blood alcohol test on blood seized from an unconscious defendant pursuant to subsection (b) of this section did not violate the defendant's rights under the Fourth Amendment of the U.S. Constitution and N.C. Const., Art. 1, § 20, relating to search and seizure, be-

cause of (1) the existence of probable cause to arrest; (2) the limited nature of the intrusion upon the person; and (3) the destructibility of the evidence. *State v. Hollingsworth*, 77 N.C. App. 36, 334 S.E.2d 463 (1985).

III. REVOCATION OF LICENSE FOR REFUSAL TO TAKE TEST.

Refusal to Provide More Than Two Samples. — Where petitioner provided two breath samples resulting in readings of .28 and .31 and then refused to provide any more samples, her conduct amounted to a willful refusal under subsection (c) of this section within the meaning of § 20-139.1(b3). *Watson v. Hiatt*, 78 N.C. App. 609, 337 S.E.2d 871 (1985).

§ 20-16.5. Immediate civil license revocation for certain persons charged with implied-consent offenses.

CASE NOTES

Constitutionality. — The summary 10 day revocation required by this section does not violate the equal protection rights guaranteed by the state and federal Constitutions. *Henry v. Edmisten*, — N.C. —, 340 S.E.2d 720 (1986).

The Safe Roads Act's prehearing suspension provisions do not deprive persons whose licenses have been suspended for a 10 day period following their failure of a breath analysis test of property without due process of law. *Henry v. Edmisten*, — N.C. —, 340 S.E.2d 720 (1986).

Because the summary 10 day license revocation under this section upon a person's failure to pass a breath analysis test is a remedial measure reasonably related to the State's interest in highway safety, the law of the land is satisfied by judicial review of the State's action to determine if there is probable cause to believe the conditions justifying revocation exist.

The Safe Roads Act provides for such review, as under subsection (e) of this section, before revocation can take place, a detached and impartial judicial officer must scrutinize every condition of revocation to determine if each condition probably has been met. *Henry v. Edmisten*, — N.C. —, 340 S.E.2d 720 (1986).

The summary 10 day revocation procedure of this section is not a punishment, but a highway safety measure. *Henry v. Edmisten*, — N.C. —, 340 S.E.2d 720 (1986).

Duration of 10 Day Revocation. — Under subsection (e) of this section, the summary 10-day revocation continues until the person has paid the applicable costs and at least 10 days have elapsed from the date the revocation order is issued. *Henry v. Edmisten*, — N.C. —, 340 S.E.2d 720 (1986), rejecting the contention that revocation continues until 10 days from

the date the revocation order is issued and the date the person has paid the applicable costs, whichever occurs last.

§ 20-17. Mandatory revocation of license by Division.

CASE NOTES

I. IN GENERAL.

Stated in *Henry v. Edmisten*, — N.C. —, 340 S.E.2d 720 (1986).

§ 20-19. Period of suspension or revocation.

CASE NOTES

Applied in *Smith v. Wilkins*, 75 N.C. App. 483, 331 S.E.2d 159 (1985).

§ 20-24. When court to forward license to Division and report convictions.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 852, s. 17 amends Session Laws 1985, c. 764, s. 40, so as to change the effective date of this section from July 1, 1986 to September 1, 1986.

Session Laws 1985, c. 764, s. 40, as amended by Session Laws 1985 (Reg. Sess., 1986), c. 852,

s. 17, provides: "This act shall become effective September 1, 1986, and shall apply to offenses committed on or after that date. Offenses committed before the effective date of this act [September 1, 1986] shall be governed by the law in effect at the time of the offense.

§ 20-24.1. Revocation for failure to appear or pay fine, penalty or costs for motor vehicle offenses.

(b) A license revoked under this section remains revoked until the person whose license has been revoked:

- (1) appears to answer the charge; or
- (2) demonstrates to the court that he is not the person charged with the offense; or
- (3) pays the penalty, fine, or costs ordered by the court; or
- (4) demonstrates to the court that his failure to pay the penalty, fine, or costs was not willful and that he is making a good faith effort to pay or that the penalty, fine, or costs should be remitted.

Upon receipt of notice from the court that the person has satisfied the conditions of this subsection applicable to his case, the Division must restore the person's license as provided in subsection (c). In addition, if the person whose license is revoked is not a resident of this State, the Division may notify the driver licensing agency in the person's state of residence that the person's license to drive in this State has been revoked.

(c) If the person satisfies the conditions of subsection (b) that are applicable to his case before the effective date of the revocation order, the revocation order must be rescinded and the person does not have to pay a restoration fee. For all other revocation orders issued pursuant to this section, the person must pay the restoration fee required by G.S. 20-7(i1) and satisfy any other applicable requirements of this Article before he may be relicensed.

(e) As used in this section and in G.S. 20-24.2, the word offense includes crimes and infractions created by this Chapter. (1985, c. 764, s. 19; 1985 (Reg. Sess., 1986), c. 852, ss. 4-6, 9.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 852, s. 17 amends Session Laws 1985, c. 764, s. 40, so as to change the effective date of this section from July 1, 1986 to September 1, 1986.

Session Laws 1985, c. 764, s. 40, as amended by Session Laws 1985 (Reg. Sess., 1986), c. 852, s. 17, provides: "This act shall become effective September 1, 1986, and shall apply to offenses committed on or after that date. Offenses committed before the effective date of this act [Sep-

tember 1, 1986] shall be governed by the law in effect at the time of the offense.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective September 1, 1986, rewrote the catchline to this section, which formerly read "Revocation for failure to appear or comply with sanctions in offenses", in subdivision (b)(2) substituted "offense" for "infraction", inserted "fine, or costs" in subdivision (b)(3) and in two places in subdivision (b)(4), substituted "G.S. 20-7(i1)" for "G.S. 20-7(o)" in the second sentence of subsection (c), and added subsection (e).

§ 20-24.2. Court to report failure to appear or pay fine, penalty or costs.

The court must report to the Division the name of any person charged with a motor vehicle offense under this Chapter who:

- (1) Fails to appear to answer the charge as scheduled, unless within 20 days after the scheduled appearance, he either appears in court to answer the charge or disposes of the charge pursuant to G.S. 7A-146; or
- (2) Fails to pay a fine, penalty, or costs within 20 days of the date specified in the court's judgment. (1985, c. 764, s. 3; 1985 (Reg. Sess., 1986), c. 852, s. 3.)

Editor's Note. — This section was formerly § 15A-1117, as enacted by Session Laws 1985, c. 764, s. 3. It was rewritten and recodified as this section by Session Laws 1985 (Reg. Sess., 1986), c. 852, s. 3, effective September 1, 1986.

Session Laws 1985, c. 764, s. 40 had originally provided that § 15A-1117 would become effective July 1, 1986. However, Session Laws 1985 (Reg. Sess., 1986), c. 852, s. 17 amends Session Laws 1985, c. 764, s. 40, so as to

change the effective date of the section from July 1, 1986 to September 1, 1986. As amended by Session Laws 1985 (Reg. Sess., 1986), c. 852, s. 17, Session Laws 1985, c. 764, s. 40 provides: "This act shall become effective September 1, 1986, and shall apply to offenses committed on or after that date. Offenses committed before the effective date of this act [September 1, 1986] shall be governed by the law in effect at the time of the offense."

§ 20-25. Right of appeal to court.

CASE NOTES

Cited in *Smith v. Wilkins*, 75 N.C. App. 483, 331 S.E.2d 159 (1985).

§ 20-28.1. Conviction of moving offense committed while driving during period of suspension or revocation of license.

CASE NOTES

Odometer alteration prohibited by § 20-343 is a violation of the motor vehicle laws of North Carolina as that term is used

in subsection (c) of this section. *Evans v. Roberson*, 314 N.C. 315, 333 S.E.2d 228 (1985).

ARTICLE 2A.

Afflicted, Disabled or Handicapped Persons.

§ 20-37.6. Handicapped; drivers and passengers; parking privileges.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 852, s. 17 amends Session Laws 1985, c. 764, s. 40, so as to change the effective date of the amendment to this section by c. 764 from July 1, 1986 to September 1, 1986.

Session Laws 1985, c. 764, s. 40, as amended by Session Laws 1985 (Reg. Sess., 1986), c. 852,

s. 17, provides: "This act shall become effective September 1, 1986, and shall apply to offenses committed on or after that date. Offenses committed before the effective date of this act [September 1, 1986] shall be governed by the law in effect at the time of the offense.

ARTICLE 2B.

Special Identification Cards for Nonoperators.

§ 20-37.7. Special identification card.

Cited in *State v. Fair*, 77 N.C. App. 681, 335 S.E.2d 783 (1985).

ARTICLE 3.

Motor Vehicle Act of 1937.

Part 3. Registration and Certificates of Titles of Motor Vehicles.

§ 20-52.1. Manufacturer's certificate of transfer of new motor vehicle.

Legal Periodicals. — For 1984 survey, "The Application of the North Carolina Motor Vehicle Act and the Uniform Commercial Code

to the Sale of Motor Vehicles by Consignment," see 63 N.C.L. Rev. 1105 (1985).

§ 20-58.1. Duty of the Division upon receipt of application for notation of security interest.

Legal Periodicals. — For 1984 survey, "The Application of the North Carolina Motor Vehicle Act and the Uniform Commercial Code

to the Sale of Motor Vehicles by Consignment," see 63 N.C.L. Rev. 1105 (1985).

§ 20-58.8. Applicability of §§ 20-58 to 20-58.8; use of term "lien."

CASE NOTES

Car held in inventory by a used car business fell within the provisions of subdivision (b)(3) of this section and § 25-9-302(3)(b).

North Carolina Nat'l Bank v. Robinson, 78 N.C. App. 1, 336 S.E.2d 666 (1985).

§ 20-66. Renewal of registration; semipermanent plates issued; renewal sticker annually; fees.

(d) The Division may also provide for the issuance of license plates for motor vehicles with the dates of expiration thereof to vary from month to month so as to approximately equalize the number that expire during a registration period of one or two years. A person may purchase a license plate for a period of two years, but the Division shall not solicit, encourage, or require the purchase of a license plate for a period of more than one year.

(1937, c. 407, s. 30; 1955, c. 554, s. 3; 1973, c. 1389, s. 1; 1975, c. 716, s. 5; 1977, c. 337; 1979, 2nd Sess., c. 1280, ss. 2, 3; 1981 (Reg. Sess., 1982), c. 1258, s. 1; 1985 (Reg. Sess., 1986), c. 982, s. 24.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 11,

1986, substituted "a registration period of one or two years" for "the registration year" at the end of the first sentence of subsection (d) and added the second sentence of subsection (d).

Part 4. Transfer of Title or Interest.

§ 20-72. Transfer by owner.

CASE NOTES

When Title to Motor Vehicle Passes, etc. —

When a dealer transfers a vehicle registered under this chapter, it must execute a reassignment and warranty of title on the reverse of the certificate of title, and title to such vehicle shall not pass or vest until such reassignment is executed and the motor vehicle is delivered to the transferee. The dealer must also deliver the duly assigned certificate of title to the transferee or lienholder at the time the vehicle is delivered. North Carolina Nat'l Bank v. Robinson, 78 N.C. App. 1, 336 S.E.2d 666 (1985).

Passage of Title for Purposes, etc. —

In accord with main volume. See Roseboro Ford, Inc. v. Bass, 77 N.C. App. 363, 335 S.E.2d 214 (1985).

Duty of Purchaser to Secure, etc. —

There is no longer a requirement under the Motor Vehicle Act that a purchaser apply for a new certificate of title before title may pass or vest. North Carolina Nat'l Bank v. Robinson, 78 N.C. App. 1, 336 S.E.2d 666 (1985).

For purposes of liability insurance coverage, ownership of a motor vehicle which re-

quires registration under the Motor Vehicle Act of 1937 does not pass until transfer of legal title is effected as provided in subsection (b). *Indiana Lumbermens Mut. Ins. Co. v. Unigard Indem. Co.*, 76 N.C. App. 88, 331 S.E.2d 741 (1985).

Controlling Effect of UCC over Security Interests and Priorities. — Notwithstanding the title transfer provisions of the Motor Vehicle Act, an automobile purchaser may be a "buyer in the ordinary course of business" as that term is used in §§ 25-2-403 and 25-9-307, even though the certificate of title has not yet been reassigned. Moreover, it was the Legislature's intent to have the UCC control issues of security interests and priorities. *North Carolina Nat'l Bank v. Robinson*, 78 N.C. App. 1, 336 S.E.2d 666 (1985).

The UCC should control over the Motor Ve-

hicle Act when automobiles are used as collateral and are held in inventory for sale. *North Carolina Nat'l Bank v. Robinson*, 78 N.C. App. 1, 336 S.E.2d 666 (1985).

Buyers who gave value for a used car displayed on a dealer's lot and received a 20-day temporary marker in June, 1983, which car was covered by a dealer inventory security agreement in effect since April 1, 1970, and on which the credit company retained the title certificate, which was in the name of the dealer, had a superior right to possession of the car when the credit company's agent came to repossess it on June 19, 1983, as it was no longer part of the dealer's inventory; and buyers were entitled to possession of the car in their action for wrongful conversion. *North Carolina Nat'l Bank v. Robinson*, 78 N.C. App. 1, 336 S.E.2d 666 (1985).

§ 20-75. When transferee is dealer or insurance company.

CASE NOTES

When a dealer transfers a vehicle registered under this chapter, it must execute a reassignment and warranty of title on the reverse of the certificate of title, and title to such vehicle shall not pass or vest until such reassignment is executed and the motor vehicle delivered to the transferee. The dealer must also deliver the duly assigned certificate of title to the transferee or lienholder at the time the vehicle is delivered. *North Carolina Nat'l Bank v. Robinson*, 78 N.C. App. 1, 336 S.E.2d 666 (1985).

Application for New Certificate of Title. — There is no longer a requirement under the Motor Vehicle Act that a purchaser apply for a new certificate of title before title may pass or vest. *North Carolina Nat'l Bank v. Robinson*, 78 N.C. App. 1, 336 S.E.2d 666 (1985).

Controlling Effect of UCC over Security Interests and Priorities. — Notwithstanding the title transfer provisions of the Motor Vehicle Act, an automobile purchaser may be a "buyer in the ordinary course of business" as that term is used in §§ 25-2-403 and 25-9-307, even though the certificate of title has not yet

been reassigned. Moreover, it was the Legislature's intent to have the UCC control issues of security interests and priorities. *North Carolina Nat'l Bank v. Robinson*, 78 N.C. App. 1, 336 S.E.2d 666 (1985).

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Buyers who gave value for a used car displayed on dealer's lot and received a 20-day temporary marker in June, 1983, which car was covered by a dealer inventory security agreement in effect since April 1, 1970, and on which the credit company retained the title certificate, which was in the name of the dealer, had superior right to possession of the car when the credit company's agent came to repossess it on June 19, 1983, as it was no longer part of the dealer's inventory; and buyers were entitled to possession of the car in their action for wrongful conversion. *North Carolina Nat'l Bank v. Robinson*, 78 N.C. App. 1, 336 S.E.2d 666 (1985).

Part 5. Issuance of Special Plates.

§ 20-79. Registration by manufacturers and dealers.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 852, s. 17 amends Session Laws 1985, c. 764, s. 40, so as to change the effective date of the amendment to this section by c. 764 from July 1, 1986 to September 1, 1986.

Session Laws 1985, c. 764, s. 40, as amended by Session Laws 1985 (Reg. Sess., 1986), c. 852,

s. 17, provides: "This act shall become effective September 1, 1986, and shall apply to offenses committed on or after that date. Offenses committed before the effective date of this act [September 1, 1986] shall be governed by the law in effect at the time of the offense.

§ 20-81.1. Special plates for amateur radio operators.

(a) Every owner of a motor vehicle who holds an unrevoked and unexpired amateur radio license of a renewable nature, issued by the Federal Communications Commission, shall, upon payment of registration and licensing fees for such vehicle as required by law and an additional initial fee of ten dollars (\$10.00), be issued plates of similar size and design as the regular registration plates provided for by G.S. 20-63 or other provisions of law, upon which shall be inscribed, in lieu of the usual registration number, the official amateur radio call letters of such persons as assigned by the Federal Communications Commission. No additional fee may be required to renew a special plate issued under this section, upon proof of purchase of a portable radio unit by the vehicle owner.

(b) Application for special registration plates shall be made on forms which shall be provided by the Division of Motor Vehicles and shall contain proof satisfactory to the Division that the applicant holds an unrevoked and unexpired official amateur radio license and shall state the call letters which have been assigned to the applicant. The special registration plates shall provide for call letters with numerical or letter suffixes so that an owner of more than one vehicle may have the call letters on each. Applications must be filed prior to 60 days before the day when regular registration plates for the year are made available to motor vehicle owners.

(c) If the amateur radio license of a person holding a special plate issued pursuant to this section shall be canceled or rescinded by the Federal Communications Commission, such person shall immediately return the special plates to the Division of Motor Vehicles and receive a regular plate at no charge. Special registration plates issued pursuant to this section shall be valid for five years and shall be renewed through the use of annual renewal stickers in the same manner as regular registration plates are renewed.

(e) Repealed by Session Laws 1985 (Regular Session, 1986), c. 961, s. 4. (1951, c. 1099; 1955, c. 291; 1961, c. 360, s. 18; 1971, c. 589, ss. 1, 2; c. 829, ss. 1, 2, 4; 1973, c. 507, s. 5; c. 1395, s. 1; 1975, c. 716, s. 5; 1977, c. 464, s. 34; 1979, c. 137, ss. 1, 2; 1981 (Reg. Sess., 1982), c. 1258, ss. 2-4; 1985 (Reg. Sess., 1986), c. 961.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective October 1, 1986, substituted "and an additional initial fee of ten dollars (\$10.00)" for "and an additional

fee as required by G.S. 20-81.3(b) for special personalized license plates" in the first sentence of subsection (a), added the second sentence of subsection (a), added the present second sentence of subsection (b), added the second sentence of subsection (c), and deleted subsection (e), which related to disposition of reve-

nue derived from the additional fee for amateur radio plates.

Part 7. Title and Registration Fees.

§ 20-88.1. Driver training and safety education.

(c) (Effective July 1, 1987) All expenses incurred by the State in carrying out the provisions of this section shall be paid out of the General Fund. (1957, c. 682, s. 1; 1965, c. 410, s. 1; 1975, c. 431; c. 716, s. 5; 1977, c. 340, s. 4; c. 1002; 1983, c. 761, s. 141; 1985 (Reg. Sess., 1986), c. 982, s. 25.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 1, 1987, added subsection (c).

§ 20-96. Overloading.

CASE NOTES

Invalid Penalty. — Where the DMV assessed a penalty for operating a vehicle on the highways with a gross weight in excess of that allowed under the license obtained pursuant to this section, but not in excess of the maximum axle weight limits, and such penalty was not authorized by § 20-118, such penalty violated

Const., Art. IV, §§ 1 and 3, since there was no reasonable necessity for conferring absolute judicial discretion in the DMV. *Young's Sheet Metal & Roofing, Inc. v. Wilkins*, 77 N.C. App. 180, 334 S.E.2d 419 (1985), decided prior to the 1985 amendment to this section.

§ 20-97. Taxes compensatory; no additional tax.

Local Modification. — City of Charlotte: 1985 (Reg. Sess., 1986), c. 1009; Towns of Cornelius, Davidson, Huntersville, Matthews,

Mint Hill, and Pineville: 1985 (Reg. Sess., 1986), c. 1009.

Part 8. Anti-Theft and Enforcement Provisions.

§ 20-106.1. Fraud in connection with rental of motor vehicles.

CASE NOTES

Cited in *Nationwide Mut. Ins. Co. v. Land*, 78 N.C. App. 342, 337 S.E.2d 180 (1985).

§ 20-108. Vehicles or component parts of vehicles without manufacturer's numbers.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 852, s. 17 amends Session Laws 1985, c. 764, s. 40, so as to change the effective date of the amendment to this section by c. 764 from July 1, 1986 to September 1, 1986.

Session Laws 1985, c. 764, s. 40, as amended by Session Laws 1985 (Reg. Sess., 1986), c. 852, s. 17, provides: "This act shall become effective September 1, 1986, and shall apply to offenses committed on or after that date. Offenses com-

mitted before the effective date of this act [September 1, 1986] shall be governed by the law in effect at the time of the offense.

Part 9. The Size, Weight, Construction and Equipment of Vehicles.

§ 20-115. Scope and effect of regulations in this title.

It shall be unlawful for any person to drive or move or for the owner to cause or knowingly permit to be driven or moved on any highway any vehicle or vehicles of a size or weight exceeding the limitations stated in this title, or any vehicle or vehicles which are not so constructed or equipped as required in this title, or the rules and regulations of the Department of Transportation adopted pursuant thereto and the maximum size and weight of vehicles herein specified shall be lawful throughout this State, and local authorities shall have no power or authority to alter said limitations except as express authority may be granted in this Article. (1937, c. 407, s. 79; 1973, c. 507, s. 5; 1977, c. 464, s. 34; 1985 (Reg. Sess., 1986), c. 852, s. 8.)

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective September 1, 1986, deleted "and constitute a misde-

meanor" following "It shall be unlawful" at the beginning of the section.

§ 20-116. Size of vehicles and loads.

Local Modification. — Dare: 1985 (Reg. Sess., 1986), c. 964.

§ 20-118. Weight of vehicles and load.

CASE NOTES

Invalid Penalty. — Where the DMV assessed a penalty for operating a vehicle on the highways with a gross weight in excess of that allowed under the license obtained pursuant to § 20-96, but not in excess of the maximum axle weight limits, and such penalty was not authorized by this section, such penalty violated

Const., Art. IV, §§ 1 and 3, since there was no reasonable necessity for conferring absolute judicial discretion in the DMV. *Young's Sheet Metal & Roofing, Inc. v. Wilkins*, 77 N.C. App. 180, 334 S.E.2d 419 (1985), decided prior to the 1985 amendment to § 20-96.

§ 20-118.3. Vehicle or combination of vehicles operated without registration plate subject to civil penalty.

CASE NOTES

Cited in *Young's Sheet Metal & Roofing, Inc. v. Wilkins*, 77 N.C. App. 180, 334 S.E.2d 419 (1985).

§ 20-122. Restrictions as to tire equipment.

(c) The Department of Transportation or local authorities in their respective jurisdictions may, in their discretion, issue special permits authorizing the operation upon a highway of traction engines or tractors having movable tracks with transverse corrugation upon the periphery of such movable tracks or farm tractors or other farm machinery.

(1937, c. 407, s. 85; 1939, c. 266; 1957, c. 65, s. 11; 1965, c. 435; 1973, c. 507, s. 5; 1977, c. 464, s. 34; 1979, c. 515.)

Only Part of Section Set Out. — As the rest of the section was not affected, it is not set out.

Editor's Note. — Subsection (c) of § 20-122 is set out above to correct a typographical error in the main volume.

§ 20-127. Windshields must be unobstructed.

(e) No motor vehicle inspection certificate shall be issued on or after October 1, 1987, for a motor vehicle subject to subsection (d) with a windshield or any other window which does not meet the light transmittance requirements of federal motor vehicle safety standard No. 205. Any motor vehicle otherwise subject to subsection (d) will be exempt from the provisions of this subsection provided the vehicle owner provides the motor vehicle inspector a document, attesting that any windshield or any other window not in compliance with subsection (d) was installed prior to August 1, 1985. (1937, c. 407, s. 90; 1953, c. 1254; 1955, c. 1157, s. 2; 1959, c. 1264, s. 7; 1967, c. 1077; 1985, c. 789; 1985 (Reg. Sess., 1986), c. 997.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Subsection (e) of § 20-127, 1985 (Reg. Sess., 1986) amendment effective July 12, 1986, substituted "October 1, 1987" for "January 1, 1987" in the first sentence of subsection (e).

Effect of Amendments. — The 1985 (Reg.

§ 20-129. Required lighting equipment of vehicles.

CASE NOTES

Cited in *Mobley v. Hill*, — N.C. App. —, 341 S.E.2d 46 (1986).

§ 20-130.1. Use of red or blue lights on vehicles prohibited; exceptions.

(b) The provisions of subsection (a) of this section do not apply to the following:

- (1) A police car;
- (2) A highway patrol car;
- (3) A vehicle owned by the Wildlife Resources Commission and operated exclusively for law-enforcement purposes;
- (4) An ambulance;
- (5) A vehicle designed, equipped, and used exclusively for the transportation of human tissues and organs for transplantation;
- (6) A fire-fighting vehicle;
- (7) A school bus;

- (8) A vehicle operated by any member of a municipal or rural fire department in the performance of his duties, regardless of whether members of that fire department are paid or voluntary;
 - (9) A vehicle of a voluntary lifesaving organization (including the private vehicles of the members of such an organization) that has been officially approved by the local police authorities and which is manned or operated by members of that organization while answering an official call;
 - (10) A vehicle operated by medical doctors or anesthetists in emergencies;
 - (11) A motor vehicle used in law enforcement by the sheriff, or any salaried rural policeman in any county, regardless of whether or not the county owns the vehicle;
 - (11a) A vehicle operated by the State Fire Marshal or his representatives in the performance of their duties, whether or not the State owns the vehicle;
 - (12) A vehicle operated by any county fire marshal, assistant fire marshal, or emergency management coordinator in the performance of his duties, regardless of whether or not the county owns the vehicle; and
 - (13) Any lights that may be prescribed by the Interstate Commerce Commission.
- (1943, c. 726; 1947, c. 1032; 1953, c. 354; 1955, c. 528; 1957, c. 65, s. 11; 1959, c. 166, s. 2; c. 1170, s. 2; 1967, c. 651, s. 1; 1971, c. 1214; 1977, c. 52, s. 2; c. 438, s. 2; 1979, c. 653, s. 1; c. 887; 1983, c. 32, s. 1; c. 768, s. 6; 1985 (Reg. Sess., 1986), c. 1027, s. 50.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1027, s. 57, contains a severability clause.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 16, 1986, added subdivision (b)(11a).

§ 20-135. Safety glass.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 852, s. 17 amends Session Laws 1985, c. 764, s. 40, so as to change the effective date of the amendment to this section by c. 764 from July 1, 1986 to September 1, 1986.

Session Laws 1985, c. 764, s. 40, as amended by Session Laws 1985 (Reg. Sess., 1986), c. 852,

s. 17, provides: "This act shall become effective September 1, 1986, and shall apply to offenses committed on or after that date. Offenses committed before the effective date of this act [September 1, 1986] shall be governed by the law in effect at the time of the offense."

§ 20-137. Unlawful display of emblem or insignia.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 852, s. 17 amends Session Laws 1985, c. 764, s. 40, so as to change the effective date of the amendment to this section by c. 764 from July 1, 1986 to September 1, 1986.

Session Laws 1985, c. 764, s. 40, as amended by Session Laws 1985 (Reg. Sess., 1986), c. 852,

s. 17, provides: "This act shall become effective September 1, 1986, and shall apply to offenses committed on or after that date. Offenses committed before the effective date of this act [September 1, 1986] shall be governed by the law in effect at the time of the offense."

Part 10. Operation of Vehicles and Rules of the Road.

§ 20-138.1. Impaired driving.

CASE NOTES

VI. Sentencing.

I. IN GENERAL.

Constitutionality. —

Subdivision (a)(2) is not unconstitutionally vague and uncertain, nor does it violate a driver's substantive due process rights. *State v. Ferrell*, 75 N.C. App. 156, 330 S.E.2d 225, cert. denied and appeal dismissed, 314 N.C. 333, 333 S.E.2d 492 (1985).

For case reaffirming the constitutionality of Subdivision (a)(2) of this section and § 20-4.01 (33a), see *State v. Denning*, — N.C. —, 342 S.E.2d 855 (1986).

"Driving" Construed. —

One "drives" within the meaning of this section if he is in actual physical control of a vehicle which is in motion or which has the engine running. *State v. Fields*, 77 N.C. App. 404, 335 S.E.2d 69 (1985).

The trial court did not err in finding that the defendant was "driving" a vehicle within the meaning of this section when he sat behind the steering wheel in the driver's seat of the car and started the car's engine in order to make the heater operable, but the car remained motionless on the street. *State v. Fields*, 77 N.C. App. 404, 335 S.E.2d 69 (1985).

Park Grounds as Public Vehicular Area.

— Evidence held to permit a finding that at the time in question portion of park grounds legally in use as a parking lot was a "public vehicular area" within the meaning and intent of that phrase as used in § 20-4.01(32), so as to permit a conviction under subsection (a) of this section for impaired driving thereon. *State v. Carawan*, — N.C. App. —, 341 S.E.2d 96 (1986).

Meaning of "Impaired." — Under our former "driving under the influence" statutes the test was whether the accused had drunk a sufficient quantity of intoxicating beverage or taken a sufficient amount of narcotic drugs to cause him to lose the normal control of his bodily or mental faculties, or both, to such an extent that there was an appreciable impairment of either or both of these faculties. This section consolidated existing impairment offenses into a single offense with two different methods of proof, but it does not appear to have changed the basic definition of "impaired." *State v. Harrington*, 78 N.C. App. 39, 336 S.E.2d 852 (1985).

Proof of Impaired Driving. — The offense of impaired driving is proven by evidence that defendant drove a vehicle on any highway in this State while his physical or mental faculties, or both, were "appreciably impaired by an impairing substance." *State v. George*, 78 N.C. App. 580, 335 S.E.2d 768 (1985).

Statutory Duty Imposed. — Pursuant to this section, a person under the influence of an impairing substance commits the offense of impaired driving if he drives a car on any public road. Thus, the statutory law imposes a duty on all persons to avoid driving while under the influence of an impairing substance. *King v. Allred*, 76 N.C. App. 427, 333 S.E.2d 758, cert. denied, 315 N.C. 184, 337 S.E.2d 857 (1985).

Violation as Culpable Negligence. —

This section is a statute designed for the protection of human life and limb, and as such, it is a matter of law that a violation of its provisions constitutes culpable negligence. *State v. McGill*, 314 N.C. 633, 336 S.E.2d 90 (1985).

Death caused by a violation, etc. —

When a death is caused by one who was driving under the influence of alcohol, only two elements must exist for the successful prosecution of manslaughter: A willful violation of § 20-138 (now this section) and the causal link between that violation and the death. If these elements are present, the State need not demonstrate that defendant violated any other rule of the road, nor that his conduct was in any other way wrongful. *State v. McGill*, 314 N.C. 633, 336 S.E.2d 90 (1985).

Cited in *State v. Hollingsworth*, 77 N.C. App. 36, 334 S.E.2d 463 (1985); *United States v. Canane*, 622 F. Supp. 279 (W.D.N.C. 1985); *State v. Haislip*, — N.C. App. —, 339 S.E.2d 832 (1986).

II. DRIVING UNDER THE INFLUENCE.

The statutory blood alcohol concentration (BAC) is not a sine qua non of driving under the influence. The State may prove driving under the influence where the BAC is entirely unknown or less than 0.10. *State v. Harrington*, 78 N.C. App. 39, 336 S.E.2d 852 (1985).

Prior convictions are not an element of the offense of driving while impaired, but are now merely one of several factors relating to

punishment. *State v. Denning*, — N.C. —, 342 S.E.2d 855 (1986).

Where there was evidence that defendant had a blood alcohol concentration (BAC) of .09 some two and one-half hours after accident, and no evidence of drinking between the time of the accident and the sample, and police officer smelled a moderate odor of alcohol on defendant's person at the accident scene, observed her slurred speech and glassy eyes, and gave his opinion that she had consumed some controlled substance to an appreciable degree that would have affected both her mental and physical faculties, the evidence was sufficient to go to the jury on the question of DUI, regardless of additional expert extrapolation evidence. *State v. Catoe*, 78 N.C. App. 167, 336 S.E.2d 691, supersedeas granted, — N.C. —, 338 S.E.2d 107 (1985).

III. DRIVING WITH 0.10 PERCENT OR MORE ALCOHOL IN BLOOD.

Expression of Concentration in Grams Per Milliliters or in Liters Not Required. — There is no requirement in this section or elsewhere in the Motor Vehicle Code that a person's alcohol concentration be expressed in terms of grams per milliliters of blood or liters of breath, nor have the courts interpreted this section as requiring such specificity; moreover, where both the chemical analyst who testified about the test results and the trial court defined the term "alcohol concentration" for the jury so that it was completely clear what was meant by the term, there was no error in the admission of the test results. *State v. Jones*, 76 N.C. App. 160, 332 S.E.2d 494 (1985).

Evidence Corroborating Defendant's Admissions. — Evidence aliunde admissions by defendant was sufficient to corroborate defendant's admission that he drove vehicle which was found wrecked on a public highway or vehicular area after he had consumed alcohol and, when considered with his admissions, was sufficient to support a reasonable inference that at the time he was driving the motor vehicle he had consumed a sufficient amount of alcohol to raise his blood alcohol level to 0.10% or greater at a relevant time after driving. *State v. Trexler*, — N.C. —, 342 S.E.2d 878 (1986).

Extrapolation Evidence. — In prosecution in which the jury found defendant guilty of DUI and driving on the wrong side of the road, testimony of expert witness that the average person displays a certain rate of decline in blood alcohol concentration (BAC) in the hours after the last consumption of alcohol, and that

based on that average rate of decline, defendant's BAC, which was .09 some two and one-half hours after the accident, would have been approximately 0.13 at the time of the accident, was not improper. *State v. Catoe*, 78 N.C. App. 167, 336 S.E.2d 691, supersedeas granted, — N.C. —, 338 S.E.2d 107 (1985).

IV. PROCEDURE.

Bifurcated Procedure Constitutional. — The bifurcated procedure that the legislature has established for impaired driving cases, with the jury determining whether this section has been violated and the judge determining the length of punishment required under § 20-179, is constitutional. *State v. Field*, 75 N.C. App. 647, 331 S.E.2d 221, cert. denied and appeal dismissed, 315 N.C. 186, 337 S.E.2d 582 (1985).

Evidence of Wanton Conduct Held Sufficient to Go to Jury. — In a negligence action, the evidence of the defendant's wanton conduct was sufficient to go to the jury, where defendant admitted: awareness of her own substantial intoxication, indifference to her duty under this section to avoid operating a motor vehicle while impaired, and obliviousness to the duty under § 20-158 to stop at the five stoplights between the cocktail lounge and the accident. It was for the jury to determine whether defendant's negligence evinced a wilful or reckless indifference to the rights of others, and then, whether her wilful or wanton conduct was the proximate cause of the accident. *King v. Allred*, 76 N.C. App. 427, 333 S.E.2d 758, cert. denied, 315 N.C. 184, 337 S.E.2d 857 (1985).

VI. SENTENCING.

Increase in Punishment Based on Aggravating Factor Did Not Deprive Right to Jury. — A trial judge's increasing punishment under the Safe Roads Act of 1983 after a finding of a grossly aggravating factor, that the defendant had a prior conviction for a similar offense within seven years, did not in any way deprive the defendant of his right to jury trial. *State v. Denning*, 76 N.C. App. 156, 332 S.E.2d 203 (1985).

Serious Injury to Another Is Sentencing Factor. — Whether the defendant seriously injured another person was not an element of the crime of driving while impaired; it was a sentencing factor that the General Assembly deemed to be important in punishing those convicted of driving while impaired. *State v. Field*, 75 N.C. App. 647, 331 S.E.2d 221, cert. denied and appeal dismissed, 315 N.C. 186, 337 S.E.2d 582 (1985).

§ 20-138.3. Driving by provisional licensee after consuming alcohol or drugs.

(c) Punishment; Effect When Impaired Driving Offense Also Charged. — The offense in this section is a misdemeanor punishable under G.S. 20-176(c). It is not, in any circumstances, a lesser included offense of impaired driving under G.S. 20-138.1, but if a person is convicted under this section and of an offense involving impaired driving arising out of the same transaction, the aggregate punishment imposed by the court may not exceed the maximum applicable to the offense involving impaired driving, and any minimum punishment applicable must be imposed. (1983, c. 435, s. 34; 1985 (Reg. Sess., 1986), c. 852, s. 11.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 (Reg.

Sess., 1986) amendment, effective September 1, 1986, rewrote the first sentence of subsection (c), which read "The offense in this section is punishable under G.S. 20-176(b)."

§ 20-139.1. Procedures governing chemical analyses; admissibility; evidentiary provisions; controlled-drinking programs.

CASE NOTES

I. IN GENERAL.

This section contemplates situations in which more than two samples may be required to constitute a valid chemical analysis. *Watson v. Hiatt*, 78 N.C. App. 609, 337 S.E.2d 871 (1985).

Refusal to Give More Than Two Samples. — Where petitioner provided two breath samples resulting in readings of .28 and .31 and then refused to provide any more samples, her conduct amounted to a willful refusal under § 20-16.2(c), within the meaning of subsection (b3) of this section. *Watson v. Hiatt*, 78 N.C. App. 609, 337 S.E.2d 871 (1985).

State is not required to negate every possible flaw in testing procedure in order for the results of the chemical analysis to be admissible; it is only required that the State show compliance with the provisions of this section. *State v. Bailey*, 76 N.C. App. 610, 334 S.E.2d 266 (1985).

Chain of Custody of Evidence. — If all the evidence can reasonably support a conclusion that the blood sample analyzed is the same as that taken from the defendant then it is admissible into evidence. The fact that the defendant can show potential weak spots in the chain of custody only relates to the weight to be given the evidence establishing the chain of custody. *State v. Bailey*, 76 N.C. App. 610, 334 S.E.2d 266 (1985).

II. ADMINISTRATION AND USE OF BREATHALYZER TEST.

This section requires two things, etc. —

In accord with 2nd paragraph in main volume. See *State v. George*, 77 N.C. App. 470, 336 S.E.2d 93 (1985).

Time of Test Goes to Weight of Evidence. — The fact that three hours had passed from the time the defendant operated a vehicle until breathalyzer test was given went to the weight to be given the evidence, rather than its admissibility, and the breathalyzer evidence was properly admitted. *State v. George*, 77 N.C. App. 470, 336 S.E.2d 93 (1985).

Expression of Test Results in Terms of Breath or Blood. — Police officer who was issued a permit to perform chemical analysis under the authority of subsection (b) of this section by the Department of Human Resources was permitted by § 20-4.01(0.2) to express alcohol concentration in terms of 210 liters of breath, as well as 100 milliliters of blood. *State v. Midgett*, 78 N.C. App. 387, 337 S.E.2d 117 (1985).

Regulations Governing Second and Subsequent Samples. — Commission of Health Services operational procedure designating a specific time, namely, at the reappearance of the words "blow sample" on the machine for the collection of the second breath sample, met the requirements of subdivision (b)(1) of this section that Commission regulations provide

time requirements as to the collection of second and subsequent samples. *State v. Lockwood*, 78 N.C. App. 205, 336 S.E.2d 678 (1985).

§ 20-140. Reckless driving.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 852, s. 17 amends Session Laws 1985, c. 764, s. 40, so as to change the effective date of the amendment to this section by c. 764 from July 1, 1986 to September 1, 1986.

Session Laws 1985, c. 764, s. 40, as amended by Session Laws 1985 (Reg. Sess., 1986), c. 852,

s. 17, provides: "This act shall become effective September 1, 1986, and shall apply to offenses committed on or after that date. Offenses committed before the effective date of this act [September 1, 1986] shall be governed by the law in effect at the time of the offense."

CASE NOTES

I. IN GENERAL.

Cited in *State v. Harrington*, 78 N.C. App. 39, 336 S.E.2d 852 (1985).

§ 20-140.3. Unlawful use of National System of Interstate and Defense Highways and other controlled-access highways.

CASE NOTES

Cited in *State v. Dixon*, 77 N.C. App. 27, 334 S.E.2d 433 (1985).

§ 20-141. Speed restrictions.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 852, s. 17 amends Session Laws 1985, c. 764, s. 40, so as to change the effective date of the amendment to this section by c. 764 from July 1, 1986 to September 1, 1986.

Session Laws 1985, c. 764, s. 40, as amended by Session Laws 1985 (Reg. Sess., 1986), c. 852,

s. 17, provides: "This act shall become effective September 1, 1986, and shall apply to offenses committed on or after that date. Offenses committed before the effective date of this act [September 1, 1986] shall be governed by the law in effect at the time of the offense."

CASE NOTES

II. STANDARD OF CARE AND NEGLIGENCE.

And a Motorist May Not Lawfully, etc. —

Subsections (g) and (m) of this section, construed together, establish a duty to drive with caution and circumspection and to reduce speed if necessary to avoid a collision, irrespective of the lawful speed limit or the speed actu-

ally driven. *State v. Stroud*, 78 N.C. App. 599, 337 S.E.2d 873 (1985).

Driving below the speed limit is not a defense to a charge of driving at a speed greater than is reasonable and prudent under existing conditions; regardless of the posted speed limit, motorists have a duty to decrease speed if necessary to avoid a collision. *State v. Stroud*, 78 N.C. App. 599, 337 S.E.2d 873 (1985).

§ 20-141.3. Unlawful racing on streets and highways.

CASE NOTES

Violation of the racing statute is negligent per se. —

A violation of subsection (b) of this section is negligence per se. *Lewis v. Brunston*, 78 N.C. App. 678, 338 S.E.2d 595 (1986).

Violation as Wilful or Wanton Negligence. — A violation of subsection (b) of this section constitutes wilful or wanton negligence. *Lewis v. Brunston*, 78 N.C. App. 678, 338 S.E.2d 595 (1986).

Proximate Cause of Collision. — Evidence showing that about one-half mile before and

immediately prior to the accident defendants were driving their cars at night "bumper to bumper" at speeds of 75 to 80 m.p.h. on road where the speed limit was 45 m.p.h., if believed by the jury, was sufficient to support a finding by the jury that defendants operated their cars wilfully in speed competition in violation of subsection (b) of this section and that their negligence in this respect proximately caused collision. *Lewis v. Brunston*, 78 N.C. App. 678, 338 S.E.2d 595 (1986).

§ 20-141.4. Felony and misdemeanor death by vehicle.

CASE NOTES

Cited in *State v. Stroud*, 78 N.C. App. 599, 337 S.E.2d 873 (1985).

§ 20-146. Drive on right side of highway; exceptions.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 852, s. 17 amends Session Laws 1985, c. 764, s. 40, so as to change the effective date of the amendment to this section by c. 764 from July 1, 1986 to September 1, 1986.

Session Laws 1985, c. 764, s. 40, as amended by Session Laws 1985 (Reg. Sess., 1986), c. 852,

s. 17, provides: "This act shall become effective September 1, 1986, and shall apply to offenses committed on or after that date. Offenses committed before the effective date of this act [September 1, 1986] shall be governed by the law in effect at the time of the offense."

§ 20-152. Following too closely.

CASE NOTES

Certain Inferences Are Permitted, etc. —

Admission of defendant that his car collided with the rear of plaintiff's car permitted a legitimate inference by a jury that defendant was following plaintiff's automobile more closely than was reasonable and prudent, in violation of this section. *Scher v. Antonucci*, 77 N.C. App. 810, 336 S.E.2d 434 (1985).

But Mere Proof of Collision, etc. —

In accord with the main volume. See *Scher v. Antonucci*, 77 N.C. App. 810, 336 S.E.2d 434 (1985).

A violation of this section is negligence per se. —

In accord with 1st paragraph in main volume. See *Scher v. Antonucci*, 77 N.C. App. 810, 336 S.E.2d 434 (1985).

Instruction Required. — Where violation of this section bore directly on the issue of defendant's negligence, which was a substantial feature of the case, the court should have declared and explained the section in its charge to the jury, and should also have explained that violation of this section was negligence per se. The court had this duty irrespective of plaintiff's request for special instructions. *Scher v. Antonucci*, 77 N.C. App. 810, 336 S.E.2d 434 (1985).

§ 20-157. Approach of police, fire department or rescue squad vehicles or ambulances; driving over fire hose or blocking fire-fighting equipment; parking, etc., near police, fire department, or rescue squad vehicle or ambulance.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 852, s. 17 amends Session Laws 1985, c. 764, s. 40, so as to change the effective date of the amendment to this section by c. 764 from July 1, 1986 to September 1, 1986.

Session Laws 1985, c. 764, s. 40, as amended by Session Laws 1985 (Reg. Sess., 1986), c. 852,

s. 17, provides: "This act shall become effective September 1, 1986, and shall apply to offenses committed on or after that date. Offenses committed before the effective date of this act [September 1, 1986] shall be governed by the law in effect at the time of the offense."

§ 20-158. Vehicle control signs and signals.

CASE NOTES

I. IN GENERAL.

The automobile driver on a dominant highway approaching an intersecting servient highway is not under a duty to anticipate that the automobile driver on the servient highway will fail to stop as required by statute, and in the absence of anything which gives or should give notice to the contrary, he will be entitled to assume and to act upon the assumption, even to the last moment, that the automobile driver on the servient highway will obey the law and stop before entering the dominant highway. *Lewis v. Brunston*, 78 N.C. App. 68, 338 S.E.2d 595 (1986).

The automobile driver on the servient intersecting highway is not under a duty to anticipate that the automobile driver on the dominant highway, approaching the intersection of the two highways, will fail to observe the speed regulations and the rules of the road, and in the absence of anything which gives or should give notice to the contrary, he is entitled to assume and to act upon the assumption

that the automobile driver on the dominant highway will obey such regulations and the rules of the road. *Lewis v. Brunston*, 78 N.C. App. 68, 338 S.E.2d 595 (1986).

Evidence of Wanton Conduct Held Sufficient to Go To Jury. — In a negligence action, the evidence of the defendant's wanton conduct was sufficient to go to the jury, where defendant admitted: Awareness of her own substantial intoxication, indifference to her duty under § 20-138.1 to avoid operating a motor vehicle while impaired, and obliviousness to the duty under this section to stop at the five stoplights between the cocktail lounge and the accident. It was for the jury to determine whether defendant's negligence evinced a wilful or reckless indifference to the rights of others, and then, whether her wilful or wanton conduct was the proximate cause of the accident. *King v. Allred*, 76 N.C. App. 427, 333 S.E.2d 758, cert. denied, 315 N.C. 184, 337 S.E.2d 857 (1985).

Cited in *State v. Field*, 75 N.C. App. 627, 331 S.E.2d 221 (1985).

§ 20-161. Stopping on highway prohibited; warning signals; removal of vehicles from public highway.

CASE NOTES

IV. NEGLIGENCE AND PROXIMATE CAUSE.

Evidence of Negligence Held Sufficient to Go to Jury. — Where defendant's truck, which was not disabled, was parked on the shoulder of a much-traveled, two-lane high-

way, and though the shoulder was wide enough with room to spare to accommodate the truck, part of it extended into the main-traveled portion of the highway far enough so that cars could not pass the truck without going into the other traffic lane, this was evidence enough of defendant's negligence and the issue was for

the jury to determine, rather than the court.
 Wilkins v. Taylor, 76 N.C. App. 536, 333
 S.E.2d 503 (1985).

§ 20-162. Parking in front of private driveway, fire hydrant, fire station, intersection of curb lines or fire lane.

Local Modification. — Town of Tarboro:
 1985 (Reg. Sess., 1986), c. 905, s. 2.

§ 20-162.1. Prima facie rule of evidence for enforcement of parking regulations.

Local Modification. — City of Greenville:
 1985 (Reg. Sess., 1986), c. 813; Town of
 Tarboro: 1985 (Reg. Sess., 1986), c. 905, s. 1.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 852, s. 17 amends Session Laws 1985, c. 764, s. 40, so as to change the effective date of the amendment to this section by c. 764 from July 1, 1986 to September 1, 1986.

Session Laws 1985, c. 764, s. 40, as amended by Session Laws 1985 (Reg. Sess., 1986), c. 852, s. 17, provides: "This act shall become effective September 1, 1986, and shall apply to offenses committed on or after that date. Offenses committed before the effective date of this act [September 1, 1986] shall be governed by the law in effect at the time of the offense."

§ 20-166. Duty to stop in event of accident or collision; furnishing information or assistance to injured person, etc.; persons assisting exempt from civil liability.

CASE NOTES

I. IN GENERAL.

Evidence of prior convictions for driving under the influence can properly be considered as an aggravating factor in sentencing a defendant for hit and run personal injury,

impairment not being an element of the offense. *State v. Ragland*, — N.C. App. —, 342 S.E.2d 532 (1986).

Cited in *State v. Green*, 77 N.C. App. 429, 335 S.E.2d 176 (1985).

§ 20-166.1. Reports and investigations required in event of collision.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 852, s. 17 amends Session Laws 1985, c. 764, s. 40, so as to change the effective date of the amendment to this section by c. 764 from July 1, 1986 to September 1, 1986.

Session Laws 1985, c. 764, s. 40, as amended by Session Laws 1985 (Reg. Sess., 1986), c. 852,

s. 17, provides: "This act shall become effective September 1, 1986, and shall apply to offenses committed on or after that date. Offenses committed before the effective date of this act [September 1, 1986] shall be governed by the law in effect at the time of the offense."

§ 20-167.1. Transportation of spent nuclear fuel.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 852, s. 17 amends Session Laws 1985, c. 764, s. 40, so as to change the effective date of the amendment to this section by c. 764 from July 1, 1986 to September 1, 1986.

Session Laws 1985, c. 764, s. 40, as amended by Session Laws 1985 (Reg. Sess., 1986), c. 852,

s. 17, provides: "This act shall become effective September 1, 1986, and shall apply to offenses committed on or after that date. Offenses committed before the effective date of this act [September 1, 1986] shall be governed by the law in effect at the time of the offense."

Part 11. Pedestrians' Rights and Duties.

§ 20-174. Crossing at other than crosswalks; walking along highway.

CASE NOTES

III. NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE.

Failure to yield the right-of-way, etc. — Although a violation of subsection (a) is not contributory negligence per se, a failure to yield the right-of-way to a motor vehicle may constitute contributory negligence as a matter of law. *Meadows v. Lawrence*, 75 N.C. App. 86, 330 S.E.2d 47 (1985), *aff'd*, 315 N.C. 383, 337 S.E.2d 851 (1986).

Pedestrian Crossing at Night Outside Crosswalk. — If the road is straight, visibility unobstructed, the weather clear, and the headlights of the vehicle in use, the failure of a pedestrian crossing a road at night outside a crosswalk to see and avoid a vehicle will consistently be deemed contributory negligence as a matter of law. *Meadows v. Lawrence*, 75 N.C. App. 86, 330 S.E.2d 47 (1985), *aff'd*, 315 N.C. 383, 337 S.E.2d 851 (1986).

Part 12. Sentencing; Penalties.

§ 20-176. Penalty for misdemeanor or infraction.

(c1) Notwithstanding any other provision of law, no person convicted of a misdemeanor for the violation of any provision of this Chapter except G.S. 20-28(a) and (b), G.S. 20-141(j), G.S. 20-141.3(b) and (c), G.S. 20-141.4, or a second or subsequent conviction of G.S. 20-138.1 shall be imprisoned in the State prison system unless the person previously has been imprisoned in a local confinement facility, as defined by G.S. 153A-217(5), for a violation of this Chapter.

(d) For purposes of determining whether a violation of an offense contained in this Chapter constitutes negligence per se, crimes and infractions shall be treated identically. (1937, c. 407, s. 137; 1951, c. 1013, s. 7; 1957, c. 1255; 1967, c. 674, s. 3; 1969, c. 378, s. 3; 1973, c. 1330, s. 34; 1975, c. 644; 1985, c. 764, s. 20; 1985 (Reg. Sess., 1986), c. 852, s. 7; c. 1014, s. 202.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendments, it is not set out.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 852, s. 17 amends Session Laws 1985, c. 764, s. 40, so as to change the effective date of the amendment to this section by c. 764 from July 1, 1986 to September 1, 1986.

Session Laws 1985, c. 764, s. 40, as amended by Session Laws 1985 (Reg. Sess., 1986), c. 852, s. 17, provides: "This act shall become effective September 1, 1986, and shall apply to offenses committed on or after that date. Offenses committed before the effective date of this act [September 1, 1986] shall be governed by the law in effect at the time of the offense."

Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 243, contains a severability clause.

Effect of Amendments. — Session Laws 1985 (Reg. Sess., 1986), c. 852, s. 7, effective September 1, 1986, substituted "crimes" for "criminal offenses" in subsection (d).

Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 202, effective October 1, 1986 and applicable to persons sentenced on and after that date, added subsection (c1).

§ 20-179. Sentencing hearing after conviction for impaired driving; determination of grossly aggravating and aggravating and mitigating factors; punishments.

(s) **Method of Serving Sentence.** — The judge in his discretion may order a term of imprisonment or community service to be served on weekends, even if the sentence cannot be served in consecutive sequence. (1937, c. 407, s. 140; 1947, c. 1067, s. 18; 1967, c. 510; 1969, c. 50; c. 1283, ss. 1-5; 1971, c. 619, s. 16; c. 1133, s. 1; 1975, c. 716, s. 5; 1977, c. 125; 1977, 2nd Sess., c. 1222, s. 1; 1979, c. 453, ss. 1, 2; c. 903, ss. 1, 2; 1981, c. 466, ss. 4-6; 1983, c. 435, s. 29; 1983 (Reg. Sess., 1984), c. 1101, ss. 21-29, 36; 1985, c. 706, s. 1; 1985 (Reg. Sess., 1986), c. 1014, s. 201(d).)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 243, contains a severability clause.

Effect of Amendments. — The 1985 (Reg.

Sess., 1986) amendment, effective July 15, 1986, deleted the second sentence of subsection (s), which read "The judge in his discretion may order that a sentence of imprisonment of seven or more consecutive days may be served with work release privileges."

CASE NOTES

Bifurcated Procedure Constitutional. — The bifurcated procedure that the legislature has established for impaired driving cases, with the jury determining whether § 20-138.1 has been violated and the judge determining the length of punishment required under this section, is constitutional. *State v. Field*, 75 N.C. App. 627, 331 S.E.2d 221, cert. denied and appeal dismissed, 315 N.C. 186, 337 S.E.2d 582 (1985).

Because the factors before the trial judge in determining sentencing are not elements of the offense, their consideration for purposes of sentencing is a function of the judge and is therefore not susceptible to constitutional challenge based upon either the Sixth Amendment right to a jury trial or Article I, Section 24 of the North Carolina Constitution. *State v. Denning*, — N.C. —, 342 S.E.2d 855 (1986), involving sentencing under this section for impaired driving.

Serious Injury to Another Not Element of Offense. — Whether the defendant seriously injured another person was not an element of the crime of driving while impaired; it was a sentencing factor that the General Assembly deemed to be important in punishing

those convicted of driving while impaired. *State v. Field*, 75 N.C. App. 627, 331 S.E.2d 221, cert. denied and appeal dismissed, 315 N.C. 186, 337 S.E.2d 582 (1985).

Meaning of "Gross Impairment". — "Gross impairment" is a high level of impairment, higher than that impairment which must be shown to prove the offense of DUI. *State v. Harrington*, 78 N.C. App. 39, 336 S.E.2d 852 (1985).

Effect of BAC on Determination of "Gross Impairment". — While the statutory blood alcohol concentration (BAC) of 0.20 may provide a "bright line" for determining "gross impairment," the finding of a BAC of 0.20 clearly is not required for the court to make the finding of gross impairment. *State v. Harrington*, 78 N.C. App. 39, 336 S.E.2d 852 (1985).

Evidence was sufficient to allow the court to consider whether defendant was grossly impaired, where police officer testified that defendant drove erratically and did not keep his car in its lane of travel, was obviously unsteady on his feet, slurred his speech, had difficulty answering routine questions, and could not perform any of the four field sobriety tests satisfactorily; that defendant's

blood alcohol concentration (BAC) was .14; and that he admitted to the officer that he was under the influence of alcohol. *State v. Harrington*, 78 N.C. App. 39, 336 S.E.2d 852 (1985).

"Especially Reckless" Driving Not Shown. — Where although the assistant district attorney stated that defendant had been charged with passing through a red light without stopping, there was no evidence before the court to support this assertion, the court erred in finding as an aggravating factor that defendant's driving had been especially reckless. *State v. Lockwood*, 78 N.C. App. 205, 336 S.E.2d 678 (1985).

The burden to prove a factor under this section is by the greater weight of the evidence, similar to the preponderance standard used in the Fair Sentencing Act, § 15A-1340.4. *State v. Harrington*, 78 N.C. App. 39, 336 S.E.2d 852 (1985).

Provision of this section specifically requiring the State "to prove any grossly aggravating or aggravating factor by the greater weight of the evidence" is synonymous with the "preponderance of the evidence" standard which has passed constitutional muster with the courts. *State v. Denning*, — N.C. —, 342 S.E.2d 855 (1986).

Sentence of 30 Days as Condition of Suspension in Imposing Level Four Punishment Was Error. — If the court had correctly found that a level four punishment should have been imposed, it erred in requiring the defendant to serve 30 days as part of the conditions of a suspended sentence, as subsection (j)(1) limits the term of imprisonment to 48 hours. *State v. MaGee*, 75 N.C. App. 357, 330 S.E.2d 825 (1985).

Prior convictions are not an element of the offense of driving while impaired, but are now merely one of several factors relating to punishment. *State v. Denning*, — N.C. —, 342 S.E.2d 855 (1986).

When Prior Conviction May Not Be Used. — Under this section, once the State has proven by the greater weight of the evidence a prior driving under the influence conviction, defendant has the burden of proving by the preponderance of the evidence that in the case of the prior conviction (1) he was indigent; (2) he had no counsel; and (3) he had not waived counsel. If defendant meets his burden on all three facts, then the prior conviction may not be used as a basis for imposing an active sentence. *State v. Haislip*, — N.C. App. —, 339 S.E.2d 832 (1986).

Formal Rules of Evidence Not Applicable to Sentencing Hearing Under Subsection (o). — Evidence adduced by either party at trial may be used at the sentencing hearing, under subsection (o) of this section, and the formal rules of evidence do not apply. *State v. Haislip*, — N.C. App. —, 339 S.E.2d 832 (1986).

But Statement by Counsel Is Not Evidence. — While the formal rules of evidence do not apply at a sentencing hearing under subsection (o) of this section, the statement by defendant's counsel that defendant was indigent at the time of his 1981 driving under the influence conviction was not evidence. *State v. Haislip*, — N.C. App. —, 339 S.E.2d 832 (1986).

Quoted in *State v. Midgett*, 78 N.C. App. 387, 337 S.E.2d 117 (1985).

§ 20-179.2. Alcohol and drug education traffic school programs; guidelines and implementation by Commission for Mental Health, Mental Retardation and Substance Abuse Services; approval of Department of Human Resources; fees.

(c) A fee of one hundred dollars (\$100.00) shall be paid by all persons enrolling in an alcohol and drug education traffic school program established pursuant to this section. That fee must be paid to an official designated for that purpose and at a time and place specified by the Area Mental Health, Mental Retardation and Substance Abuse Authority providing the course of instruction in which the person is enrolled, except that if the clerk of court in the county in which the person is convicted agrees to collect the fees, the clerk shall collect all fees for persons convicted in that county. The clerk shall pay the fees collected to the Area Mental Health, Mental Retardation and Substance Abuse Authority for the catchment area where the clerk is located regardless of the location where the defendant attends the alcohol and drug education traffic school and that authority shall distribute the funds in accordance with the rules and regulations of the Department. The fee must be paid in full within two weeks from the date school attendance is ordered as a

condition of probation, unless the court, upon a showing of hardship by the person, allows the person additional time to pay the fee. If the person enrolling in the school demonstrates to the satisfaction of the court that ordered him to enroll in the school that he is unable to pay and his inability to pay is not willful, the court may excuse him from paying the fee.

(1979, c. 358, s. 26; c. 903, s. 3; 1981, c. 51, s. 5; c. 466, ss. 1-3; 1983, c. 435, s. 30; c. 761, s. 155; 1985 (Reg. Sess., 1986), c. 1012, s. 1.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective August 1, 1986, deleted the former last sentence of subsection (c), which read "If, however, the person

is also ordered to serve a community service punishment under G.S. 20-179 and G.S. 20-179.4, the fee for enrollment in an Alcohol and Drug Education Traffic School program established pursuant to this section is fifty dollars (\$50.00)."

§ 20-179.3. Limited driving privilege.

CASE NOTES

Evidence Held Insufficient to Support Conviction under Subsection (j). — *State v. Cooney*, 313 N.C. 594, 330 S.E.2d 206 (1985).

ARTICLE 3A.

Motor Vehicle Law of 1947.

Part 2. Equipment Inspection of Motor Vehicles.

§ 20-183.7. Charges for inspections and certificates; safety equipment inspection station records.

(c) Fees collected for inspection certificates shall be paid to the Division of Motor Vehicles in accordance with its regulations and shall be periodically transferred as follows:

(1) Seventy-five cents (75¢) of the fee for the valid inspection sticker collected pursuant to subsection (a) shall be transferred to the Highway Fund.

(2) The fee of not less than seventy-five cents (75¢) nor more than two dollars and fifteen cents (\$2.15) collected pursuant to subsection (a1) shall be transferred as follows: the first thirty-five cents (35¢) to the Division of Environmental Management and any excess up to one dollar and eighty cents (\$1.80) to the Highway Fund.

(1965, c. 734, s. 1; 1969, c. 1242; 1973, c. 1480; 1975, c. 547; c. 716, s. 5; c. 875, s. 4; 1979, c. 688; 1979, 2nd Sess., c. 1180, ss. 5, 6; 1981, c. 690, s. 17; 1981 (Reg. Sess., 1982), c. 1261, s. 2; 1985, c. 415, ss. 1-6; 1985 (Reg. Sess., 1986), c. 1018, s. 8.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985 (Reg.

Sess., 1986), c. 1018, s. 9 provides that all funds remaining unencumbered in "The Safety Inspection Monitoring Fund" created by Session Laws 1985, c. 415 on July 1, 1986, shall revert to the Highway Fund.

Session Laws 1985 (Reg. Sess., 1986), c. 1018, s. 10 provides that the people hired to monitor the Equipment Inspection of Motor Vehicles previously receiving their compensation from "The Safety Inspection Monitoring Fund" shall be paid after July 1, 1986, from the Highway Fund.

Session Laws 1985 (Reg. Sess., 1986), c. 1018, s. 22 provides that insofar as the provisions of the act are inconsistent with the provisions of any general or special laws or parts thereof, the provisions of the act shall be controlling.

Session Laws 1985 (Reg. Sess., 1986), c. 1018, s. 23 is a severability clause.

Effect of Amendments. — The 1985 (Reg.

Sess., 1986) amendment, effective July 1, 1986, deleted "and the remaining monies shall be placed in the special fund to be designated 'The Safety Inspection Monitoring Fund' to be used at the direction of the Commissioner for monitoring the equipment inspection of motor vehicles" at the end of subdivision (c)(1) and substituted "and any excess up to one dollar and eighty cents (\$1.80) to the Highway Fund" for "the next fifteen cents (15¢) to the 'State Safety Inspection Monitoring Fund' to be used at the direction of the Commissioner for monitoring the equipment inspection of motor vehicles, and any excess up to one dollar and sixty-five cents (\$1.65) to the Highway Fund" at the end of subdivision (c)(2).

§ 20-183.8. Commissioner of Motor Vehicles to issue regulations subject to approval of Governor; penalties for violation; fictitious or unlawful inspection certificate; 30-day grace period for expired inspection certificates.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 852, s. 17 amends Session Laws 1985, c. 764, s. 40, so as to change the effective date of the amendment to this section by c. 764 from July 1, 1986 to September 1, 1986.

Session Laws 1985, c. 764, s. 40, as amended by Session Laws 1985 (Reg. Sess., 1986), c. 852,

s. 17, provides: "This act shall become effective September 1, 1986, and shall apply to offenses committed on or after that date. Offenses committed before the effective date of this act [September 1, 1986] shall be governed by the law in effect at the time of the offense."

ARTICLE 4.

State Highway Patrol.

§ 20-187.3. Quotas prohibited.

Editor's Note. — Section 37(e) of Session Laws 1985 (Reg. Sess., 1986), c. 1014, provides: "Notwithstanding the provisions of Section 19.1 of Chapter 1137 of the 1979 Session Laws as amended by Chapter 1053 of the 1981 Session Laws, G.S. 115C-12(9)a., G.S. 115C-12(16), G.S. 126-7, or any other provision

of law other than G.S. 20-187.3(a) or G.S. 7A-102(c), no employee or officer of the public school system shall receive an automatic increment and no State employee or officer shall receive a merit increment during the 1986-87 fiscal year, except as otherwise permitted by this act."

§ 20-189. Patrolmen assigned to Governor's office.

The Secretary of Crime Control and Public Safety, at the request of the Governor, shall assign and attach two members of the State Highway Patrol to the office of the Governor, there to be assigned such duties and perform such services as the Governor may direct. The salary of the State highway patrolmen so assigned to the office of the Governor shall be paid from appropriations made to the office of the Governor and shall be fixed in an amount to be determined by the Governor. Prior to taking any action under the previous

sentence, the Governor may consult with the Advisory Budget Commission. (1941, cc. 23, 36; 1965, c. 1159; 1977, c. 70, s. 13; 1983, c. 717, s. 6; 1985 (Reg. Sess., 1986), c. 955, ss. 2, 3.)

Editor's Note. — Section 1 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "This act may be cited as the Separation of Powers Act of 1986."

Section 127 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "If any part of this act shall be declared invalid by any court, this shall not affect any other part of this act."

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 1, 1986, deleted "after consultation with the Advisory Budget Commission" at the end of the second sentence and added the third sentence.

ARTICLE 9A.

Motor Vehicle Safety and Financial Responsibility Act of 1953.

§ 20-279.1. Definitions.

CASE NOTES

Definition of "Owner," etc. —

In accord with main volume. *Indiana Lumbermens Mut. Ins. Co. v. Unigard Indem. Co.*, 76 N.C. App. 88, 331 S.E.2d 741, cert. denied, 314 N.C. 666, 335 S.E.2d 494 (1985).

Ownership Does Not Pass until Transfer of Title Pursuant to § 20-72 (b). — For purposes of liability insurance coverage, ownership of a motor vehicle which requires registration under the Motor Vehicle Act of 1937 does not pass until transfer of legal title is effected as provided in § 20-72(b). *Indiana Lumbermens Mut. Ins. Co. v. Unigard Indem. Co.*, 76 N.C. App. 88, 331 S.E.2d 741, cert. denied, 314 N.C. 666, 335 S.E.2d 494 (1985).

Where an insured driver has the unrestricted use and possession of an automobile, the certificate of title for which is retained by another, the car is "furnished for the regular use of" the insured driver, and thus not covered by the "non-owned" clause of the policy. *Indiana Lumbermens Mut. Ins. Co. v. Unigard Indem. Co.*, 76 N.C. App. 88, 331 S.E.2d 741, cert. denied, 314 N.C. 666, 335 S.E.2d 494 (1985).

Cited in *American Tours, Inc. v. Liberty Mut. Ins. Co.*, — N.C. —, 338 S.E.2d 92 (1986).

§ 20-279.4. Information required in accident report.

Legal Periodicals. — For 1984 survey, "Employee Exclusion Clauses in Automobile

Liability Insurance Policies," see 63 N.C.L. Rev. 1228 (1985).

§ 20-279.5. Security required unless evidence of insurance; when security determined; suspension; exceptions.

Legal Periodicals. — For 1984 survey, "Employee Exclusion Clauses in Automobile

Liability Insurance Policies," see 63 N.C.L. Rev. 1228 (1985).

CASE NOTES

The legislative policy behind uninsured motorist insurance laws is not to divide liability among insurers or limit insurers' liability, but to protect the motorist to the extent the statute requires protection against a specific class of tortfeasors. *Hamilton v. Travelers Indem. Co.*, 77 N.C. App. 318, 335 S.E.2d 228 (1985).

There is nothing in the legislative scheme suggesting that insured persons should have to concern themselves with the liability insurance limits of tortfeasors; in fact, the very purpose of uninsured motorist coverage is to ameliorate that concern. *Hamilton v. Travelers Indem. Co.*, 77 N.C. App. 318, 335 S.E.2d 228 (1985).

Effect of Change in Uninsured Motorist Coverage by 1979 Amendment. — Motorists who contracted and paid premiums for uninsured motorist coverage after the effective date of the new limits provided in subsection (c) of this section by its 1979 amendment should receive coverage up to those higher limits. *Hamilton v. Travelers Indem. Co.*, 77 N.C. App. 318, 335 S.E.2d 228 (1985).

Motorists with existing policies, including uninsured motorist coverage, at the level speci-

fied in subsection (c) of this section prior to its 1979 amendment could not claim up to the new limits if they were struck by an uninsured motorist; if those insureds, before their routinely scheduled policy renewal, desired more uninsured motorist coverage at the higher level, they could renew their policies early. In the interim, they would not be in violation of the Motor Vehicle Safety and Financial Responsibility Act because they retained their existing, lower-limit policies, nor would their insurers be forced to assume additional, uncontracted for liability. *Hamilton v. Travelers Indem. Co.*, 77 N.C. App. 318, 335 S.E.2d 228 (1985).

"Stacking" or aggregating coverages under the compulsory uninsured motorist coverage requirement may occur where coverage is provided by two or more policies, each providing the mandatory minimum coverage. However, to the extent that the coverage provided by motor vehicle liability insurance policies exceeds the mandatory minimum coverage required by the statute, the additional coverage is voluntary, and is governed by the terms of the insurance contract. *GEICO v. Herndon*, — N.C. App. —, 339 S.E.2d 472 (1986).

§ 20-279.6. Further exceptions to requirement of security.

Legal Periodicals. — For 1984 survey, "Employee Exclusion Clauses in Automobile

Liability Insurance Policies," see 63 N.C.L. Rev. 1228 (1985).

§ 20-279.21. "Motor vehicle liability policy" defined.

- (b) Such owner's policy of liability insurance:
- (1) Shall designate by explicit description or by appropriate reference all motor vehicles with respect to which coverage is thereby to be granted;
 - (2) Shall insure the person named therein and any other person, as insured, using any such motor vehicle or motor vehicles with the express or implied permission of such named insured, or any other persons in lawful possession, against loss from the liability imposed by law for damages arising out of the ownership, maintenance or use of such motor vehicle or motor vehicles within the United States of America or the Dominion of Canada subject to limits exclusive of interest and costs, with respect to each such motor vehicle, as follows: twenty-five thousand dollars (\$25,000) because of bodily injury to or death of one person in any one accident and, subject to said limit for one person, fifty thousand dollars (\$50,000) because of bodily injury to or death of two or more persons in any one accident, and ten thousand dollars (\$10,000) because of injury to or destruction of property of others in any one accident; and
 - (3) No policy of bodily injury liability insurance, covering liability arising out of the ownership, maintenance, or use of any motor vehicle, shall be delivered or issued for delivery in this State with respect to

any motor vehicle registered or principally garaged in this State unless coverage is provided therein or supplemental thereto, in limits for bodily injury or death set forth in subsection (c) of G.S. 20-279.5, under provisions filed with and approved by the Commissioner of Insurance, for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles and hit-and-run motor vehicles because of bodily injury, sickness or disease, including death, resulting therefrom; provided, an insured is entitled to secure additional coverage up to the limits of bodily injury liability in the owner's policy of liability insurance that he carries for the protection of third persons. Such provisions shall include coverage for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of injury to or destruction of the property of such insured, with a limit in the aggregate for all insureds in any one accident of up to the limits of property damage liability in the owner's policy of liability insurance, and subject, for each insured, to an exclusion of the first one hundred dollars (\$100.00) of such damages. Such provision shall further provide that a written statement by the liability insurer, whose name appears on the certification of financial responsibility made by the owner of any vehicle involved in an accident with the insured, that such other motor vehicle was not covered by insurance at the time of the accident with the insured shall operate as a prima facie presumption that the operator of such other motor vehicle was uninsured at the time of the accident with the insured for the purposes of recovery under this provision of the insured's liability insurance policy. The coverage required under this subdivision shall not be applicable where any insured named in the policy shall reject the coverage. If the named insured rejects the coverage required under this subdivision, the insurer shall not be required to offer the coverage in any renewal, reinstatement, substitute, amended, altered, modified, transfer or replacement policy unless the named insured makes a written request for the coverage. Rejection of this coverage for policies issued after October 1, 1986, shall be made in writing by the named insured on a form promulgated by the North Carolina Rate Bureau and approved by the Commissioner of Insurance.

In addition to the above requirements relating to uninsured motorist insurance, every policy of bodily injury liability insurance covering liability arising out of the ownership, maintenance or use of any motor vehicle, which policy is delivered or issued for delivery in this State, shall be subject to the following provisions which need not be contained therein.

- a. A provision that the insurer shall be bound by a final judgment taken by the insured against an uninsured motorist if the insurer has been served with copy of summons, complaint or other process in the action against the uninsured motorist by registered or certified mail, return receipt requested, or in any manner provided by law; provided however, that the determination of whether a motorist is uninsured may be decided only by an action against the insurer alone. The insurer, upon being served as herein provided, shall be a party to the action between the insured and the uninsured motorist though not named in the caption of the pleadings and may defend the suit in the name of the uninsured motorist or in its own name. The insurer, upon being served with copy of summons, complaint or other pleading, shall

have the time allowed by statute in which to answer, demur or otherwise plead (whether such pleading is verified or not) to the summons, complaint or other process served upon it. The consent of the insurer shall not be required for the initiation of suit by the insured against the uninsured motorist: Provided, however, no action shall be initiated by the insured until 60 days following the posting of notice to the insurer at the address shown on the policy or after personal delivery of such notice to the insurer or its agent setting forth the belief of the insured that the prospective defendant or defendants are uninsured motorists. No default judgment shall be entered when the insurer has timely filed an answer or other pleading as required by law.

- b. Where the insured, under the uninsured motorist coverage, claims that he has sustained bodily injury as the result of collision between motor vehicles and asserts that the identity of the operator or owner of a vehicle (other than a vehicle in which the insured is a passenger) cannot be ascertained, the insured may institute an action directly against the insurer: Provided, in such event, the insured, or someone in his behalf, shall report the accident within 24 hours or as soon thereafter as may be practicable, to a police officer, peace officer, other judicial officer, or to the Commissioner of Motor Vehicles. The insured shall also within a reasonable time give notice to the insurer of his injury, the extent thereof, and shall set forth in such notice the time, date and place of such injury. Thereafter, on forms to be mailed by the insurer within 15 days following receipt of the notice of the accident to the insurer, the insured shall furnish to insurer such further reasonable information concerning the accident and the injury as the insurer shall request. If such forms are not so furnished within 15 days, the insured shall be deemed to have complied with the requirements for furnishing information to the insurer. Suit may not be instituted against the insurer in less than 60 days from the posting of the first notice of such injury or accident to the insurer at the address shown on the policy or after personal delivery of such notice to the insurer or its agent.

Provided under this section the term "uninsured motor vehicle" shall include, but not be limited to, an insured motor vehicle where the liability insurer thereof is unable to make payment with respect to the legal liability within the limits specified therein because of insolvency.

An insurer's insolvency protection shall be applicable only to accidents occurring during a policy period in which its insured's uninsured motorist coverage is in effect where the liability insurer of the tort-feasor becomes insolvent within three years after such an accident. Nothing herein shall be construed to prevent any insurer from affording insolvency protection under terms and conditions more favorable to the insured than is provided herein.

In the event of payment to any person under the coverage required by this section and subject to the terms and conditions of such coverage, the insurer making such payment shall, to the extent thereof, be entitled to the proceeds of any settlement for judgment resulting from the exercise of any limits of recovery of such person against any person or organization legally responsible for the bodily injury for which such payment is made, including the proceeds recoverable from the assets of the insolvent insurer.

For the purpose of this section, an "uninsured motor vehicle" shall be a motor vehicle as to which there is no bodily injury liability insurance and property damage liability insurance in at least the amounts specified in subsection (c) of G.S. 20-279.5, or there is such insurance but the insurance company writing the same denies coverage thereunder, or has become bankrupt, or there is no bond or deposit of money or securities as provided in G.S. 20-279.24 or 20-279.25 in lieu of such bodily injury and property damage liability insurance, or the owner of such motor vehicle has not qualified as a self-insurer under the provisions of G.S. 20-279.33, or a vehicle that is not subject to the provisions of the Motor Vehicle Safety and Financial Responsibility Act; but the term "uninsured motor vehicle" shall not include:

- a. A motor vehicle owned by the named insured;
- b. A motor vehicle which is owned or operated by a self-insurer within the meaning of any motor vehicle financial responsibility law, motor carrier law or any similar law;
- c. A motor vehicle which is owned by the United States of America, Canada, a state, or any agency of any of the foregoing (excluding, however, political subdivisions thereof);
- d. A land motor vehicle or trailer, if operated on rails or crawler-treads or while located for use as a residence or premises and not as a vehicle; or
- e. A farm-type tractor or equipment designed for use principally off public roads, except while actually upon public roads.

For purposes of this section "persons insured" means the named insured and, while resident of the same household, the spouse of any such named insured and relatives of either, while in a motor vehicle or otherwise, and any person who uses with the consent, expressed or implied, of the named insured, the motor vehicle to which the policy applies and a guest in such motor vehicle to which the policy applies or the personal representative of any of the above or any other person or persons in lawful possession of such motor vehicle.

- (4) Shall, in addition to the coverages set forth in subdivisions (2) and (3) of this subsection, provide underinsured motorist coverage, to be used only with policies that are written at limits that exceed those prescribed by subdivision (2) of this section and that afford uninsured motorist coverage as provided by subdivision (3) of this subsection, in an amount equal to the policy limits for automobile bodily injury liability as specified in the owner's policy. An "uninsured motor vehicle," as described in subdivision (3) of this subsection, includes an "underinsured highway vehicle," which means a highway vehicle with respect to the ownership, maintenance, or use of which, the sum of the limits of liability under all bodily injury liability bonds and insurance policies applicable at the time of the accident is less than the applicable limits of liability under the owner's policy. For the purposes of this subdivision, the term "highway vehicle" means a land motor vehicle or trailer other than (i) a farm-type tractor or other vehicle designed for use principally off public roads and while not upon public roads, (ii) a vehicle operated on rails or crawler-treads, or (iii) a vehicle while located for use as a residence or premises. The provisions of subdivision (3) of this subsection shall apply to the coverage required by this subdivision. Underinsured motorist coverage shall be deemed to apply when, by reason of payment of judgment or settlement, all liability bonds or insurance policies providing coverage for bodily injury caused by the ownership, mainte-

nance, or use of the underinsured highway vehicle have been exhausted. Exhaustion of such liability coverage for purpose of any single liability claim presented for underinsured motorist coverage shall be deemed to occur when either (a) the limits of liability per claim have been paid upon such claim, or (b) by reason of multiple claims, the aggregate per occurrence limit of liability has been paid. Underinsured motorist coverage shall be deemed to apply to the first dollar of an underinsured motorist coverage claim beyond amounts paid to the claimant pursuant to the exhausted liability policy.

In any event, the limit of underinsured motorist coverage applicable to any claim is determined to be the difference between the amount paid to the claimant pursuant to the exhausted liability policy and the total limits of the owner's underinsured motorist coverages provided in the owner's policies of insurance; it being the intent of this paragraph to provide to the owner, in instances where more than one policy may apply, the benefit of all limits of liability of underinsured motorist coverage under all such policies: Provided that this paragraph shall apply only to nonfleet private passenger motor vehicle insurance as defined in G.S. 58-131.36(9) and (10).

An underinsured motorist insurer may at its option, upon a claim pursuant to underinsured motorist coverage, pay moneys without there having first been an exhaustion of the liability insurance policy covering the ownership, use, and maintenance of the underinsured highway vehicle. In the event of such payment, the underinsured motorist insurer shall be either: (a) entitled to receive by assignment from the claimant any right or (b) subrogated to the claimant's right regarding any claim the claimant has or had against the owner, operator, or maintainer of the underinsured highway vehicle, provided that the amount of the insurer's right by subrogation or assignment shall not exceed payments made to the claimant by the insurer. No insurer shall exercise any right of subrogation or any right to approve settlement with the original owner, operator, or maintainer of the underinsured highway vehicle under a policy providing coverage against an underinsured motorist where the insurer has been provided with written notice in advance of a settlement between its insured and the underinsured motorist and the insurer fails to advance a payment to the insured in an amount equal to the tentative settlement within 30 days following receipt of such notice. Further, the insurer shall have the right, at its election, to pursue its claim by assignment or subrogation in the name of the claimant, and the insurer shall not be denominated as a party in its own name except upon its own election. Assignment or subrogation as provided in this subdivision shall not, absent contrary agreement, operate to defeat the claimant's right to pursue recovery against the owner, operator, or maintainer of the underinsured highway vehicle for damages beyond those paid by the underinsured motorist insurer. The claimant and the underinsured motorist insurer may join their claims in a single suit without requiring that such insurer be named as a party. Any claimant who intends to pursue recovery against the owner, operator, or maintainer of the underinsured highway vehicle for moneys beyond those paid by the underinsured motorist insurer shall prior to doing so give notice to such insurer and give such insurer, at its expense, the opportunity to participate in the prosecution of such claim. Upon the entry of judgment in a suit upon any such claim in which the underinsured motorist insurer and claimant are joined, payment upon such judgment, unless otherwise agreed to, shall be

applied pro rata to the claimant's claim beyond payment by the insurer of the owner, operator or maintainer of the underinsured highway vehicle and the claim of the underinsured motorist insurer.

A party injured by the operation of an underinsured highway vehicle who institutes a suit for the recovery of moneys for such injuries and in such an amount that, if recovered, would support a claim under underinsured motorist coverage shall give notice of the initiation of the suit to the underinsured motorist insurer as well as to the insurer providing primary liability coverage upon the underinsured highway vehicle. Upon receipt of such notice, the underinsured motorist insurer shall have the right to appear in defense of such claim without being named as a party therein, and without being named as a party may participate in such suit as fully as if it were a party. The underinsured motorist insurer may elect, but may not be compelled, to appear in such action in its own name and present therein a claim against other parties; provided that application is made to and approved by a presiding superior court judge, in any such suit, any insurer providing primary liability insurance on the underinsured highway vehicle may upon payment of all of its applicable limits of liability be released from further liability or obligation to participate in the defense of such proceeding. However, prior to approving any such application, the court shall be persuaded that the owner, operator, or maintainer of the underinsured highway vehicle against whom a claim has been made has been apprised of the nature of the proceeding and given his right to select counsel of his own choice to appear in such action on his separate behalf. In the event that an underinsured motorist insurer, following the approval of such application, pays in settlement or partial or total satisfaction of judgment moneys to the claimant, such insurer shall be subrogated to or entitled to an assignment of the claimant's rights against the owner, operator, or maintainer of the underinsured highway vehicle and, provided that adequate notice of right of independent representation was given to such owner, operator, or maintainer, a finding of liability or the award of damages shall be res judicata between the underinsured motorist insurer and the owner, operator, or maintainer of underinsured highway vehicle.

The coverage required under this subdivision shall not be applicable where any insured named in the policy rejects the coverage.

If the named insured rejects the coverage required under this subdivision, the insurer shall not be required to offer the coverage in any renewal, reinstatement, substitute, amended, altered, modified, transfer or replacement policy unless the named insured makes a written request for the coverage. Rejection of this coverage for policies issued after October 1, 1986, shall be made in writing by the named insured on a form promulgated by the North Carolina Rate Bureau and approved by the Commissioner of Insurance.

(1953, c. 1300, s. 21; 1955, c. 1355; 1961, c. 640; 1965, c. 156; c. 674, s. 1; c. 898; 1967, c. 277, s. 4; c. 854; c. 1159, s. 1; c. 1162, s. 1; c. 1186, s. 1; c. 1246, s. 1; 1971, c. 1205, s. 2; 1973, c. 745, s. 4; 1975, c. 326, ss. 1, 2; c. 716, s. 5; c. 866, ss. 1-4; 1979, cc. 190, 675; c. 832, ss. 6, 7; 1983, c. 777, ss. 1, 2; 1985, c. 666, s. 74; 1985 (Reg. Sess., 1986), c. 1027, ss. 41, 42.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1027, s. 57, contains a severability clause.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective October 1, 1986, rewrote the proviso at the end of the first sentence of the first paragraph of subdivision (b)(3) and substituted "up to the limits of prop-

erty damage liability in the owner's policy of liability insurance" for "ten thousand dollars (\$10,000)" in the second sentence of the first paragraph of subdivision (b)(3). The amendment also added the last sentence of the first paragraph of subdivision (b)(3) and added the last paragraph of subdivision (b)(4).

Legal Periodicals. — For 1984 survey, "Employee Exclusion Clauses in Automobile Liability Insurance Policies," see 63 N.C.L. Rev. 1228 (1985).

CASE NOTES

IV. Underinsured Motorist Coverage.

I. GENERAL CONSIDERATION.

Supplemental Effect of § 20-281. — Section 20-281, which applies specifically to automobile owners who lease their cars for profit, is a companion section to and supplements this section, which applies to automobile owners generally. *American Tours, Inc. v. Liberty Mut. Ins. Co.*, 315 N.C. 341, 338 S.E.2d 92 (1986).

Section 20-281 is a source of mandatory terms for automobile liability insurance policies in addition to and independent of this section. *American Tours, Inc. v. Liberty Mut. Ins. Co.*, 315 N.C. 341, 338 S.E.2d 92 (1986).

A compulsory motor vehicle insurance act is a remedial statute, etc. —

In accord with 1st paragraph in the main volume. See *State Capital Ins. Co. v. Nationwide Mut. Ins. Co.*, 78 N.C. App. 542, 337 S.E.2d 866 (1985).

The provisions of this section are written, etc. —

When the insuring language of the policy conflicts with the coverage mandated by this section, the provisions of the statute will control. *State Capital Ins. Co. v. Nationwide Mut. Ins. Co.*, 78 N.C. App. 542, 337 S.E.2d 866 (1985), reading into insurance policy coverage for damages arising out of the use of an automobile.

Exclusionary Provisions Contravening Article Are Void. —

An exclusion which attempts to limit the protection available to those designated as insureds to only the insured vehicle would be contrary to subdivision (b)(3) of this section and void. *Crowder v. North Carolina Farm Bureau Mut. Ins. Co.*, — N.C. App. —, 340 S.E.2d 127 (1986).

In essence, subdivision (b)(3) of this section establishes two "classes" of "persons insured": (1) The named insured and, while resident of the same household, the spouse of the named insured and relatives of either and

(2) any person who uses with the consent, express or implied, of the named insured, the insured vehicle, and a guest in such vehicle. The latter class are "persons insured" under this section only when the insured vehicle is involved, while the former class are "persons insured" even where the insured vehicle is not involved in the insured's injuries. *Crowder v. North Carolina Farm Bureau Mut. Ins. Co.*, — N.C. App. —, 340 S.E.2d 127 (1986).

The words "arising out of", etc. —

For purposes of determining whether an injury is covered by policy or statutory language extending coverage to loss "arising out of the use" of a motor vehicle, the use need not be the proximate cause of the injury in the narrow legal sense. Coverage will be extended if there is a reasonable causal connection between the use and the injury. *State Capital Ins. Co. v. Nationwide Mut. Ins. Co.*, 78 N.C. App. 542, 337 S.E.2d 866 (1985).

Where the cause of injury is distinctly independent of the use of the vehicle, no causal connection can be said to exist, and coverage will not be afforded. *State Capital Ins. Co. v. Nationwide Mut. Ins. Co.*, 78 N.C. App. 542, 337 S.E.2d 866 (1985).

Injury in Reaching into Truck for Rifle.

— Where the insured frequently used his insured truck for hunting, the transportation of firearms being an integral part of that activity, and at the time of the accident, the insured was reaching into the cab for his rifle in order to shoot a deer, the requisite causal connection between victim's injury and the use of the truck was present, and thus the injury arose out of the use of the truck so as to be within the coverage provided by the automobile liability insurance policy. *State Capital Ins. Co. v. Nationwide Mut. Ins. Co.*, 78 N.C. App. 542, 337 S.E.2d 866 (1985).

Admissibility of Insurer's Statements Regarding Coverage. — A written statement by the liability insurer creates a prima facie presumption of an operator's underinsurance

as well as uninsurance. By establishing a prima facie presumption of underinsurance for such written statements, subdivisions (b)(3) and (b)(4) of this section implicitly make such statements admissible into evidence in order to trigger the operation of the presumption. *Crowder v. North Carolina Farm Bureau Mut. Ins. Co.*, — N.C. App. —, 340 S.E.2d 127 (1986).

Additional coverage is voluntary and the liability of the carrier for such coverage must be determined according to the terms and conditions of the binder. *Roseboro Ford, Inc. v. Bass*, 77 N.C. App. 263, 335 S.E.2d 214 (1985).

Stacking of Coverage. — Policy provisions which require that the terms of the policy should "apply separately" to separate automobiles insured under a single policy would allow stacking of medical payments coverages, except where there was unambiguous language establishing that the per accident limitations applied regardless of the number of automobiles insured under the policy or other unambiguous language tying the coverages to specific automobiles. *Hamilton v. Travelers Indem. Co.*, 77 N.C. App. 318, 335 S.E.2d 228 (1985).

Absolute Obligation to Defend. — The obligation of a liability insurer to defend an action brought by an injured third party against the insured is absolute when the allegations of the complaint bring the claim within the coverage of the policy. *Indiana Lumbermen's Mut. Ins. Co. v. Champion*, — N.C. App. —, 343 S.E.2d 15 (1986).

An insurer's refusal to defend is unjustified if it is determined that the action is in fact within the coverage of the policy. This is so even if the refusal to defend is based on the insurer's honest but mistaken belief that the claim is outside the policy coverage. *Indiana Lumbermen's Mut. Ins. Co. v. Champion*, — N.C. App. —, 343 S.E.2d 15 (1986).

Insurer Unjustifiedly Refusing to Defend Not Entitled to Invoke "No Action" Provision. — Where claim against insured was within the coverage of insurer's policy, insurer's refusal to defend the action was unjustified, and therefore insurer was not entitled to successfully invoke the "no action" provision in its policy as a defense. *Indiana Lumbermen's Mut. Ins. Co. v. Champion*, — N.C. App. —, 343 S.E.2d 15 (1986).

Stated in Gardner v. North Carolina State Bar, — N.C. —, 341 S.E.2d 517 (1986).

II. THE OMNIBUS CLAUSE.

No Recovery Where Driver Had Neither Permission Nor Lawful Possession. — Subdivision (b)(2) of this section does not permit victims of accidents to recover from the owner of a motor vehicle, or his insurer, where the

offending driver of the vehicle had neither permission to drive it nor lawful possession of it. *Nationwide Mut. Ins. Co. v. Land*, 78 N.C. App. 342, 337 S.E.2d 180 (1985).

Permission May Be Expressed, etc. —

In accord with 2nd paragraph in main volume. See *Nationwide Mut. Ins. Co. v. Land*, 78 N.C. App. 342, 337 S.E.2d 180 (1985).

Use Held Without Permission. —

While an individual's initial use of an automobile was permitted under the terms of a written lease and was subject to the terms thereof, once he defaulted and failed to return the car as demanded by Bank-Lessor, his continued use was a material deviation from the permission granted in the lease. As such, it was not a permissive use within the meaning of Bank's insurance policy or subdivision (b)(2) of this section. *Nationwide Mut. Ins. Co. v. Land*, 78 N.C. App. 342, 337 S.E.2d 180 (1985).

III. UNINSURED MOTORIST COVERAGE.

Purpose of Uninsured Motorist Provisions. —

In accord with 1st paragraph in the main volume. See *Hamilton v. Travelers Indem. Co.*, 77 N.C. App. 318, 335 S.E.2d 228 (1985).

The legislative policy behind uninsured motorist insurance laws is not to divide liability among insurers or limit insurers' liability, but to protect the motorist to the extent the statute requires protection against a specific class of tortfeasors. *Hamilton v. Travelers Indem. Co.*, 77 N.C. App. 318, 335 S.E.2d 228 (1985).

There is nothing in the legislative scheme suggesting that insured persons should have to concern themselves with the liability insurance limits of tortfeasors; in fact, the very purpose of uninsured motorist coverage is to ameliorate that concern. *Hamilton v. Travelers Indem. Co.*, 77 N.C. App. 318, 335 S.E.2d 228 (1985).

Effect of Increase in Coverage under 1979 Amendment. — Motorists with existing policies including uninsured motorist coverage at the level specified in § 20-279.5(c) prior to its 1979 amendment could not claim up to the new limits if they were struck by an uninsured motorist; if those insureds, before their routinely scheduled policy renewal, desired more uninsured motorist coverage at the higher level, they could renew their policies early. In the interim, they would not be in violation of the Motor Vehicle Safety and Financial Responsibility Act because they retained their existing, lower-limit policies, nor would their insurers be forced to assume additional, uncontracted for liability. *Hamilton v. Travelers Indem. Co.*, 77 N.C. App. 318, 335 S.E.2d 228 (1985).

Motorists who contracted and paid premiums for uninsured motorist coverage after the effective date of the new limits provided in § 20-279.5(c) following its 1979 amendment should receive coverage up to those higher limits. *Hamilton v. Travelers Indem. Co.*, 77 N.C. App. 318, 335 S.E.2d 228 (1985).

Insured Is Not Limited to One Recovery, etc. —

In accord with the main volume. See *Hamilton v. Travelers Indem. Co.*, 77 N.C. App. 318, 335 S.E.2d 228 (1985).

"Stacking" or aggregating coverages under the compulsory uninsured motorists coverage requirement may occur where coverage is provided by two or more policies, each providing the mandatory minimum coverage. However, to the extent that the coverage provided by motor vehicle liability insurance policies exceeds the mandatory minimum coverage required by the statute, the additional coverage is voluntary, and is governed by the terms of the insurance contract. *GEICO v. Herndon*, — N.C. App. —, 339 S.E.2d 472 (1986).

The authority of the court to tax costs in an action to recover under uninsured motorist provisions of an insurance policy is not dependent on either the insurance policy or subdivision (b)(3) of this section. *Ensley v. Nationwide Mut. Ins. Co.*, — N.C. App. —, 342 S.E.2d 567 (1986).

IV. UNDERINSURED MOTORIST COVERAGE.

Limits of Coverage. — Subdivision (b)(4) of this section provides that the limit of payment

for underinsured motorist coverage is only the difference between the liability insurance that is applicable (the limit on the tortfeasor's liability coverage) and the limits of the undersigned motorist coverage as specified in the owner's policy (the limit on the undersigned motorist coverage in the plaintiff's policy with the defendant). *Davidson v. United States Fid. & Guar. Co.*, 78 N.C. App. 140, 336 S.E.2d 709 (1985).

Where the unambiguous terms of plaintiff's underinsured motorist coverage provided that any amount payable by the defendant would be reduced by all sums paid because of bodily injury by those legally responsible, the \$25,000.00 limit on the plaintiff's underinsured motorist coverage would be reduced by the \$25,000.00 which the plaintiff received in settlement from tortfeasor, leaving nothing due to plaintiff from defendant. *Davidson v. United States Fid. & Guar. Co.*, 78 N.C. App. 140, 336 S.E.2d 709 (1985).

Underinsured Motorist Endorsement Held Applicable to Insured Riding in Nonowned Vehicle. — Plaintiff, who was injured while riding as a passenger in a Jeep owned and operated by another individual, was covered by his father's policy, which contained an underinsured motorist endorsement, even though his injuries were unrelated to the use or operation of his father's van, which was the insured vehicle under the policy. *Crowder v. North Carolina Farm Bureau Mut. Ins. Co.*, — N.C. App. —, 340 S.E.2d 127 (1986), expressly limiting its holding to allowing underinsured motorist coverage for insureds operating, or riding in, a nonowned vehicle.

§ 20-279.34. North Carolina Automobile Insurance Plan.

Legal Periodicals. — For 1984 survey, "Employee Exclusion Clauses in Automobile

Liability Insurance Policies," see 63 N.C.L. Rev. 1228 (1985).

ARTICLE 11.

Liability Insurance Required of Persons Engaged in Renting Motor Vehicles.

§ 20-281. Liability insurance prerequisite to engaging in business; coverage of policy.

CASE NOTES

Coverage Requirement Is Reasonable. — The requirement of this section that policies which insure automobile lessors provide coverage for lessees and their agents is reasonable

in light of the statute's purpose. A lessor's insurance should cover lessees because lessees are unlikely to purchase insurance on account of what may be the temporary nature of a

rental arrangement. A lessor's insurance also should cover lessees' agents because, being mere agents, they are also unlikely to obtain their own insurance. *American Tours, Inc. v. Liberty Mut. Ins. Co.*, 315 N.C. 341, 338 S.E.2d 92 (1986).

The public policy expressed in this section is that even where automobile rental agreements are violated it is preferable to provide coverage for innocent motorists rather than to deny such coverage because of the violation. *American Tours, Inc. v. Liberty Mut. Ins. Co.*, 315 N.C. 341, 338 S.E.2d 92 (1986).

Section Is in Addition to § 20-279.21. — This section is a source of mandatory terms for automobile liability insurance policies in addition to and independent of § 20-279.21. *American Tours, Inc. v. Liberty Mut. Ins. Co.*, 315 N.C. 341, 338 S.E.2d 92 (1986).

This section, which applies specifically to automobile owners who lease their cars for profit, is a companion section to and supplements § 20-279.21, which applies to automobile owners generally. *American Tours, Inc. v. Liberty Mut. Ins. Co.*, 315 N.C. 341, 338 S.E.2d 92 (1986).

A liability policy issued to one in the business of renting cars must comply with both § 20-281 and this section and provide all coverages required by both sections. *American Tours, Inc. v. Liberty Mut. Ins. Co.*, 315 N.C. 341, 338 S.E.2d 92 (1986).

Section Provides Coverage to Lessees and Their Agents. — In every automobile liability policy insuring automobile lessors, this section provides coverage to lessees and lessees' agents. *American Tours, Inc. v. Liberty Mut. Ins. Co.*, 315 N.C. 341, 338 S.E.2d 92 (1986), holding that if 19 year old was an agent of her father, the lessee, this section required that she be covered, even though she did not have lessors' permission to use the car.

Amount of Coverage. — When an automobile insurance policy providing coverage in amounts in excess of that statutorily required contains substantive coverages less than those statutorily required, the insurer's liability for an accident for which the statute requires but the policy does not provide coverage is limited to the minimum amount of coverage required by statutes. *American Tours, Inc. v. Liberty Mut. Ins. Co.*, 315 N.C. 341, 338 S.E.2d 92 (1986).

Extension of Coverage until Relationship Is Terminated. — The Legislature intended that coverage under this section should be extended until such times as there has been a clear termination of the relationship of lessor-lessee. *Nationwide Mut. Ins. Co. v. Land*, 78 N.C. App. 342, 337 S.E.2d 180 (1985).

Breach or Default by Lessee. — An insurer who issues a policy to satisfy the requirements of this section is not relieved from its duty to provide coverage for a lessee upon a mere breach of an automobile lease agreement, or even upon a default in its terms. *Nationwide Mut. Ins. Co. v. Land*, 78 N.C. App. 342, 337 S.E.2d 180 (1985).

Conversion by Lessee. — Where individual's continued possession of automobile, after bank had given him notice that he was in default and demanded possession of the automobile, was adverse to the rights of bank as owner and lessor and amounted to a conversion of the automobile, the relationship of lessor-lessee ceased to exist. Therefore such individual was not operating the automobile as banks lessee at the time of collision some 12 months thereafter, and bank's insurer was not required by this section to extend coverage for personal injuries caused by defendant's operation of the automobile. *Nationwide Mut. Ins. Co. v. Land*, 78 N.C. App. 342, 337 S.E.2d 180 (1985).

ARTICLE 12.

Motor Vehicle Dealers and Manufacturers Licensing Law.

§ 20-285. Regulation of motor vehicle distribution in public interest.

Legal Periodicals. — For 1984 survey on commercial law, "Green Light to Territorial

Security for Automobile Dealers," see 63 N.C.L. Rev. 1080 (1985).

§ 20-286. Definitions.

Legal Periodicals. — For 1984 survey on commercial law, "Green Light to Territorial Security for Automobile Dealers," see 63 N.C.L. Rev. 1080 (1985).

§ 20-288. Application for license; information required and considered; expiration of license; supplemental license; bond.

CASE NOTES

Accrual of Cause of Action Against Surety. — Causes of action of truck purchaser against dealer and against dealer's surety under a motor vehicle dealer surety bond both arose when purchaser discovered dealer's breach of contract or fraud, and could be no later than the date on which purchaser filed a complaint against the dealer in the superior

court. And as nothing prevented purchaser from joining both defendants in one action or from instituting a separate action against surety while the case against dealer was pending, the three-year statute of limitations of § 1-52(1) was not tolled. *Bernard v. Ohio Cas. Ins. Co.*, — N.C. App. —, 339 S.E.2d 20 (1986).

§ 20-300. Appeals from actions of Commissioner.

CASE NOTES

Review of a decision by the Commissioner of Motor Vehicles is governed by § 150A-51 (see now § 150B-51). *GMC v.*

Kinlaw, 78 N.C. App. 521, 338 S.E.2d 114 (1985).

§ 20-301. Powers of Commissioner.

CASE NOTES

Power to Forestall Franchise Termination. — Neither this section nor § 20-305(6) expressly vests the Commissioner with the power to order parties to enter into a contract. However, the statutory prohibition on franchise termination except for cause remains intact. Thus it is not necessary that the Commissioner have the power to order parties to enter into contracts to enable the agency to function properly. *GMC v. Kinlaw*, 78 N.C. App. 521, 338 S.E.2d 114 (1985).

Commissioner's order finding that GMC failed to renew dealer's franchise agreements without cause and directing that the agreements not be terminated was proper. However, the Commissioner exceeded his authority in ordering GMC to enter "a regular five (5) year motor vehicle dealer sales agreement" with dealer. *GMC v. Kinlaw*, 78 N.C. App. 521, 338 S.E.2d 114 (1985).

§ 20-305. Coercing dealer to accept commodities not ordered; threatening to cancel franchise; preventing transfer of ownership; granting additional franchises; terminating franchises without good cause; preventing family succession.

Legal Periodicals. — For 1984 survey on commercial law, "Green Light to Territorial Security for Automobile Dealers," see 63 N.C.L. Rev. 1080 (1985).

CASE NOTES

Good Cause for Failure to Renew Franchise. — To prove that poor sales performance constitutes good cause for its failure to renew respondent's franchise agreements, petitioner must demonstrate that: (1) respondent failed to comply with a provision of the franchise agreements which required satisfactory sales performance; (2) petitioner's performance standards are reasonable; and (3) respondent's failure was not due primarily to economic or market factors beyond his control. *GMC v. Kinlaw*, 78 N.C. App. 521, 338 S.E.2d 114 (1985).

Power to Forestall Franchise Termination. — Neither § 20-301 nor subdivision (6) of this section expressly vest the Commissioner with the power to order parties to enter into a

contract. However, the statutory prohibition on franchise termination except for cause remains intact. Thus it is not necessary that the Commissioner have the power to order parties to enter into contracts to enable the agency to function properly. *GMC v. Kinlaw*, 78 N.C. App. 521, 338 S.E.2d 114 (1985).

Commissioner's order finding that GMC failed to renew dealer's franchise agreements without cause and directing that the agreements not be terminated was proper. However, the Commissioner exceeded his authority in ordering GMC to enter "a regular five (5) year motor vehicle dealer sales agreement" with dealer. *GMC v. Kinlaw*, 78 N.C. App. 521, 338 S.E.2d 114 (1985).

ARTICLE 13.

The Vehicle Financial Responsibility Act of 1957.

§ 20-309. Financial responsibility prerequisite to registration; must be maintained throughout registration period.

Legal Periodicals. —

For 1984 survey, "Employee Exclusion

Clauses in Automobile Liability Insurance Policies," see 63 N.C.L. Rev. 1228 (1985).

CASE NOTES

Applied in *Harris v. Scotland Neck Rescue Squad, Inc.*, 75 N.C. App. 444, 331 S.E.2d 695 (1985).

Stated in *Smith v. Nationwide Mut. Ins. Co.*, 315 N.C. 262, 337 S.E.2d 569 (1985).

§ 20-310. Grounds and procedure for cancellation or non-renewal of a motor vehicle liability insurance policy; review by Commissioner of Insurance.

CASE NOTES

As to the interrelationship between subdivision (d)(1) and subsection (f) of this section, see *Peerless Ins. Co. v. Freeman*, 78 N.C. App. 774, 338 S.E.2d 570 (1986).

Termination Before End of Policy Period Governed by Section. — An insurer may terminate automobile liability coverage before the end of a policy period only for the reasons stated in and in compliance with the proce-

dural requirements of this section. *Peerless Ins. Co. v. Freeman*, 78 N.C. App. 774, 338 S.E.2d 570 (1986).

Nonrenewal for Nonpayment of Premiums. — Provisions of this section were not intended to apply to the situation in which the policy is simply not renewed for nonpayment of premiums, where the insurer's "Premium Notice" puts the insured on notice of the need to

renew and affords him an opportunity to do so. *Smith v. Nationwide Mut. Ins. Co.*, 315 N.C. 262, 337 S.E.2d 569 (1985).

Where insurer's "Premium Notice" constituted a manifestation of its willingness to renew insured's policy, subdivision (g)(1) of this section was invoked and the requirements of subsection (f) did not apply. *Smith v. Nationwide Mut. Ins. Co.*, 315 N.C. 262, 337 S.E.2d 569 (1985).

Failure to Comply with Section. — Where the insured had accepted the insurance com-

pany's offer to renew when insured sent and insurer accepted partial payment in August, the insurer's attempted cancellation two months after renewal could only be deemed an act of the insurer, thereby invoking this section; and where insurer did not fulfill its obligations in conformity with this section, it did not effectively cancel insured's liability policy prior to the accident in question. *Peerless Ins. Co. v. Freeman*, 78 N.C. App. 774, 338 S.E.2d 570 (1986).

ARTICLE 15.

Vehicle Mileage Act.

§ 20-343. Unlawful change of mileage.

CASE NOTES

Odometer alteration prohibited by this section is a violation of motor vehicle laws of North Carolina as that term is used in

§ 20-28.1(c). *Evans v. Roberson*, 314 N.C. 315, 333 S.E.2d 228 (1985).

§ 20-347. Disclosure requirements.

CASE NOTES

Intent to Defraud Found Where Dealer Had Reason to Question Odometer Mileage. — The dealer acted with the intent to defraud, where the evidence showed that the dealer had some question as to the verity of the odometer mileage, yet all it did to confirm the mileage was to drive the vehicle, examine the interior and compare the mileage on the inspection sticker with the mileage on the odometer, and the evidence also showed that any mechanic could ascertain from the grease buildup on the chassis that the vehicle had

been driven more than the number of miles shown on the odometer, that several pieces of equipment, most noticeably the tires, were not of the original brand, and that the truck showed other signs of wear. To allow a dealer with expertise to ignore such indicators of wear would be to eviscerate the purpose of the statute. *Levine v. Parks Chevrolet, Inc.*, 76 N.C. App. 44, 331 S.E.2d 747, cert. denied, 315 N.C. 184, 337 S.E.2d 858 (1985).

Stated in *United States v. Cotoia*, 785 F.2d 497 (4th Cir. 1986).

§ 20-348. Private civil action.

CASE NOTES

Applied in *Levine v. Parks Chevrolet, Inc.*, 76 N.C. App. 44, 331 S.E.2d 747 (1985).

ARTICLE 17.

Motor Carrier Safety Regulation Unit.

Part 2. Authority and Powers of Division.

§ 20-384. Safety regulations applicable to motor carrier and private carrier vehicles.

The Division of Motor Vehicles may promulgate highway safety rules and regulations for all for-hire motor carrier vehicles and all private carrier vehicles engaged in interstate commerce and intrastate commerce over the highways of North Carolina whether common carriers, contract carriers, exempt carriers, or private carriers. (1985, c. 454, s. 1; 1985 (Reg. Sess., 1986), c. 1018, s. 13.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1018, s. 22 provides that insofar as the provisions of the act are inconsistent with the provisions of any general or special laws or parts thereof, the provisions of the act shall be controlling.

Session Laws 1985 (Reg. Sess., 1986), c. 1018, s. 23 is a severability clause.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective June 30, 1986, repealed the amendment to this section by Session Laws 1985, c. 757, s. 164(b). The amendment had been made effective July 1, 1986, and therefore never went into effect. The section is set out above as enacted by Session Laws 1985, c. 454, s. 1.

Chapters 21 to 27.

Editor's Note. — The 1986 legislation and annotations affecting Chapters 21 to 27 have been included in recently published Replacement Volume 1D.

Chapter 28A.

Administration of Decedents' Estates.

Article 3.

Venue for Probate of Wills and Administration of Estates of Decedents.

Sec.

28A-3-1. Proper county.

Article 21.

Accounting.

28A-21-2. Final accounts.

Article 27.

Apportionment of Federal Estate Tax.

28A-27-1. Definitions.

Sec.

28A-27-2. Apportionment.

28A-27-3. Procedure for determining apportionment.

28A-27-4. Uncollected tax.

28A-27-5. Exemptions, deductions, and credits.

28A-27-6. No apportionment between temporary and remainder interests.

28A-27-7. Fiduciary's rights and duties.

28A-27-8. Difference with Federal Estate Tax Law.

28A-27-9. Effective date.

ARTICLE 3.

Venue for Probate of Wills and Administration of Estates of Decedents.

§ 28A-3-1. Proper county.

The venue for the probate of a will and for all proceedings relating to the administration of the estate of a decedent shall be:

(1) In the county in this State where the decedent had his domicile at the time of his death; or

(R.C., c. 46, s. 1; C.C.P., s. 433; 1868-9, c. 113, s. 115; Code, s. 1374; Rev., s. 16; C.S., s. 1; 1931, c. 165; 1943, c. 543; 1951, c. 765; 1973, c. 1329, s. 3.)

Only Part of Section Set Out. — As the rest of the section was not affected, it is not set out.

Editor's Note. — Subdivision (1) of this section is set out above to correct a typographical error in the main volume.

CASE NOTES

I. GENERAL CONSIDERATION.

Transfer of Action Brought by Judgment Creditor. — To allow a party to seek construction of a will in conjunction with and pursuant to § 1-307, providing for execution and enforcement of judgments, would overly burden that procedure and open the door to possible confusion in the administration of estates. For this reason, the trial court erred in denying

defendant judgment debtor's motion to transfer matter in which judgment creditor sought to enforce judgment against debtor's interest in property under will of his father to the county where the decedent had his domicile at the time of his death for a determination of debtor's interest under the will. *North Carolina Nat'l Bank v. C.P. Robinson Co.*, — N.C. App. —, 341 S.E.2d 362 (1986).

ARTICLE 4.

Qualification and Disqualification for Letters Testamentary and Letters of Administration.

§ 28A-4-1. Order of persons qualified to serve.

CASE NOTES

III. LETTERS OF ADMINISTRATION.

Correction of Error in Appointment. — Petitioner, an heir at law and beneficiary under will, had a higher preference of appointment than respondent, who was neither an heir nor a beneficiary, and as the respondent should not have been appointed administrator C.T.A. without notice to the petitioner, it was

not error for the clerk to correct this error by removing the respondent as administrator C.T.A. The fact that petitioner may not have been qualified to serve as administrator C.T.A. under § 28A-4-2(4) because she was a nonresident of this State who had not appointed a process agent was irrelevant. In re Estate of Cole, — N.C. App. —, 343 S.E.2d 263 (1986).

§ 28A-4-2. Persons disqualified to serve as personal representative.

CASE NOTES

I. GENERAL CONSIDERATION.

Correction of Error in Appointment. — Petitioner, an heir at law and beneficiary under will, had a higher preference of appointment than respondent, who was neither an heir nor a beneficiary, and as the respondent should not have been appointed administrator C.T.A. without notice to the petitioner, it was

not error for the clerk to correct this error by removing the respondent as administrator C.T.A. The fact that petitioner may not have been qualified to serve as administrator C.T.A. under subdivision (4) of this section because she was a nonresident of this State who had not appointed a process agent was irrelevant. In re Estate of Cole, — N.C. App. —, 343 S.E.2d 263 (1986).

ARTICLE 6.

Appointment of Personal Representative.

§ 28A-6-2. Letters issued without notice; exceptions.

CASE NOTES

Correction of Error in Appointment. — Petitioner, an heir at law and beneficiary under will, had a higher preference of appointment than respondent, who was neither an heir nor a beneficiary, and as the respondent should not have been appointed administrator C.T.A. without notice to the petitioner, it was not error for the clerk to correct this error by

removing the respondent as administrator C.T.A. The fact that petitioner may not have been qualified to serve as administrator C.T.A. under § 28a-4-2(4) because she was a nonresident of this State who had not appointed a process agent was irrelevant. In re Estate of Cole, — N.C. App. —, 343 S.E.2d 263 (1986).

ARTICLE 18.

Actions and Proceedings.

§ 28A-18-2. Death by wrongful act of another; recovery not assets.

CASE NOTES

I. GENERAL CONSIDERATION.

Payment of Expenses of Suit from Assets of Estates. — With the 1985 amendment of subsection (a) of this section, the Legislature has chosen to allow reasonable and necessary expenses, excluding attorneys' fees, incurred in pursuing a wrongful death action to be paid from the assets of the deceased's estate. If there is any recovery from the wrongful death action, the recovery must first be applied to reimburse the estate for the expenses paid from its assets in pursuing the action. In re Estate of Proctor, — N.C. App. —, 340 S.E.2d 138 (1986).

Prior to the 1985 amendment to subsection (a) of this section, there was no statutory authority for paying out of a decedent's estate the reasonable and necessary expenses incurred in pursuing a wrongful death action. Thus, on February 1, 1985, clerk properly denied petition seeking authorization of payment of litigation expenses out of decedent's estate, and superior court was correct in affirming the clerk's order. However, following the July 5, 1985 amendment there was nothing to prevent decedent's personal representatives from filing a new petition seeking to have those same expenses paid from the deceased's estate. In re Estate of Proctor, — N.C. App. —, 340 S.E.2d 138 (1986).

III. PARTIES TO THE ACTION.

A wrongful death action may be maintained against a municipal corporation. Jackson v. Housing Auth., — N.C. —, 341 S.E.2d 523 (1986).

Prenatal Death of Viable Child. — A viable child en ventre sa mere who dies as a result of a third party's negligence may not obtain civil redress under the wrongful death

statute. DiDonato v. Wortman, — N.C. App. —, 341 S.E.2d 58 (1986).

IV. DISTRIBUTION OF RECOVERY.

Editor's Note. — The annotations to the case of Crawford v. Hudson, 3 N.C. App. 555, 165 S.E.2d 557 (1969), appearing under this analysis line on pages 87 to 89 of the main volume, should be disregarded.

Attorney's Fees. — The 1985 amendment to this section provides that an attorney who litigates a wrongful death claim may be paid for his services from the wrongful death proceeds. In re Lessard, 78 N.C. App. 196, 336 S.E.2d 712 (1985).

Attorney who neither initiated nor handled wrongful death claim and was appointed successor administrator only after wrongful death award had been made, but who expended considerable time in determining the correct distribution of wrongful death proceeds, could be compensated for his services from the wrongful death proceeds. In re Lessard, 78 N.C. App. 196, 336 S.E.2d 712 (1985).

"Costs" of an estate would not be payable from wrongful death proceeds. In re Lessard, 78 N.C. App. 196, 336 S.E.2d 712 (1985).

V. DAMAGES RECOVERABLE.

E. Punitive Damages.

Recovery from Municipal Corporations. — Reading portions of § 12-3(6) into this section, the North Carolina Wrongful Death Act contains a statutory provision providing for the recovery of punitive damages from bodies politic, which includes municipal corporations. Jackson v. Housing Auth., — N.C. —, 341 S.E.2d 523 (1986).

§ 28A-18-3. To sue or defend in representative capacity.

CASE NOTES

Cited in *In re Lessard*, 78 N.C. App. 196, 336 S.E.2d 712 (1985).

ARTICLE 19.

Claims against the Estate.

§ 28A-19-3. Limitations on presentation of claims.

Legal Periodicals. —

For note on statute of limitations accrual in attorney malpractice actions, in light of Thorpe

v. DeMent, 69 N.C. App. 355, 317 S.E.2d 692, aff'd per curiam, 312 N.C. 488, 322 S.E.2d 777 (1984), see 20 Wake Forest L. Rev. 1017 (1984).

CASE NOTES

Claim for Compensation for Occupation of Property Not Barred Where Presented within Period under Section. — A landowner's claim for "reasonable compensation" for occupation of her property (§ 42-4), brought against one of the former co-tenants as administratrix of her husband's estate, was presented to the administratrix within the statutory period under this section and was therefor not

barred by the three-year statute of limitations (§ 1-52(2)) as of the decedent's death. The landowner was allowed to sue the administratrix for rents not paid in the period of three years prior to the decedent's death, although the action itself was not brought until some six months after this date. *Simon v. Mock*, 75 N.C. App. 564, 331 S.E.2d 300 (1985).

ARTICLE 21.

Accounting.

§ 28A-21-2. Final accounts.

(a) Unless the time for filing the final account has been extended by the clerk of superior court, the personal representative or collector must file his final account for settlement within one year of his qualification or within six months after his receipt of the State inheritance tax release, whichever is later. If no inheritance tax return was required to be filed for the estate under G.S. 105-23 because the estate met the requirements of subsection (b) of that section, the personal representative or collector shall so certify in the final account filed with the clerk of superior court. Such certification shall list the amount and value of all of the decedent's property, and with respect to real estate, its particular location within or outside the State, including any property transferred by the decedent over which he had retained any interest as described in G.S. 105-2(3), or any property transferred within three years prior to the date of the decedent's death, and after being filed and accepted by the clerk of the superior court shall be prima facie evidence that such property is free of any State inheritance or State estate tax liability. The personal representative or collector shall produce vouchers for all payments or verified proof for all payments in lieu of vouchers. With the approval of the clerk of superior court, such account may be filed voluntarily at any time. In all cases, the accounting shall be reviewed, audited and recorded by the clerk of superior court in the manner prescribed in G.S. 28A-21-1.

(C.C.P., s. 481; Code, s. 1402; Rev., s. 103; C.S., s. 109; 1973, c. 1329, s. 3; 1975, c. 637, s. 5; 1977, c. 446, s. 1; 1979, c. 801, s. 13; 1981, c. 955, s. 2; 1981 (Reg. Sess., 1982), c. 1221, s. 3; 1985, c. 82, s. 3; c. 656, s. 3.1; 1985 (Reg. Sess., 1986), c. 822, s. 3.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 (Reg.

Sess., 1986) amendment, effective July 1, 1986, and applicable to the estates of decedents dying on or after that date, rewrote the second sentence of subsection (a).

ARTICLE 23.

Settlement.

§ 28A-23-4. Counsel fees allowable to attorneys serving as representatives.

CASE NOTES

Cited in *In re Lessard*, 78 N.C. App. 196, 336 S.E.2d 712 (1985).

ARTICLE 27.

Apportionment of Federal Estate Tax.

§ 28A-27-1. Definitions.

For the purposes of this Article:

- (1) "Estate" means the gross estate of a decedent as determined for the purpose of the federal estate tax.
- (2) "Fiduciary" includes a personal representative and a trustee.
- (3) "Person" means any individual, partnership, association, joint stock company, corporation, governmental agency, including any multiples or combinations of the foregoing as, for example, individuals as joint tenants.
- (4) "Person interested in the estate" means any person, including a personal representative, guardian, or trustee, entitled to receive, or who has received, from a decedent while alive or by reason of the death of a decedent any property or interest therein included in the decedent's taxable estate.
- (5) "State" means any state, territory, or possession of the United States, the District of Columbia, or the Commonwealth of Puerto Rico.
- (6) "Tax" means the net Federal Estate Tax due, after application of any available unified transfer tax credit, and interest and penalties imposed in addition to the tax. (1985 (Reg. Sess., 1986), c. 878, s. 1.)

Editor's Note. — Session Laws 1985 (Reg. Sess. 1986), c. 878, s. 3 makes this Article effective

October 1, 1986. As to the applicability of the provisions of this Article, see § 28A-27-9.

§ 28A-27-2. Apportionment.

(a) Except as otherwise provided in subsection (b) of this section, or in G.S. 28A-27-5, G.S. 28A-27-6, or G.S. 28A-27-8, the tax shall be apportioned among all persons interested in the estate in the proportion that the value of the interest of each person interested in the estate bears to the total value of the interests of all persons interested in the estate. The values as finally determined for federal estate tax purposes shall be used for the purposes of this computation.

(b) In the event the decedent's will provides a method of apportionment of the tax different from the method provided in subsection (a) above, the method described in the will shall control. A general direction in the will that taxes shall not be apportioned, whether or not referring to this Article, but shall be paid from the residuary portion of the estate shall not, unless specifically stated otherwise, apply to taxes imposed on assets which are includible in the valuation of the decedent's gross estate for federal estate tax purposes only by reason of Sections 2041, 2042 or 2044 of the Internal Revenue Code of 1954 or corresponding provisions of any subsequent tax law. In the event that the estate tax computation involves assets described in the preceding sentence, unless specifically stated otherwise, apportionment shall be made against such assets and the tax so apportioned shall be recovered from the persons receiving such assets as provided in Sections 2206, 2207 or 2207A of the Internal Revenue Code of 1954 or corresponding provisions of any subsequent tax law. (1985 (Reg. Sess., 1986), c. 878, s. 1.)

§ 28A-27-3. Procedure for determining apportionment.

(a) The personal representative of a decedent shall determine the apportionment of the tax.

(b) If the personal representative finds that it is inequitable to apportion interest and penalties in the manner provided in this Article because such interest or penalties were imposed due to the fault of one or more persons interested in the estate he may direct apportionment thereon in the manner he finds equitable.

(c) The expenses reasonably incurred by the personal representative in connection with the apportionment of the tax shall be apportioned as provided for taxes under this Article. If the personal representative finds that it is inequitable to apportion the expenses because such expenses were incurred because of the fault of one or more persons interested in the estate he may direct other more equitable apportionment. (1985 (Reg. Sess., 1986), c. 878, s. 1.)

§ 28A-27-4. Uncollected tax.

The personal representative shall not be under any duty to institute any suit or proceeding to recover from any person interested in the estate the amount of the tax apportioned to the person until the expiration of the six months next following final determination of the tax. A personal representative who institutes the suit or proceeding within a reasonable time after the six months' period shall not be subject to any liability or surcharge because any portion of the tax apportioned to any person interested in the estate was collectable at a time following the death of the decedent but thereafter became uncollectable. If the personal representative cannot collect from any person interested in the estate the amount of the tax apportioned to the person, the amount not recoverable shall be apportioned among the other persons inter-

ested in the estate who are subject to apportionment. The apportionment shall be made in the proportion that the value of the interest of each remaining person interested in the estate bears to the total value of the interests of all remaining persons interested in the estate. (1985 (Reg. Sess., 1986), c. 878, s. 1.)

§ 28A-27-5. Exemptions, deductions, and credits.

(a) Any interest for which a deduction or exemption is allowable under the federal revenue laws in determining the value of the decedent's net taxable estate, such as property passing to or in trust for a surviving spouse and gifts or bequests for charitable, public, or similar purposes, shall not be included in the computation provided for in Section 28A-27-2 to the extent of the allowable deduction or exemption. When such an interest is subject to a prior present interest which is not allowable as a deduction or exemption, such present interest shall not be included in the computation provided for in this Article and no tax shall be apportioned to or paid from principal.

(b) Any credit for property previously taxed and any credit for gift taxes or death taxes of a foreign country paid by the decedent or his estate shall inure to the proportionate benefit of all persons liable to apportionment; provided, however, that if the tax which gives rise to such a credit has in fact been paid by a person interested in the estate, the benefit of such credit shall inure to that person paying the tax.

(c) Any credit for inheritance, succession, or estate taxes or taxes in the nature thereof in respect to property or interests includible in the estate shall inure to the benefit of the persons or interests chargeable with the payment thereof to the extent that, or in the proportion that, the credit reduces the tax.

(d) To the extent that property passing to or in trust for a surviving spouse or any charitable, public, or similar gift or bequest does not constitute an allowable deduction for purposes of the tax solely by reason of an inheritance tax or other death tax imposed upon and deductible from the property, the property shall not be included in the computation provided for in this Article, and to that extent no apportionment shall be made against the property. This section does not apply in any instance where the result will be to deprive the estate of a deduction otherwise allowable under Section 2053(a) of the Internal Revenue Code of 1954 of the United States or corresponding provisions of any subsequent tax law, relating to deduction for State death taxes on transfers for public, charitable, or religious uses. (1985 (Reg. Sess., 1986), c. 878, s. 1.)

§ 28A-27-6. No apportionment between temporary and remainder interests.

No interest in income and no estate for years or for life or other temporary interest in any property or fund is subject to apportionment as between the temporary interest and the remainder. The tax on the temporary interest and the tax, if any, on the remainder is chargeable against the corpus of the property or funds subject to the temporary interest and remainder. (1985 (Reg. Sess., 1986), c. 878, s. 1.)

§ 28A-27-7. Fiduciary's rights and duties.

(a) The personal representative may withhold from any property of the decedent in his possession, distributable to any person interested in the estate, the amount of the tax apportioned to his interest. If the property in possession of the personal representative and distributable to any person interested in the estate tax is insufficient to satisfy the proportionate amount of the tax determined to be due from the person, the personal representative may recover the deficiency from the person interested in the estate. If the property is not in the possession of the personal representative he may recover from any person interested in the estate the amount of the tax apportioned to the person in accordance with this Article.

(b) If property held by the fiduciary or other person is distributed prior to final apportionment of the tax, the personal representative may require the distributee to provide a bond or other security for the apportionment liability in the form and amount prescribed by the fiduciary, with the approval of the clerk of superior court having jurisdiction of the administration of the estate. (1985 (Reg. Sess., 1986), c. 878, s. 1.)

§ 28A-27-8. Difference with Federal Estate Tax Law.

If the liabilities of persons interested in the estate as prescribed by this Article differ from those which result under the Federal Estate Tax Law, the liabilities imposed by the federal law will control and the balance of this Article shall apply as if the resulting liabilities had been prescribed herein. (1985 (Reg. Sess., 1986), c. 878, s. 1.)

§ 28A-27-9. Effective date.

The provisions of this Article shall not apply to taxes due on account of the death of decedents dying prior to October 1, 1986. (1985 (Reg. Sess., 1986), c. 878, s. 1.)

Chapter 29.

Intestate Succession.

ARTICLE 1.

General Provisions.

§ 29-2. Definitions.

CASE NOTES

III. A. Lineal Descendants.

III. A. LINEAL DESCENDANTS.

Children Distinguished from Others. — The phrase "lineal descendants" generally applies not to distinguish between children of various marriages or out of wedlock, but to distinguish children from other collateral descendants, e.g., nieces and nephews. In re Estate of Edwards, 77 N.C. App. 302, 335 S.E.2d 39 (1985).

Illegitimate and Adopted Children Included. — The term "lineal descendants" would include even illegitimate children of a deceased female, under § 29-19(a), and clearly includes adopted children, under § 29-17. In re Estate of Edwards, 77 N.C. App. 302, 335 S.E.2d 39 (1985).

§ 29-10. Renunciation.

CASE NOTES

A renunciation is not a grant of legal title by the renouncer. It merely triggers a set of statutorily defined legal rights which ultimately determine ownership. *Hinson v. Hinson*, — N.C. App. —, 343 S.E.2d 266 (1986), decided under this section as it read prior to October 1, 1975.

A renunciation relates back to the death of the testator or intestate. The renouncer never actually holds legal title to the property. *Hinson v. Hinson*, — N.C. App. —, 343 S.E.2d 266 (1986), decided under this section as it read prior to Oct. 1, 1975.

A parol trust may not be engrafted upon a renounced interest. *Hinson v. Hinson*, — N.C. App. —, 343 S.E.2d 266 (1986), decided under this section as it read prior to Oct. 1, 1975.

Action Seeking Constructive Trust. —

Plaintiff, who sought to assert that defendant unduly influenced his decision to sign a "Petition to Renounce" his interest in will, could maintain an action seeking the declaration of a constructive trust. *Hinson v. Hinson*, — N.C. App. —, 343 S.E.2d 266 (1986), decided under this section as it read prior to Oct. 1, 1975.

Collateral Attack. — The legality of plaintiff's renunciation under this section as it read prior to Oct. 1, 1975, was a matter before the clerk, who, having exclusive original jurisdiction of the administration of testatrix's estate, allowed plaintiff's "Petition to Renounce." As a party to the original action, plaintiff could not later collaterally attack it. *Hinson v. Hinson*, — N.C. App. —, 343 S.E.2d 266 (1986), decided under this section as it read prior to Oct. 1, 1975.

ARTICLE 2.

Shares of Persons Who Take upon Intestacy.

§ 29-14. Share of surviving spouse.

CASE NOTES

Cited in *In re Estate of Edwards*, 77 N.C. App. 302, 335 S.E.2d 39 (1985).

ARTICLE 3.

Distribution among Classes.

§ 29-16. Distribution among classes.

CASE NOTES

Cited in *Ladd v. Estate of Kellenberger*, 314 N.C. App. 477, 334 S.E.2d 751 (1985).

ARTICLE 4.

Adopted Children.

§ 29-17. Succession by, through and from adopted children.

CASE NOTES

The term "lineal descendants" is defined at § 29-2(4) as "all children of such person"; this would include even illegitimate children of a deceased female, under § 29-19(a), and clearly includes adopted children, under this

section. *In re Estate of Edwards*, 77 N.C. App. 302, 335 S.E.2d 39 (1985).

Cited in *Ladd v. Estate of Kellenberger*, 314 N.C. App. 477, 334 S.E.2d 751 (1985).

ARTICLE 6.

Illegitimate Children.

§ 29-19. Succession by, through and from illegitimate children.

Legal Periodicals. —

For 1984 survey, "Intestate Succession of Il-

legitimate Children in North Carolina," see 63 N.C.L. Rev. 1274 (1985).

CASE NOTES

The term "lineal descendants" is defined at § 29-2(4) as "all children of such person"; this would include even illegitimate children of a deceased female, under subsection (a) of this

section, and clearly includes adopted children, pursuant to § 29-17. In re Estate of Edwards, 77 N.C. App. 302, 335 S.E.2d 39 (1985).

Chapter 30.

Surviving Spouses.

Article 1.

Dissent from Will.

Sec.

30-1. Right of dissent.

ARTICLE 1.

Dissent from Will.

§ 30-1. Right of dissent.

(c) For the purpose of establishing the right of dissent, the estate of the deceased spouse and the property passing outside of the will to the surviving spouse as a result of the death of the testator shall be determined and valued as of the date of his death, which determination and value the executor or administrator with the will annexed and the surviving spouse are hereby authorized to establish by agreement subject to approval by the clerk of the superior court. If such personal representative and the surviving spouse do not so agree upon the determination and value, or if the surviving spouse is the personal representative, or if the clerk shall be of the opinion that the personal representative may not be able to represent the estate adversely to the surviving spouse, the clerk shall appoint one or more disinterested persons to make such determination and establish such value. Such determination and establishment of value made as herein authorized shall be final for determining the right of dissent and shall be used exclusively for this purpose. (1959, c. 880, s. 1; 1961, c. 959, s. 1; 1965, c. 849, s. 1; 1975, c. 106, s. 1.)

Only Part of Section Set Out. — As the rest of the section was not affected, it is not set out.

Editor's Note. — Subsection (c) of this section has been set out above to correct a typographical error in the main volume.

CASE NOTES

I. GENERAL CONSIDERATION.

Family settlement agreements are favored by the law; however, such an agreement is invalid unless all who receive under the will join in the agreement. In *re Estate of Outen*, 77 N.C. App. 818, 336 S.E.2d 436 (1985).

Alleged agreement between dissenting widow and estate was not a "family settlement agreement," where it was never executed by all of the beneficiaries under the will. In *re Estate of Outen*, 77 N.C. App. 818, 336 S.E.2d 436 (1985).

The right time, manner and effect of fil-

ing and recording a dissent to a will are all matters within the probate jurisdiction of the clerk of superior court. In *re Estate of Outen*, 77 N.C. App. 818, 336 S.E.2d 436 (1985).

To establish the right to dissent, a spouse must make a timely filing pursuant to § 30-2, and must show an entitlement to that right under this section. In *re Estate of Outen*, 77 N.C. App. 818, 336 S.E.2d 436 (1985).

Cited in *Ladd v. Estate of Kellenberger*, 314 N.C. 477, 334 S.E.2d 751 (1985); In *re Estate of Edwards*, 77 N.C. App. 302, 335 S.E.2d 39 (1985).

§ 30-2. Time and manner of dissent.

CASE NOTES

The right time, manner and effect of filing and recording a dissent to a will are all matters within the probate jurisdiction of the clerk of superior court. In *re Estate of Outen*, 77 N.C. App. 818, 336 S.E.2d 436 (1985).

To establish the right to dissent, a spouse must make a timely filing pursuant to this section, and must show an entitlement to that right under § 30-1. In *re Estate of Outen*, 77 N.C. App. 818, 336 S.E.2d 436 (1985).

§ 30-3. Effect of dissent.

CASE NOTES

II. SECOND OR SUCCESSIVE SPOUSE.

Purpose of Subsection (b). — While the legislative purpose of subsection (b) of this section is not entirely clear, it was apparently passed to protect a testator's children by a former marriage against a "fortune-hunting" second or successive spouse. In *re Estate of Edwards*, 77 N.C. App. 302, 335 S.E.2d 39 (1985).

The term "lineal descendants" is not defined in Chapter 30, but is defined at § 29-2(4) as "all children of such person"; this would include even illegitimate children of a deceased female, under § 29-19(a), and clearly includes adopted children, pursuant to § 29-17. In *re Estate of Edwards*, 77 N.C. App. 302, 335 S.E.2d 39 (1985).

The phrase "lineal descendants" is generally applied not to distinguish between children of various marriages or out of wedlock, but to distinguish children from other collateral descen-

dants, e.g., nieces and nephews. In *re Estate of Edwards*, 77 N.C. App. 302, 335 S.E.2d 39 (1985).

Adopted Children as Lineal Descendants. — Natural children of one spouse born during a previous marriage, if adopted by second spouse with the consent of their surviving natural parent, are considered lineal descendants by the second marriage for the purposes of subsection (b) of this section, which determines a dissenting spouse's share. In *re Estate of Edwards*, 77 N.C. App. 302, 335 S.E.2d 39 (1985).

Applying § 48-23(1), children adopted must be treated legally as having been born at the time of the order of adoption; accordingly, children in question were as a matter of law born of decedent's second marriage, and were "lineal descendants by the second marriage" within the intended meaning of subsection (b) of this section. In *re Estate of Edwards*, 77 N.C. App. 302, 335 S.E.2d 39 (1985).

Chapter 31.

Wills.

ARTICLE 1.

Execution of Will.

§ 31-3.3. Attested written will.

CASE NOTES

I. GENERAL CONSIDERATION.

A codicil must be executed, etc. —

In accord with main volume. See *In re Will of King*, — N.C. App. —, 342 S.E.2d 394 (1986).

II. SIGNING BY OR FOR TESTATOR.

Evidence that testator made his mark on codicil in the presence of the witnesses indicates that the instrument was his, and is sufficient to imply a request that they attest his signature. In *re Will of King*, — N.C. App. —, 342 S.E.2d 394 (1986).

§ 31-4. Execution of power of appointment by will.

CASE NOTES

A provision calling for reference to a power of appointment does not concern the "execution and attestation" of a will within the meaning of this section. *First Citizens Bank & Trust Co. v. Fleming*, 77 N.C. App. 568, 335 S.E.2d 515 (1985).

In order to exercise a power of appointment calling for specific reference to the power before the power may be exercised, some reference to the power must be made. *First Citizens Bank & Trust Co. v. Fleming*, 77 N.C. App. 568, 335 S.E.2d 515 (1985).

ARTICLE 2.

Revocation of Will.

§ 31-5.5. After-born or after-adopted child; illegitimate child; effect on will.

CASE NOTES

A testator is not required to mention by name or make some provision for a child in order to disinherit that child under North Carolina law, even if the child is born or

adopted after the will is made. *Ladd v. Estate of Kellenberger*, 314 N.C. 477, 334 S.E.2d 751 (1985).

ARTICLE 6.

Caveat to Will.

§ 31-32. When and by whom caveat filed.

CASE NOTES

I. GENERAL CONSIDERATION.

Propounder Functions as Plaintiff. — It is the propounder, and not the caveator, who functions as a plaintiff in a caveat proceeding. In re Will of Parker, 76 N.C. App. 594, 334 S.E.2d 97, cert. denied, 315 N.C. 185, 337 S.E.2d 859 (1985).

Burden of Proof. — Although a caveat proceeding is an in rem proceeding without a

plaintiff and a defendant as such, it is the propounder who has the initial burden of proof, namely, to prove that the instrument in question was executed with the proper formalities required by law. Once this has been established, the burden shifts to the caveator to show that the execution of the will was procured by undue influence. In re Will of Parker, 76 N.C. App. 594, 334 S.E.2d 97, cert. denied, 315 N.C. 185, 337 S.E.2d 859 (1985).

§ 31-33. Bond given and cause transferred to trial docket.

CASE NOTES

Caveat filed without compliance with bond requirement under this section is not a valid attack upon the will. In re Will of Parker,

76 N.C. App. 594, 334 S.E.2d 97, cert. denied, 315 N.C. 185, 337 S.E.2d 859 (1985).

§ 31-34. Prosecution bond required in actions to contest wills.

CASE NOTES

Section is not applicable to a caveator. Therefore, a prosecution bond cannot be required of a caveator in an action to contest a

will. In re Will of Parker, 76 N.C. App. 594, 334 S.E.2d 97, cert. denied, 315 N.C. 185, 337 S.E.2d 859 (1985).

ARTICLE 7.

Construction of Will.

§ 31-42. Failure of devises and legacies by lapse or otherwise; renunciation.

CASE NOTES

I. GENERAL CONSIDERATION.

A renunciation is not a grant of legal title by the renouncer. It merely triggers a set of statutorily defined legal rights which ultimately determine ownership. Hinson v. Hinson, — N.C. App. —, 343 S.E.2d 266 (1986),

decided under § 29-10 as it read prior to Oct. 1, 1975.

A renunciation relates back to the death of the testator or intestate. The renouncer never actually holds legal title to the property. Hinson v. Hinson, — N.C. App. —, 343 S.E.2d 266 (1986), decided under § 29-10 as it read prior to Oct. 1, 1975.

A parol trust may not be engrafted upon a renounced interest. *Hinson v. Hinson*, — N.C. App. —, 343 S.E.2d 266 (1986), decided under § 29-10 as it read prior to Oct. 1, 1975.

Action Seeking Constructive Trust. — Plaintiff, who sought to assert that defendant

unduly influenced his decision to sign a "Petition to Renounce" his interest in will, could maintain an action seeking the declaration of a constructive trust. *Hinson v. Hinson*, — N.C. App. —, 343 S.E.2d 266 (1986), decided under § 29-10 as it read prior to Oct. 1, 1975.

§ 31-43. General gift by will an execution of power of appointment.

CASE NOTES

Purpose of Section. —

In accord with the main volume. See *First Citizens Bank & Trust Co. v. Fleming*, 77 N.C. App. 568, 335 S.E.2d 515 (1985).

In order to exercise a power of appointment calling for specific reference to the power before the power may be exercised, some reference to the power must be made.

First Citizens Bank & Trust Co. v. Fleming, 77 N.C. App. 568, 335 S.E.2d 515 (1985).

Residuary Devise, etc. —

A power of appointment upon which no restrictions are imposed is exercised by a residuary clause. *First Citizens Bank & Trust Co. v. Fleming*, 77 N.C. App. 568, 335 S.E.2d 515 (1985).

Chapter 31A.

Acts Barring Property Rights.

ARTICLE 2.

Parents.

§ 31A-2. Acts barring rights of parents.

CASE NOTES

Meaning of Abandonment. — Abandonment is defined as any willful or intentional conduct on the part of the parent which evinces a settled purpose to forego all parental duties and relinquish all parental claims to the child. *Lessard v. Lessard*, 77 N.C. App. 97, 334 S.E.2d 475 (1985), cert. granted as to additional issues, 315 N.C. 390, 338 S.E.2d 879 (1986).

Abandonment has been defined as willful neglect and refusal to perform the natural and legal obligations of parental care and support; if a parent withholds his presence, his love, his care, and the opportunity to display filial affection, and willfully neglects to lend support and maintenance, such parent relinquishes all pa-

rental claims and abandons the child. *Lessard v. Lessard*, 77 N.C. App. 97, 334 S.E.2d 475 (1985), cert. granted as to additional issues, 315 N.C. 390, 338 S.E.2d 879 (1986).

Willful intent is an integral part of abandonment and this is a question of fact to be determined from the evidence. *Lessard v. Lessard*, 77 N.C. App. 97, 334 S.E.2d 475 (1985), cert. granted as to additional issues, 315 N.C. 390, 338 S.E.2d 879 (1986).

Or Wrongful Death Proceeds. —

In accord with 1st paragraph in the main volume. See *Lessard v. Lessard*, 77 N.C. App. 97, 334 S.E.2d 475 (1985), cert. granted as to additional issues, 315 N.C. 290, 338 S.E.2d 879 (1986).

Chapter 31B.

Renunciation of Transfers by Will, Intestacy, Appointment or Insurance Contract Act.

§ 31B-3. Effect of renunciation.

CASE NOTES

A renunciation is not a grant of legal title by the renouncer. It merely triggers a set of statutorily defined legal rights which ultimately determine ownership. *Hinson v. Hinson*, — N.C. App. —, 343 S.E.2d 266 (1986), decided under § 29-10 as it read prior to Oct. 1, 1975.

A renunciation relates back to the death of the testator or intestate. The renouncer never actually holds legal title to the property. *Hinson v. Hinson*, — N.C. App. —, 343 S.E.2d 266 (1986), decided under § 29-10 as it read prior to Oct. 1, 1975.

A parol trust may not be engrafted upon a renounced interest. *Hinson v. Hinson*, — N.C. App. —, 343 S.E.2d 266 (1986), decided under § 29-10 as it read prior to Oct. 1, 1975.

Action Seeking Constructive Trust. — Plaintiff, who sought to assert that defendant unduly influenced his decision to sign a "Petition to Renounce" his interest in will, could maintain an action seeking the declaration of a constructive trust. *Hinson v. Hinson*, — N.C. App. —, 343 S.E.2d 266 (1986), decided under § 29-10 as it read prior to Oct. 1, 1975.

§ 31B-5. Exclusiveness of remedy.

CASE NOTES

A renunciation is not a grant of legal title by the renouncer. It merely triggers a set of statutorily defined legal rights which ultimately determine ownership. *Hinson v. Hinson*, — N.C. App. —, 343 S.E.2d 266 (1986), decided under § 29-10 as it read prior to Oct. 1, 1975.

A renunciation relates back to the death of the testator or intestate. The renouncer never actually holds legal title to the property. *Hinson v. Hinson*, — N.C. App. —, 343 S.E.2d 266 (1986), decided under § 29-10 as it read prior to Oct. 1, 1975.

A beneficiary's right to renounce exists irrespective of statutory authority. *Hinson v. Hinson*, — N.C. App. —, 343 S.E.2d 266 (1986), decided under § 29-10 as it read prior to Oct. 1, 1975.

Time for Renunciation. — A devisee may disclaim or renounce a right under a will, but he or she must do so within a reasonable time. *Hinson v. Hinson*, — N.C. App. —, 343 S.E.2d 266 (1986), decided under § 29-10 as it read prior to Oct. 1, 1975.

A parol trust may not be engrafted upon a renounced interest. *Hinson v. Hinson*, — N.C. App. —, 343 S.E.2d 266 (1986), decided under § 29-10 as it read prior to Oct. 1, 1975.

Action Seeking Constructive Trust. — Plaintiff, who sought to assert that defendant unduly influenced his decision to sign a "Petition to Renounce" his interest in will, could maintain an action seeking the declaration of a constructive trust. *Hinson v. Hinson*, — N.C. App. —, 343 S.E.2d 266 (1986), decided under § 29-10 as it read prior to Oct. 1, 1975.

Chapter 33.

Guardian and Ward.

ARTICLE 1.

Creation and Termination of Guardianship.

§ 33-6. Separate appointment for person and estate; yearly support specified; payments allowed in accounting.

Legal Periodicals. — For 1984 survey, "North Carolina Court of Appeals Recognizes Wrongful Birth and Wrongful Life Claims," see 63 N.C.L. Rev. 1327 (1985).

§ 33-9. Removal by clerk.

CASE NOTES

Showing Required for Removal of Legal Guardian. — A legal guardian of a child's person, unlike a mere custodian, is not removable for a mere change of circumstances; unfitness

or neglect of duty must be shown. In re Williamson, 77 N.C. App. 53, 334 S.E.2d 428 (1985).

ARTICLE 4.

Sales of Ward's Estate.

§ 33-31. Special proceedings to sell; judge's approval required.

Legal Periodicals. — For 1984 survey, "North Carolina Court of Appeals Recognizes Wrongful Birth and Wrongful Life Claims," see 63 N.C.L. Rev. 1327 (1985).

ARTICLE 5.

Returns and Accounting.

§ 33-39. Annual accounts.

Legal Periodicals. — For 1984 survey, "North Carolina Court of Appeals Recognizes Wrongful Birth and Wrongful Life Claims," see 63 N.C.L. Rev. 1327 (1985).

§ 33-43. Commissions.

Legal Periodicals. — For 1984 survey, "Wrongful Birth and Wrongful Life Claims,"
"North Carolina Court of Appeals Recognizes" see 63 N.C.L. Rev. 1327 (1985).

Chapter 35.

Persons with Mental Diseases and Incompetents.

ARTICLE 1A.

Guardianship of Incompetent Adults.

Part 1. Legislative Purpose.

§ 35-1.6. Legislative purpose.

CASE NOTES

Guardian of a young incompetent adult, appointed by the State, acted under color of State law and was a State actor for purposes of jurisdiction under 42 U.S.C. § 1983 in a suit brought by ward's next friend seeking appropriate treatment for the ward. *Thomas v. Morrow*, 781 F.2d 367 (4th Cir. 1986),

upholding federal district court's order directing guardian and Secretary of North Carolina Department of Human Resources to furnish specific treatment for the ward, but directing the district court to delete from its order the direction that the guardian perform his duties under State law.

Part 2. Definitions.

§ 35-1.7. Definitions.

CASE NOTES

The test for mental competence to enter into a release is the same as that controlling the running of the statute of limitations, i.e., whether at the time of execution of the release, the party challenging the release had the mental competence to manage his own affairs. *Cox v. Jefferson-Pilot Fire & Cas. Co.*, — N.C. App. —, 341 S.E.2d 608 (1986).

Guardian of a young incompetent adult, appointed by the State, acted under color of State law and was a State actor for pur-

poses of jurisdiction under 42 U.S.C. § 1983 in a suit brought by ward's next friend seeking appropriate treatment for the ward. *Thomas v. Morrow*, 781 F.2d 367 (4th Cir. 1986), upholding federal district court's order directing guardian and Secretary of North Carolina Department of Human Resources to furnish specific treatment to the ward, but directing the district court to delete from its order the direction that the guardian perform his duties under State law.

Part 5. Qualifications, Priorities, Duties, and Liabilities of Guardians.

§ 35-1.29. Priorities for appointment.

CASE NOTES

Guardian of a young incompetent adult, appointed by the State, acted under color of State law and was a State actor for purposes of jurisdiction under 42 U.S.C. § 1983 in

a suit brought by ward's next friend seeking appropriate treatment for the ward. *Thomas v. Morrow*, 781 F.2d 367 (4th Cir. 1986), upholding federal district court's order directing

guardian and Secretary of North Carolina Department of Human Resources to furnish specific treatment of the ward, but directing the

district court to delete from its order the direction that the guardian perform his duties under State law.

§ 35-1.34. General powers and duties of guardians with respect to the person.

CASE NOTES

Guardian of a young incompetent adult, appointed by the State, acted under color of state law and was state actor for purposes of jurisdiction under 42 U.S.C. § 1983 in a suit brought by ward's next friend seeking appropriate treatment for the ward. *Thomas v. Morrow*, 781 F.2d 367 (4th Cir. 1986), upholding

federal district court's order directing guardian and Secretary of North Carolina Department of Human Resources to furnish specific treatment to the ward, but directing the district court to delete from its order the direction that the guardian perform his duties under State law.

ARTICLE 2.

Guardianship and Management of Estates of Incompetents.

§ 35-2. Appointment of guardian.

CASE NOTES

I. GENERAL CONSIDERATION.

The test for mental competence to enter into a release is the same as that controlling the running of the statute of limitations, i.e.,

whether at the time of execution of the release, the party challenging the release had the mental competence to manage his own affairs. *Cox v. Jefferson-Pilot Fire & Cas. Co.*, — N.C. App. —, 341 S.E.2d 608 (1986).

Chapter 36A.

Trusts and Trustees.

ARTICLE 1.

Investment and Deposit of Trust Funds.

§ 36A-1. Definition.

Legal Periodicals. — For 1984 survey, Wrongful Birth and Wrongful Life Claims," "North Carolina Court of Appeals Recognizes see 63 N.C.L. Rev. 1327 (1985).

ARTICLE 4.

Charitable Trusts.

§ 36A-48. Action for account; court to enforce trust.

Legal Periodicals. — ber Derivative Suits," see 63 N.C.L. Rev. 999 (1985).
For note, "The Nonprofit Corporation in North Carolina: Recognizing a Right to Mem-

CASE NOTES

Quoted in State v. Felts, — N.C. App. —, 339 S.E.2d 99 (1986).

§ 36A-53. Charitable Trusts Administration Act.

Legal Periodicals. — ber Derivative Suits," see 63 N.C.L. Rev. 999 (1985).
For note, "The Nonprofit Corporation in North Carolina: Recognizing a Right to Mem-

CASE NOTES

Cited in Oxford Orphanage, Inc. v. United States, 775 F.2d 570 (4th Cir. 1985).

ARTICLE 9.

*Alienability of Beneficial Interest; Spendthrift Trust.***§ 36A-115. Alienability of beneficiary's interest; spendthrift trusts.**

CASE NOTES

Trust which was created prior to October 1, 1979, was not subject to this section. *Lineback ex rel. Hutchens v. Stout*, — N.C. App. —, 339 S.E.2d 103 (1986).

Testamentary trust created for "the lifetime" of beneficiary, the disabled daughter of settlor, containing provision for the distribution of the trust corpus remaining upon beneficiary's death, which was designed so that trust

funds would be used to provide supplemental, rather than total, support for the beneficiary, was a discretionary trust and the superior court erred in requiring trustee to expend funds from the trust for the general welfare, support, maintenance and benefit of the beneficiary. *Lineback ex rel. Hutchens v. Stout*, — N.C. App. —, 339 S.E.2d 103 (1986), decided under law in effect prior to this section.

Chapter 37.

Allocation of Principal and Income.

ARTICLE 2.

Principal and Income Act of 1973.

§ 37-16. Short title.

Legal Periodicals. — For article, "Estate Planning Considerations for the North Carolina Principal and Income Act of 1973," see 8 Campbell L. Rev. 173 (1986).

§ 37-17. Definitions.

Legal Periodicals. — For article, "Estate Planning Considerations for the North Carolina Principal and Income Act of 1973," see 8 Campbell L. Rev. 173 (1986).

§ 37-18. Duty of trustee or personal representative as to receipts and expenditures.

Legal Periodicals. — For article, "Estate Planning Considerations for the North Carolina Principal and Income Act of 1973," see 8 Campbell L. Rev. 173 (1986).

§ 37-19. Income; principal; charges.

Legal Periodicals. — For article, "Estate Planning Considerations for the North Carolina Principal and Income Act of 1973," see 8 Campbell L. Rev. 173 (1986).

§ 37-20. When right to income arises; apportionment of income.

Legal Periodicals. — For article, "Estate Planning Considerations for the North Carolina Principal and Income Act of 1973," see 8 Campbell L. Rev. 173 (1986).

§ 37-21. Income earned and expenses incurred during administration of a decedent's estate.

Legal Periodicals. — For article, "Estate Planning Considerations for the North Carolina Principal and Income Act of 1973," see 8 Campbell L. Rev. 173 (1986).

§ 37-22. Corporate distributions.

Legal Periodicals. — For article, "Estate Planning Considerations for the North Carolina Principal and Income Act of 1973," see 8 Campbell L. Rev. 173 (1986).

§ 37-23. Bond premium and discount.

Legal Periodicals. — For article, "Estate Planning Considerations for the North Carolina Principal and Income Act of 1973," see 8 Campbell L. Rev. 173 (1986).

§ 37-25. Disposition of natural resources.

Legal Periodicals. — For article, "Estate Planning Considerations for the North Carolina Principal and Income Act of 1973," see 8 Campbell L. Rev. 173 (1986).

§ 37-26. Timber.

Legal Periodicals. — For article, "Estate Planning Considerations for the North Carolina Principal and Income Act of 1973," see 8 Campbell L. Rev. 173 (1986).

§ 37-27. Other property subject to depletion.

Legal Periodicals. — For article, "Estate Planning Considerations for the North Carolina Principal and Income Act of 1973," see 8 Campbell L. Rev. 173 (1986).

§ 37-28. Underproductive property.

Legal Periodicals. — For article, "Estate Planning Considerations for the North Carolina Principal and Income Act of 1973," see 8 Campbell L. Rev. 173 (1986).

§ 37-30. Taxes.

Legal Periodicals. — For article, "Estate Planning Considerations for the North Carolina Principal and Income Act of 1973," see 8 Campbell L. Rev. 173 (1986).

§ 37-37. Depreciation.

Legal Periodicals. — For article, "Estate Planning Considerations for the North Carolina Principal and Income Act of 1973," see 8 Campbell L. Rev. 173 (1986).

§ 37-39. Recurring charges; apportionment.

Legal Periodicals. — For article, "Estate Planning Considerations for the North Carolina Principal and Income Act of 1973," see 8 Campbell L. Rev. 173 (1986).

Chapter 38.

Boundaries.

§ 38-1. Special proceeding to establish.

CASE NOTES

Questions of Law and Fact as to Lines. — Ordinarily, in a special proceeding brought under this Chapter, "the only question presented is the location of the true dividing line," title or ownership to land not being directly at issue. Particularly, what are petitioners' lines is determinable as a matter of law from the calls in

the description of their lands. Where these lines are located on the earth's surface is determinable as a matter of fact. *Taylor v. Brittain*, 76 N.C. App. 574, 334 S.E.2d 242 (1985).

Cited in *Fauchette v. Zimmerman*, — N.C. App. —, 338 S.E.2d 804 (1986).

§ 38-4. Surveys in disputed boundaries.

CASE NOTES

Survey Not Required. — While the better practice is to order a survey in a proceeding to establish a boundary line, this section, the per-

minent statute, does not require the court to do so. *Young v. Young*, 76 N.C. App. 93, 331 S.E.2d 769 (1985).

Chapter 39.

Conveyances.

ARTICLE 1.

Construction and Sufficiency.

§ 39-1. Fee presumed, though word "heirs" omitted.

CASE NOTES

I. GENERAL CONSIDERATION.

Cited in *Atlas Fire Apparatus, Inc. v. Beaver*, 56 Bankr. 927 (Bankr. E.D.N.C. 1986).

§ 39-1.1. In construing conveyances court shall give effect to intent of the parties.

CASE NOTES

Construction so as to Effectuate Intent. — In construing a conveyance of an easement, whether or not executed prior to January 1, 1968, the effective date of this section, the deed

is to be construed in such a way as to effectuate the intention of the parties, as gathered from the entire instrument. *Higdon v. Davis*, 315 N.C. 208, 337 S.E.2d 543 (1985).

ARTICLE 2.

Conveyances by Husband and Wife.

§ 39-13.6. Control of real property held in tenancy by the entirety.

CASE NOTES

This section is reflective of changed circumstances in economic relationship and responsibilities among married persons and expresses a public policy of this State that their rights in property should be equalized. *Perry v. Perry*, — N.C. App. —, 341 S.E.2d 53 (1986).

Applicability to tenancies by the entirety which existed prior to January 1, 1983. — Provisions of subsection (a) of this section should generally be construed to apply to tenancies by the entirety which preexisted the effective date of the statute (January 1, 1983) and such application is not, in and of itself, unconstitutional. *Perry v. Perry*, — N.C. App. —, 341 S.E.2d 53 (1986).

The General Assembly has clearly mani-

fested its intention that this section, including the "equal right to control" provision of subsection (a), apply to estates by the entirety created before January 1, 1983. *Perry v. Perry*, — N.C. App. —, 341 S.E.2d 53 (1986).

The claim of a vested property right may not rest upon state enforcement of common law which is unconstitutionally discriminatory. Thus, to the extent that defendant husband's claims to the exclusive right of control and income of pre-1983 estates by the entirety were based solely upon the common-law incidents of the tenancy, they would fail, as the right recognized by the common law could not be said to be a "vested property right." *Perry v. Perry*, — N.C. App. —, 341 S.E.2d 53 (1986).

Burden of Proving Vested Rights. — There may be circumstances under which a husband's rights to income and control of pre-1983 tenancy by the entirety property, to the exclusion of his wife, may be classified as "vested rights" for reasons other than the common-law incidents of that estate. In such cases,

the burden will be upon the husband to demonstrate facts showing why his rights are "vested rights" such that application of the "equal control" provisions of subsection (a) of this section to the estate would violate due process. *Perry v. Perry*, — N.C. App. —, 341 S.E.2d 53 (1986).

ARTICLE 3.

Fraudulent Conveyances.

§ 39-15. Conveyance with intent to defraud creditors void.

CASE NOTES

I. GENERAL CONSIDERATION.

It Applies Only to Conveyances, etc. — In accord with the main volume. See *Havee v. Belk*, 775 F.2d 1209 (4th Cir. 1985).

Question for Jury. — Whether a conveyance, whatever its form, was in substance and

fact a conveyance by the debtor-bankrupt, or by another such as a pledgee, is a jury question. *Havee v. Belk*, 775 F.2d 1209 (4th Cir. 1985).

Cited in *Moffett v. Daniels*, — N.C. App. —, 342 S.E.2d 925 (1986).

§ 39-17. Voluntary conveyance evidence of fraud as to existing creditors.

CASE NOTES

I. GENERAL CONSIDERATION.

When Conveyance May Be Set Aside as Fraudulent. — Before a conveyance may be set aside as fraudulent, the finder of fact must find that the conveyance was voluntary, that the conveyance was made without fair and rea-

sonable consideration and that the conveyance was either made with the intent to defraud creditors or made so that at the time of the conveyance the transferor did not retain sufficient property to satisfy his then existing debts. *Valdese Gen. Hosp. v. Burns*, — N.C. App. —, 339 S.E.2d 23 (1986).

Chapter 40A.

Eminent Domain.

ARTICLE 1.

General.

§ 40A-1. Exclusive provisions.

CASE NOTES

Chapter Is Applicable to Private Landowners. — Even though private landowners are not specifically mentioned in § 40A-3, they are bound by the provisions of this chapter. *Smith v. City of Charlotte*, — N.C. App. —, 339 S.E.2d 844 (1986).

Applicability of Rules of Civil Procedure to Private Condemnation Proceedings. — Section 40A-12, together with § 1-393, gives trial courts clear authority to apply the Rules of Civil Procedure in private condemnation proceedings, at least to the extent that those

rules do not directly conflict with procedures specifically mandated by this chapter. *VEPCO v. Tillett*, — N.C. —, 340 S.E.2d 62 (1986).

Conversion of Private Condemnation Proceedings into Quiet Title Action. — Trial court did not err by applying § 1A-1, Rule 15(b) in such a way as to convert condemnation proceedings brought by private condemnors, with the consent of the parties, into an action to quiet title. *VEPCO v. Tillett*, — N.C. —, 340 S.E.2d 62 (1986).

§ 40A-2. Definitions.

CASE NOTES

Cited in *VEPCO v. Tillett*, — N. C. App. —, 343 S.E.2d 188 (1986).

§ 40A-3. By whom right may be exercised.

CASE NOTES

I. GENERAL CONSIDERATION.

Chapter Is Applicable to Private Landowners. — Even though private landowners are not specifically mentioned in this section, they are bound by the provisions of this chapter. *Smith v. City of Charlotte*, — N.C. App. —, 339 S.E.2d 844 (1986).

despite petitioner's argument that the plant would benefit the public by employing 30 people and thus contribute to the public welfare; and dismissal of petitioner's condemnation proceeding would be affirmed. *City of Statesville v. Roth*, 77 N.C. App. 803, 336 S.E.2d 142 (1985).

III. PRIVATE CONDEMNORS.

A. In General.

Installation of water and sewer lines solely for the benefit of one individual's manufacturing plant involved a private use,

IV. PUBLIC CONDEMNORS.

Municipal Airports. — The provisions of this chapter now control cities' eminent domain actions with respect to airports. *Smith v. City of Charlotte*, — N.C. App. —, 339 S.E.2d 844 (1986).

§ 40A-8. Costs.

CASE NOTES

Assessment of Costs Upheld. — Where although city filed a Declaration of Taking, it did not include property held to have been inversely condemned, the court's assessment of costs under this section was proper. *City of*

Winston-Salem v. Ferrell, — N.C. App. —, 338 S.E.2d 794 (1986).

Cited in *Yates v. Jamison*, 782 F.2d 1182 (4th Cir. 1986).

§ 40A-12. Additional rules.

CASE NOTES

Applicability of Rules of Civil Procedure to Private Condemnation Proceedings. — This section, together with § 1-393, gives trial courts clear authority to apply the Rules of Civil Procedure in private condemnation proceedings, at least to the extent that those rules do not directly conflict with procedures specifically mandated by this chapter. *VEPCO v. Tillett*, — N.C. —, 340 S.E.2d 62 (1986).

Conversion of Private Condemnation Proceeding into Quiet Title Action. — Trial court did not err by applying § 1A-1, Rule 15(b) in such a way as to convert condemnation proceeding brought by private condemnors, with the consent of the parties, into an action to quiet title. *VEPCO v. Tillett*, — N.C. —, 340 S.E.2d 62 (1986).

ARTICLE 2.

Condemnation Proceedings by Private Condemnors.

§ 40A-19. Proceedings by private condemnors.

CASE NOTES

Cited in *VEPCO v. Tillett*, — N.C. App. —, 343 S.E.2d 188 (1986).

ARTICLE 3.

Condemnation by Public Condemnors.

§ 40A-42. Vesting of title and right of possession; injunction not precluded.

Local Modification. — *Town of Holly Springs*: 1985 (Reg. Sess., 1986), c. 941.

§ 40A-47. Determination of issues other than damages.

CASE NOTES

A municipality is solely liable for the damages that inevitably or necessarily flow from the construction of an improvement in keeping with the design of the condemnor, and contract provisions which require that work be accomplished upon public property or upon private property for which the city holds an easement do not alter the city's liability for such damages. *City of Winston-Salem v. Ferrell*, — N.C. App. —, 338 S.E.2d 794 (1986).

Damages to land outside city's ease-

ments which inevitably or necessarily flow from the construction of the outfall result in an appropriation of land for public use. Such damages are embraced within the just compensation to which defendant landowners are entitled. *City of Winston-Salem v. Ferrell*, — N.C. App. —, 338 S.E.2d 794 (1986).

Cited in *City of Winston-Salem v. Ferrell*, — N.C. App. —, 338 S.E.2d 794 (1986); *Smith v. City of Charlotte*, — N.C. App. —, 339 S.E.2d 844 (1986).

§ 40A-48. Appointment of commissioners.

CASE NOTES

Cited in *Smith v. City of Charlotte*, — N.C. App. —, 339 S.E.2d 844 (1986).

§ 40A-51. Remedy where no declaration of taking filed; recording memorandum of action.

CASE NOTES

An inverse condemnation remedy is now provided in this jurisdiction by this section. *City of Winston-Salem v. Ferrell*, — N.C. App. —, 338 S.E.2d 794 (1986).

Inverse condemnation is simply a device to force a governmental body to exercise its power of condemnation, even though it may have no desire to do so. It allows a property owner to obtain compensation for a taking in fact, even though no formal exercise of the taking power has occurred. *Smith v. City of Charlotte*, — N.C. App. —, 339 S.E.2d 844 (1986).

Defendants' assertion of a counterclaim in condemnation action by city, alleging that property not included therein had been taken, properly placed the inverse condemnation issue before the court. *City of Winston-Salem v. Ferrell*, — N.C. App. —, 338 S.E.2d 794 (1986).

Remedy for Municipal Airport Overflight. — Private landowners no longer have any private common law actions for damages in trespass or nuisance in municipal airport overflight cases; their sole remedy is inverse condemnation. *Smith v. City of Charlotte*, — N.C. App. —, 339 S.E.2d 844 (1986).

This section provided the sole procedure by which plaintiffs could bring an inverse con-

demnation action involving a taking occurring as a result of the construction and operation of an airport runway. *Smith v. City of Charlotte*, — N.C. App. —, 339 S.E.2d 844 (1986).

No simple test exists for determining when a taking occurs by aircraft overflights; rather, a particularized judgment of the facts of the individual case is necessary. Thus the date requirement of this section does not impose any stringent standard of specificity. *Smith v. City of Charlotte*, — N.C. App. —, 339 S.E.2d 844 (1986).

Plaintiffs' allegation of a very general taking by aircraft overflights "within the past two years" failed to allege with reasonable specificity when the alleged appropriation or taking occurred; however, rather than dismissing the complaint altogether, the court should have required plaintiffs to come forward in accordance with defendant's motion for a more definite statement and plead the facts which they possessed, so that the court could then rule on their timeliness and sufficiency. *Smith v. City of Charlotte*, — N.C. App. —, 339 S.E.2d 844 (1986).

The statutory time begins to run on completion of the project or the taking, whichever is later. *Smith v. City of Charlotte*, — N.C. App. —, 339 S.E.2d 844 (1986).

Limitation Period for Taking Occurring Prior to Enactment of Chapter. — Where plaintiffs' action involving a taking incident to construction of an airport runway accrued in June 1979, and over two years later, in July 1981, new Chapter 40A was enacted, the period between such enactment and the cutoff date under the new limitation, five months and three weeks (10 July 1981 to 1 January 1982) was not itself so unreasonably short as to deny plaintiffs due process of law, particularly in light of the fact that plaintiffs lived in an area where large numbers of inverse condemnation actions were filed within the statutory period. *Smith v. City of Charlotte*, — N.C. App. —, 339 S.E.2d 844 (1986).

A municipality is solely liable for the damages that inevitably or necessarily flow from the construction of an improvement in keeping with the design of the condemnor, and contract provisions which require that work be accomplished upon public property or upon private property for which the city holds

an easement do not alter the city's liability for such damages. *City of Winston-Salem v. Ferrell*, — N.C. App. —, 338 S.E.2d 794 (1986).

Damages to land outside city's easements which inevitably or necessarily flow from the construction of the outfall result in an appropriation of land for public use. Such damages are embraced within the just compensation to which defendant landowners are entitled. *City of Winston-Salem v. Ferrell*, — N.C. App. —, 338 S.E.2d 794 (1986).

Assessment of Costs. — Where although city filed a Declaration of Taking, it did not include property held to have been inversely condemned, the court's assessment of costs under § 40A-8 was proper. *City of Winston-Salem v. Ferrell*, — N.C. App. —, 338 S.E.2d 794 (1986).

Stated in *Yates v. Jamison*, 782 F.2d 1182 (4th Cir. 1986).

Cited in *VEPCO v. Tillett*, — N.C. App. —, 343 S.E.2d 188 (1986).

ARTICLE 4.

Just Compensation.

§ 40A-62. Application.

CASE NOTES

Cited in *Smith v. City of Charlotte*, — N.C. App. —, 339 S.E.2d 844 (1986).

§ 40A-64. Compensation for taking.

CASE NOTES

The sales prices of voluntary sales of property similar in nature, location, and condition to the land being condemned is admissible as evidence of the value of that land if the other sales are not too remote in time. Whether the properties are sufficiently similar to admit such evidence is a question to be determined by

the trial judge in his sound discretion, usually after a hearing on the issue conducted out of the presence of the jury. *City of Winston-Salem v. Cooper*, — N.C. —, 340 S.E.2d 366 (1986).

Stated in *Yates v. Jamison*, 782 F.2d 1182 (4th Cir. 1986).

§ 40A-65. Effect of condemnation procedure on value.

CASE NOTES

Evidence of Highest and Best Use as if Not under "Cloud of Condemnation" Was Proper. — In a condemnation action by an airport authority, the testimony of the condemnor's expert witness as to the property's high-

est and best use as if it had not been under a "cloud of condemnation" was proper. Since a property owner cannot capitalize on any increase in the property's value due to the reasonable likelihood that it will be acquired, the

condemnor likewise cannot take advantage of any resulting decrease in the property due to the threat of condemnation. Raleigh-Durham

Airport Auth. v. King, 75 N.C. App. 57, 330 S.E.2d 622 (1985).

Chapter 41.

Estates.

§ 41-6. "Heirs" construed to be "children" in certain limitations.

Legal Periodicals. —

For article, "The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legis-

lations, Private Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

§ 41-10. Titles quieted.

CASE NOTES

I. GENERAL CONSIDERATION.

No statute of limitations runs against plaintiff bringing action for removal of a cloud upon title. Such an action is a continuing right, which exists as long as there is occasion for its exercise. *Poore v. Swan Quarter Farms, Inc.*, — N.C. App. —, 338 S.E.2d 817 (1986).

But Theory of Relief May Determine Applicability of Limitations. — There is no express statute of limitations governing actions to quiet title under this section. It thus is necessary to refer to plaintiffs' underlying theory of relief to determine which statute, if any, applies. *Poore v. Swan Quarter Farms, Inc.*, — N.C. App. —, 338 S.E.2d 817 (1986).

When Quiet Title Actions Are Treated as Ejectment Actions. — Actions to remove a cloud upon title are in essence ejectment actions and are properly reviewed as such where defendants are in actual possession and plaintiffs seek to recover possession. *Poore v. Swan Quarter Farms, Inc.*, — N.C. App. —, 338 S.E.2d 817 (1986).

Action Held Not One for Ejectment. — Where plaintiffs made no specific allegation

that defendants were in actual possession at the time of the filing of their action, and did not seek specifically to recover possession in their demand for relief, but merely prayed for rents and profits and removal of certain deeds as a cloud upon their title, plaintiffs' action was not in essence one for ejectment controlled by §§ 1-38 and 1-40; rather, plaintiffs' action was one to remove a cloud upon title which was not barred by any statute of limitations. *Poore v. Swan Quarter Farms, Inc.*, — N.C. App. —, 338 S.E.2d 817 (1986).

III. PLEADING AND PRACTICE.

A. In General.

Complaint Upheld. — Plaintiffs' complaint, which alleged that noncompliance with legal formalities voided two deeds, but did not allege fraud, despite failure to state specific facts underlying these allegations, nevertheless, under the liberal theory of notice pleading, was minimally sufficient to state a claim for relief under this section. *Poore v. Swan Quarter Farms, Inc.*, — N.C. App. —, 338 S.E.2d 817 (1986).

Chapter 41A.

State Fair Housing Act.

§ 41A-1. Title.

CASE NOTES

Caselaw Interpreting Federal Act. — In light of the similarity between the two acts, the body of federal cases interpreting the federal Fair Housing Act is useful, although not controlling, in interpreting the North Carolina

State Fair Housing Act. *North Carolina Human Relations Council ex rel. Leach v. Weaver Realty Co.*, — N.C. App. —, 340 S.E.2d 766 (1986).

§ 41A-3. Definitions.

CASE NOTES

Quoted in North Carolina Human Relations Council ex rel. Leach v. Weaver Realty Co., — N.C. App. —, 340 S.E.2d 766 (1986).

§ 41A-4. Unlawful discriminatory housing practices.

CASE NOTES

What Plaintiff Must Show. — To prevail under the State Fair Housing Act, plaintiff must show that defendant refused to engage in a real estate transaction with plaintiff due to the plaintiff's race, color, religion, sex or national origin. *North Carolina Human Relations Council ex rel. Leach v. Weaver Realty Co.*, — N.C. App. —, 340 S.E.2d 766 (1986).

Under the Act, race, color, religion, sex or national origin must be more than a mere factor in a defendant's decision not to engage in a real estate transaction. *North Carolina Human Relations Council ex rel. Leach v. Weaver Realty Co.*, — N.C. App. —, 340 S.E.2d 766 (1986).

Statistics describing the disparate impact of practices or policies may be circumstantial evidence of prohibited biased conduct. However, if the finder of fact reasonably finds that a particular housing practice or policy is not motivated by considerations of race, color,

religion, sex or national origin, then the particular housing practice or policy is not a violation of the State Fair Housing Act, no matter how "disparate" the impact of the practice or policy. *North Carolina Human Relations Council ex rel. Leach v. Weaver Realty Co.*, — N.C. App. —, 340 S.E.2d 766 (1986).

Family Composition Rules in Apartment Complex. — In a proceeding under the State Fair Housing Act, plaintiff could meet her burden of proof by showing that the facially neutral family composition rules used to deny her application to rent an apartment were promulgated to discriminate against blacks; she could also meet her burden of proof by showing that she could have leased the apartment if she were of another race. *North Carolina Human Relations Council ex rel. Leach v. Weaver Realty Co.*, — N.C. App. —, 340 S.E.2d 766 (1986).

Chapter 42.

Landlord and Tenant.

ARTICLE 1.

General Provisions.

§ 42-4. Recovery for use and occupation.

CASE NOTES

Judge Did Not Have Authority to Assign No Rental Value at All. — In an action under this section, while the trial judge had the authority to believe all, any or none of the landowner's testimony, and so to decline to accept her estimate of reasonable compensation, he did not have the authority to refuse to assign any rental value to the land at all. Even if the house on the property was fallen down or demolished, the land would still have had a rental value. *Simon v. Mock*, 75 N.C. App. 564, 331 S.E.2d 300 (1985).

Period of Limitations on Action for Fair Rental Value. — An action for the "fair rental value" of occupied property was brought upon a statutory liability under this section and was subject to the three-year statute of limitations provided for in § 1-52(2). Such a cause of action accrued continually, for each day the prop-

erty was occupied. *Simon v. Mock*, 75 N.C. App. 564, 331 S.E.2d 300 (1985).

Claim Against Administratrix for Reasonable Compensation Held Subject to Limitation Period in § 28A-19-3. — A landowner's claim under this section for "reasonable compensation" for occupation of her property, brought against one of the former co-tenants as administratrix of her husband's estate, was presented to the administratrix within the statutory period (§ 28A-19-3) and was therefore not barred by the three-year statute of limitations (§ 1-52(2)) as of the decedent's death. The landowner was allowed to sue the administratrix for rents not paid in the period of three years prior to the decedent's death, although the action itself was not brought until some six months after this date. *Simon v. Mock*, 75 N.C. App. 564, 331 S.E.2d 300 (1985).

§ 42-11. Willful destruction by tenant misdemeanor.

CASE NOTES

Cited in *Homeland, Inc. v. Backer*, 78 N.C. App. 477, 337 S.E.2d 114 (1985).

§ 42-14. Notice to quit in certain tenancies.

CASE NOTES

Effect of Failure to Provide Notice. — Generally, the effect of failure to provide notice when it is required under this section is that the parties are bound to a new term. The rule applies to agricultural tenancies, even those

for fixed one-year terms under § 42-23. *Lewis v. Lewis Nursery, Inc.*, — N.C. App. —, 342 S.E.2d 45 (1986).

Applied in *Cla-Mar Mgt. v. Harris*, 76 N.C. App. 300, 332 S.E.2d 495 (1985).

ARTICLE 2.

*Agricultural Tenancies.***§ 42-15. Landlord's lien on crops for rents, advances, etc.; enforcement.**

CASE NOTES

I. IN GENERAL.

Landlord's Priority in Bankruptcy Proceedings. — Although landlord's claim for rent of 250 acres pursuant to the statutory landlord's lien of this section would be denied, since the bankruptcy trustee could properly

avoid that lien pursuant to 11 U.S.C. § 545(3), the landlord had an administrative expense priority claim for rent in the amount of \$12,073.39 pursuant to 11 U.S.C. §§ 364(a) and 503(b)(1). In re Harrell, 55 Bankr. 203 (Bankr. E.D.N.C. 1985).

§ 42-23. Terms of agricultural tenancies in certain counties.

CASE NOTES

Applicability. — For a lease to fall within this section it must be both (1) for an agricultural purpose, and (2) for a period of one year or from year to year. *Lewis v. Lewis Nursery, Inc.*, — N.C. App. —, 342 S.E.2d 45 (1986).

When Notice Must Be Given. — Because this section prescribes December 1 as the expiration of the lease year, notice must be given by the preceding November 1. *Lewis v. Lewis Nursery, Inc.*, — N.C. App. —, 342 S.E.2d 45 (1986).

This section requires that notice to quit be given, in accordance with § 42-14, one month

before the expiration of the tenancy, even if the tenancy is an estate for years. *Lewis v. Lewis Nursery, Inc.*, — N.C. App. —, 342 S.E.2d 45 (1986).

Effect of Failure to Provide Notice. — Generally, the effect of failure to provide notice when it is required under § 42-14 is that the parties are bound to a new term. This rule applies to agricultural tenancies, even those for fixed one-year terms under this section. *Lewis v. Lewis Nursery, Inc.*, — N.C. App. —, 342 S.E.2d 45 (1986).

ARTICLE 3.

*Summary Ejectment.***§ 42-26. Tenant holding over may be dispossessed in certain cases.**

CASE NOTES

I. IN GENERAL.

Quoted in *Cla-Mar Mgt. v. Harris*, 76 N.C. App. 300, 332 S.E.2d 495 (1985).

§ 42-28. Summons issued by clerk.

Legal Periodicals. —

For article discussing 1983 amendments to the Federal Rules of Civil Procedure relative to magistrate practice, comparing state court

magistrate practice, and making certain suggestions, see 20 Wake Forest L. Rev. 819 (1984).

§ 42-30. Judgment by confession or where plaintiff has proved case.

Legal Periodicals. —

For article discussing 1983 amendments to the Federal Rules of Civil Procedure relative to magistrate practice, comparing state court

magistrate practice, and making certain suggestions, see 20 Wake Forest L. Rev. 819 (1984).

§ 42-34. Undertaking on appeal and order staying execution.

CASE NOTES

Cited in In re Nexus Communications, Inc., 55 Bankr. 596 (Bankr. E.D.N.C. 1985).

ARTICLE 5.

Residential Rental Agreements.

§ 42-42. Landlord to provide fit premises.

CASE NOTES

Tenant's Contributory Negligence Held a Jury Question. — In a civil action wherein a tenant was injured when he stepped into a hole under the landlord's control, it could not be said as a matter of law whether the surrounding circumstances — darkness, a growth of grass around the hole, the lapse of time between the tenant's prior awareness of the hole

and his injury — were sufficient to excuse the tenant's alleged contributory negligence, and the issue of contributory negligence should have been decided by the jury. *Baker v. Duhan*, 75 N.C. App. 191, 330 S.E.2d 53 (1985).

Cited in *Jackson v. Housing Auth.*, — N.C. —, 341 S.E.2d 523 (1986).

ARTICLE 6.

Tenant Security Deposit Act.

§ 42-51. Permitted uses of the deposit.

CASE NOTES

Applied in *Cla-Mar Mgt. v. Harris*, 76 N.C.
App. 300, 332 S.E.2d 495 (1985).

Chapter 43.

Land Registration.

ARTICLE 1.

Nature of Proceeding.

§ 43-1. Jurisdiction in superior court.

Legal Periodicals. —

For article, "The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legis-

lations, Private Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

ARTICLE 3.

Procedure for Registration.

§ 43-12. Effect of decree; approval of judge.

Legal Periodicals. — For article, "The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislations, Private

Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

ARTICLE 4.

Registration and Effect.

§ 43-18. Registered owner's estate free from adverse claims; exceptions.

Legal Periodicals. — For article, "The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislations, Private

Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

§ 43-21. No right by adverse possession.

Legal Periodicals. — For article, "The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislations, Private

Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

Chapter 44.

Liens.

Article 9B.

Attachment or Garnishment and Lien for Ambulance Service in Certain Counties.

Sec.

44-51.8. Counties to which Article applies.

ARTICLE 9B.

Attachment or Garnishment and Lien for Ambulance Service in Certain Counties.

§ 44-51.8. Counties to which Article applies.

The provisions of this Article shall apply only to Alamance, Alexander, Alleghany, Anson, Ashe, Beaufort, Bladen, Brunswick, Buncombe, Burke, Cabarrus, Caldwell, Caswell, Catawba, Chatham, Cherokee, Chowan, Cleveland, Columbus, Cumberland, Dare, Davidson, Davie, Duplin, Durham, Edgecombe, Forsyth, Franklin, Gaston, Granville, Greene, Guilford, Halifax, Harnett, Haywood, Henderson, Hertford, Hoke, Hyde, Iredell, Johnston, Jones, Lee, Lenoir, Lincoln, McDowell, Madison, Mecklenburg, Mitchell, Montgomery, Moore, Nash, New Hanover, Onslow, Pasquotank, Person, Pitt, Polk, Randolph, Richmond, Robeson, Rockingham, Rowan, Rutherford, Sampson, Scotland, Stanly, Stokes, Surry, Transylvania, Tyrrell, Union, Vance, Wake, Warren, Washington, Watauga, Wilkes, Wilson, Yadkin and Yancey Counties. (1969, c. 708, s. 5; c. 1197; 1971, c. 132; 1973, c. 880, s. 1; cc. 887, 894, 907, 1182; 1975, c. 595, s. 1; 1977, cc. 64, 138, 357; 1977, 2nd Sess., cc. 1144, 1157; 1979, c. 452; 1983, cc. 186, 424; 1983 (Reg. Sess., 1984), c. 933; 1985, c. 9; 1985 (Reg. Sess., 1986), c. 936, s. 6.)

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 8, 1986, inserted a reference to Chatham County in this section.

Chapter 44A.

Statutory Liens and Charges.

ARTICLE 1.

Possessory Liens on Personal Property.

§ 44A-3. When lien arises and terminates.

CASE NOTES

Amendment of Complaint Held Timely. — When plaintiff filed motion to amend his complaint to add a cause of action to enforce a materialman's or laborer's lien on December 8, 1983, and the last day he had furnished material or labor to defendants' property was June 15, 1983, his motion was filed within the 180-day period set forth in subsection (a) of this section, the date of the filing of the motion,

rather than the date the court rules on it, being the crucial date in measuring the period of limitations. Plaintiff's amendment was therefore not barred by the statute of limitations, and whether it would "relate back" to the filing of the original complaint was immaterial. *Mauney v. Morris*, — N.C. —, 340 S.E.2d 397 (1986).

ARTICLE 2.

Statutory Liens on Real Property.

Part 1. Liens of Mechanics, Laborers and Materialmen Dealing with Owner.

§ 44A-7. Definitions.

CASE NOTES

Cited in *W.H. Dail Plumbing, Inc. v. Roger Baker & Assocs.*, 78 N.C. App. 664, 338 S.E.2d 135 (1986).

§ 44A-8. Mechanics', laborers' and materialmen's lien; persons entitled to lien.

CASE NOTES

The lien created by this section, etc., — In accord with 1st paragraph in main volume. See *Caldwell's Well Drilling, Inc. v. Moore*, — N.C. App. —, 340 S.E.2d 518 (1986).
No Lien for Lost Profits. — A lien under this section attaches only for debts owing for labor done or professional design or surveying services or material furnished. Nothing is said about lost profits. *W.H. Dail Plumbing, Inc. v. Roger Baker & Assocs.*, 78 N.C. App. 664, 338 S.E.2d 135 (1986).

Plaintiff Must Prove, etc., — In accord with main volume. See *Caldwell's Well Drilling, Inc. v. Moore*, — N.C. App. —, 340 S.E.2d 518 (1986).
"Debts Owning." — Where plumbing company had contracted with owner of office condominium complex for a total, after change orders, of \$43,178.61, and prior to defaulting, owner had paid \$30,000.00 toward this total, the "debt owing" to which a lien under this

section could attach totalled \$13,718.61. *W.H. Dail Plumbing, Inc. v. Roger Baker & Assocs.*, 78 N.C. App. 664, 338 S.E.2d 135 (1986).

Lien Could Not Be Imposed Absent Underlying Debt. — Where plaintiff sought a personal judgment against owners based on its contract to drill a well and sought to have such personal judgment declared to be a specific lien on the property allegedly conveyed by owners to purchasers, but there was no allegation in the complaint that the purchasers were indebted to plaintiff in any amount, and subsequently plaintiff abandoned its claim for a personal judgment based on the contract by taking

a voluntary dismissal of its claim against owners, when the trial judge granted the purchasers' Rule 12(b) motion to dismiss there was no debt or judgment to be secured by a lien on the property in question, and since the court necessarily considered matters outside the pleadings, i.e., the voluntary dismissal of plaintiff's claim for personal judgment against the owners, the 12(b)(6) order was converted to a summary judgment for the purchasers with respect to the dismissal of plaintiff's claim to have a lien imposed on the property. *Caldwell's Well Drilling, Inc. v. Moore*, — N.C. App. —, 340 S.E.2d 515 (1986).

§ 44A-12. Filing claim of lien.

CASE NOTES

Cited in Trustees of Garden of Prayer Baptist Church v. Geraldco Bldrs., Inc., 78 N.C. App. 108, 336 S.E.2d 694 (1985).

§ 44A-13. Action to enforce lien.

CASE NOTES

The amount of the lien is limited by subsection (b) of this section to the amount stated in the claim. *W.H. Dail Plumbing, Inc. v. Roger Baker & Assocs.*, 78 N.C. App. 664, 338 S.E.2d 135 (1986).

Prejudgment Interest. — Prejudgment in-

terest is not authorized when only enforcing a statutory lien, absent a contract between the parties. *W.H. Dail Plumbing, Inc. v. Roger Baker & Assocs.*, 78 N.C. App. 664, 338 S.E.2d 135 (1986).

Part 2. Liens of Mechanics, Laborers and Materialmen Dealing with One Other Than Owner.

§ 44A-18. Grant of lien; subrogation; perfection.

CASE NOTES

Cited in Trustees of Garden of Prayer Baptist Church v. Geraldco Bldrs., Inc., 78 N.C. App. 108, 336 S.E.2d 694 (1985).

§ 44A-20. Duties and liability of obligor.

CASE NOTES

Cited in Trustees of Garden of Prayer Baptist Church v. Geraldco Bldrs., Inc., 78 N.C. App. 108, 336 S.E.2d 694 (1985).

§ 44A-21. Pro rata payments.**CASE NOTES**

Cited in Trustees of Garden of Prayer
Baptist Church v. Geraldco Bldrs., Inc., 78
N.C. App. 108, 336 S.E.2d 694 (1985).

§ 44A-22. Priority of liens.**CASE NOTES**

Cited in Trustees of Garden of Prayer
Baptist Church v. Geraldco Bldrs., Inc., 78
N.C. App. 108, 336 S.E.2d 694 (1985).

ARTICLE 3.*Model Payment and Performance Bond.***§ 44A-25. Definitions.**

Local Modification. — (As to Article 3) 30, 1989; (As to Article 3) Town of Manteo:
East Duplin High School in Duplin County: 1985 (Reg. Sess., 1986), c. 808.
1985 (Reg. Sess., 1986), c. 887, expiring June

Chapter 45.

Mortgages and Deeds of Trust.

ARTICLE 2.

Right to Foreclose or Sell under Power.

§ 45-4. Representative succeeds on death of mortgagee or trustee in deeds of trust; parties to action.

CASE NOTES

When Objection to Foreclosure to be Raised. — If the foreclosure proceeding was not authorized for any reason or if it was irregularly conducted (e.g., the notice was incorrect or inadequate in certain respects; the affidavit of default was based on hearsay), it was incumbent on the mortgagor to raise that issue in that proceeding either by objection or motion in the cause. *Douglas v. Pennamco, Inc.*, 75

N.C. App. 644, 331 S.E.2d 298, cert. denied, 314 N.C. 664, 336 S.E.2d 399 (1985).

Collateral Attack Not Permitted. — The law does not permit a collateral attack on a foreclosure proceeding and judgment. *Douglas v. Pennamco, Inc.*, 75 N.C. App. 644, 331 S.E.2d 298, cert. denied, 314 N.C. 664, 336 S.E.2d 399 (1985).

ARTICLE 2A.

Sales under Power of Sale.

Part 2. Procedure for Sale.

§ 45-21.16. Notice and hearing.

CASE NOTES

Issues To Be Determined, etc. —

In accord with 2nd paragraph in main volume. See *In re Fortescue*, 75 N.C. App. 127, 330 S.E.2d 219, cert. denied, 314 N.C. 330, 335 S.E.2d 890 (1985).

How Equitable Defenses Raised. — Equitable defenses, such as the acceptance of late payments, may not be raised in a foreclosure hearing pursuant to this section, but must instead be asserted in an action to enjoin the foreclosure sale under § 45-21.34. In *re Fortescue*, 75 N.C. App. 127, 330 S.E.2d 219, cert. denied, 314 N.C. 330, 335 S.E.2d 890 (1985).

Assignment between Notice and Hearing. — This section does not prohibit an assignment or negotiation of the debt instrument during the interval between the date notice is issued and the time of the hearing, and it is silent as to whether additional notification is necessary when an assignment takes place. In

re Fortescue, — N.C. App. —, 341 S.E.2d 757 (1986), upholding notice which named the original and present holder of the note and deed of trust where the note and deed were subsequently assigned to another individual, where mortgagor had over nine months actual notice before the trial court's de novo hearing of the assignment.

Second Proceeding Set Aside Where Debt Satisfied in Prior Proceeding. — The mortgage indebtedness that a substitute trustee sought to collect in a foreclosure proceeding instituted in Davidson County, upon a tract of land located partly in Davidson and Randolph counties, was paid off in full during a prior foreclosure in Randolph County. Thus, this second foreclosure was without foundation and the order of the trial court authorizing the foreclosure was set aside. In *re Rollins*, 75 N.C. App. 656, 331 S.E.2d 303 (1985).

Payment Delinquent Where One Day

Past Due. — The 30-day grace period contained in the original promissory note was contained in the clause governing the lender's right to accelerate the debt, and the loan modification agreement contained a new acceleration clause, which provided that the lender could accelerate the debt in the event one monthly payment became "delinquent." The

judge properly gave the word "delinquent" its plain meaning, i.e., overdue or late. Consequently, it was clear that the debtor became delinquent in making his payment one day after the agreement provided it was due. In re Fortescue, 75 N.C. App. 127, 330 S.E.2d 219, cert. denied, 314 N.C. 330, 335 S.E.2d 890 (1985).

§ 45-21.27. Upset bid on real property; compliance bonds.

CASE NOTES

Cited in In re Keziah, 53 Bankr. 116 (W.D.N.C. 1985).

§ 45-21.30. Failure of bidder to make cash, deposit or to comply with bid; resale.

CASE NOTES

Quoted in In re Otter Pond Inv. Group, Ltd., — N.C. App. —, 339 S.E.2d 854 (1986).

ARTICLE 2B.

Injunctions; Deficiency Judgments.

§ 45-21.34. Enjoining mortgage sales or confirmations thereof on equitable grounds.

CASE NOTES

How Equitable Defenses Raised. — Equitable defenses, such as the acceptance of late payments, may not be raised in a foreclosure hearing pursuant to § 45-21.16, but must instead be asserted in an action to enjoin the

foreclosure sale under this section. In re Fortescue, 75 N.C. App. 127, 330 S.E.2d 219, cert. denied, 314 N.C. 330, 335 S.E.2d 890 (1985).

§ 45-21.36. Right of mortgager to prove in deficiency suits reasonable value of property by way of defense.

CASE NOTES

This section has no application to foreclosure sales made pursuant to an order or decree of court. In re Otter Pond Inv. Group, Ltd. — N.C. App. —, 339 S.E.2d 854 (1986).

When Proof of Value of Foreclosed Property May Be Made. — This section permits proof that foreclosed property acquired by

creditors was worth the sum that was owed them only in a suit against a mortgagor, trustor or other maker for a deficiency judgment. In re Otter Pond Inv. Group, Ltd., — N.C. App. —, 339 S.E.2d 854 (1986).

Cited in Northwestern Bank v. Barber, — N.C. App. —, 339 S.E.2d 452 (1986).

§ 45-21.38. Deficiency judgments abolished where mortgage represents part of purchase price.

CASE NOTES

Legislative Intent. —

The legislative intent behind this section is to limit recovery by purchase money mortgagees to the property conveyed. Underlying this intent is a desire to discourage oppressive overpricing at sale and underpricing at foreclosure. *Sink v. Egerton*, 76 N.C. App. 526, 333 S.E.2d 520 (1985).

Commercial Transactions Not Excluded.

— The 1933 General Assembly of North Carolina did not intend any special exclusion of commercial transactions, such as by "sophisticated business people," from this section. *Barnaby v. Boardman*, 313 N.C. 565, 330 S.E.2d 600 (1985).

So long as the debt of the purchaser of property is secured by a deed of trust on the property or part of it given by the purchaser to secure payment of the purchase price, the deed of trust is a purchase money deed of trust. *Burnette Indus., Inc. v. Danbar of Winston-Salem, Inc.*, — N.C. App. —, 341 S.E.2d 754 (1986).

This section prohibited plaintiff from re-

covering interest on a purchase money note, where the interest was part of the debt secured by the purchase money deed of trust. *Burnette Indus., Inc. v. Danbar of Winston-Salem, Inc.*, — N.C. App. —, 341 S.E.2d 754 (1986).

Noteholder Could Recover Debt Only from Property Conveyed. — The holder of a promissory note given by a buyer to a seller for the purchase of land and secured by a deed of trust embracing the land could not release his security and sue on the note, but had to look exclusively to the property conveyed in seeking to recover any balance owed. *Barnaby v. Boardman*, 313 N.C. 565, 330 S.E.2d 600 (1985).

Holder of Subordinate Deed of Trust Cannot Bring In Personam Action. — A seller, who is the holder of a subordinate purchase money deed of trust and whose security has been eroded by foreclosure of a senior deed of trust, cannot bring an in personam action for the debt. *Sink v. Egerton*, 76 N.C. App. 526, 333 S.E.2d 520 (1985).

ARTICLE 5.

Miscellaneous Provisions.

§ 45-45.1. Release of mortgagor by dealings between mortgagee and assuming grantee.

CASE NOTES

Quoted in *Branch Banking & Trust Co. v. Kenyon Inv. Corp.*, 76 N.C. App. 1, 332 S.E.2d 186 (1985).

Chapter 46.

Partition.

ARTICLE 1.

Partition of Real Property.

§ 46-1. Partition is a special proceeding.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

ARTICLE 2.

Partition Sales of Real Property.

§ 46-22. Sale in lieu of partition.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

Chapter 47.

Probate and Registration.

Article 3.

Model Payment and Performance Bond.

Sec.

47-36.1. Correction of errors in recorded instruments.

Article 4.

Curative Statutes; Acknowledgments; Probates; Registration.

Sec.

47-108.20. Validation of certain recorded instruments that were not acknowledged.

ARTICLE 2.

Registration.

§ 47-18. Conveyances, contracts to convey, options and leases of land.

CASE NOTES

I. IN GENERAL.

Principles applicable to sufficiency of references, etc. —

In accord with the main volume. See *Terry v. Brothers Inv. Co.*, 77 N.C. App. 1, 334 S.E.2d 469 (1985).

When a grantee accepts a conveyance subject to an outstanding claim or interest evidenced by an unrecorded instrument executed by his grantor, he takes the property burdened by that claim or interest; by accepting such a deed he ratifies the unrecorded in-

strument and agrees to take the property subject to it and is estopped to deny the unrecorded instrument's validity. This principle derives from the theory that reference to the unrecorded encumbrance, if made with sufficient certainty, creates a trust or agreement that the property is held subject to the encumbrance. *Terry v. Brothers Inv. Co.*, 77 N.C. App. 1, 334 S.E.2d 469 (1985).

Cited in *Hornets Nest Girl Scout Council, Inc. v. Cannon Found., Inc.*, — N.C. App. —, 339 S.E.2d 26 (1986); *VEPCO v. Tillet*, — N.C. App. —, 343 S.E.2d 188 (1986).

§ 47-20.2. Place of registration; personal property.

Legal Periodicals. —

For 1984 survey, "The Application of the North Carolina Motor Vehicle Act and the

Uniform Commercial Code to the Sale of Motor Vehicles by Consignment," see 63 N.C.L. Rev. 1105 (1985).

§ 47-26. Deeds of gift.

CASE NOTES

Right-of-way deed which, besides reciting consideration as "One Dollar and other valuable consideration," contained a statement that the consideration for the conveyance was the obligation imposed upon grantees to maintain an all-weather driveway across the right-

of-way, usable by all parties, was not without consideration, and the fact that the driveway was not maintained did not convert the deed, supported by consideration, into a deed of gift. *Higdon v. Davis*, 315 N.C. 208, 337 S.E.2d 543 (1985).

§ 47-36.1. Correction of errors in recorded instruments.

Notwithstanding G.S. 47-14 and 47-17, an obvious typographical or other minor error in a deed or other instrument recorded with the register of deeds may be corrected by rerecording the original instrument with the correction clearly set out on the face of the instrument and with a statement of explanation attached. The parties who signed the original instrument or the attorney who drafted the original instrument shall initial the correction and sign the statement of explanation. The statement of explanation need not be acknowledged. Notice of the correction made pursuant to this section shall be effective from the time the instrument is rerecorded. (1985 (Reg. Sess., 1986), c. 842, s. 1.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 842, s. 3 makes this section effective upon ratification and provides that it shall not affect pending litigation. The act was ratified June 30, 1986.

ARTICLE 4.

Curative Statutes; Acknowledgments; Probates; Registration.

§ 47-108.20. Validation of certain recorded instruments that were not acknowledged.

All instruments recorded before June 30, 1986, that were not reexecuted and reacknowledged and that correct an obvious typographical or other minor error in a recorded instrument that was previously properly executed and acknowledged are declared to be valid instruments. (1985 (Reg. Sess., 1986), c. 842, s. 2.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 842, s. 3 makes this section effective upon ratification and provides that it shall not affect pending litigation. The act was ratified June 30, 1986.

ARTICLE 6.

Registration and Execution of Instruments Signed under a Power of Attorney.

§ 47-115.1: Repealed by Session Laws 1983, c. 626, s. 2, effective October 1, 1983.

Cross References. — As to powers of attorney, see now § 32A-1 et seq. As to effect of powers of attorney executed pursuant to § 47-115.1 prior to October 1, 1983, see § 32A-14.

Chapter 47A.

Unit Ownership.

ARTICLE 1.

Unit Ownership Act.

§ 47A-1. Short title.

Legal Periodicals. —

For comment, "Time Sharing: The North Carolina General Assembly's Response to

Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

§ 47A-2. Declaration creating unit ownership; recordation.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assem-

bly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

§ 47A-4. Property subject to Article.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assem-

bly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

§ 47A-8. Use of common areas and facilities.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assem-

bly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

§ 47A-9. Maintenance, repair and improvements to common areas and facilities; access to units for repairs.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assem-

bly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

§ 47A-10. Compliance with bylaws, regulations and covenants; damages; injunctions.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assem-

bly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

§ 47A-13. Declaration creating unit ownership; contents; recordation.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

§ 47A-16. Termination of unit ownership; consent of lienholders; recordation of instruments.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

§ 47A-19. Bylaws; contents.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

§ 47A-21. Units taxed separately.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

§ 47A-26. Actions as to common interests; service of process on designated agent; exhaustion of remedies against association.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

Chapter 47B.

Real Property Marketable Title Act.

§ 47B-1. Declaration of policy and statement of purpose.

Legal Periodicals. — For article, "The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislations, Private

Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

§ 47B-2. Marketable record title to estate in real property; 30-year unbroken chain of title of record; effect of marketable title.

Legal Periodicals. — For article, "The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislations, Private

Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

CASE NOTES

Applied in *Town of Winton v. Scott*, — N.C. App. —, 342 S.E.2d 560 (1986).

Cited in *Harris v. Walden*, 314 N.C. 284, 333 S.E.2d 254 (1985).

§ 47B-3. Exceptions.

Legal Periodicals. —

For article, "The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legis-

lations, Private Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

CASE NOTES

Applied in *Town of Winton v. Scott*, — N.C. App. —, 342 S.E.2d 560 (1986).

Chapter 47C.

North Carolina Condominium Act.

Article 1.

General Provisions.

- Sec.
 47C-1-101. Short title.
 47C-1-102. Applicability.
 47C-1-103. Definitions.
 47C-1-104. Variation; power of attorney or proxy to declarant.
 47C-1-105. Separate titles and taxation.
 47C-1-106. Applicability of local ordinances, regulations, and building codes.
 47C-1-107. Eminent domain.
 47C-1-108. Supplemental general principles of law applicable.
 47C-1-109. Inconsistent time share provisions.

Article 2.

Creation, Alteration, and Termination of Condominiums.

- 47C-2-101. Execution and recordation of declaration.
 47C-2-102. Unit boundaries.
 47C-2-103. Construction and validity of declaration and bylaws.
 47C-2-104. Description of units.
 47C-2-105. Contents of declaration.
 47C-2-106. Leasehold condominiums.
 47C-2-107. Allocation of common element, interests, votes, and common expense liabilities.
 47C-2-108. Limited common elements.
 47C-2-109. Plats and plans.
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 47C-2-111. Alterations of units.
 47C-2-112. Relocation of boundaries between adjoining units.
 47C-2-113. Subdivision of units.
 47C-2-114. Easement for encroachments.
 47C-2-115. Use for sales purposes.
 47C-2-116. Easement to facilitate exercise of special declarant rights.
 47C-2-117. Amendment of declaration.
 47C-2-118. Termination of condominium.
 47C-2-119. [Reserved.]
 47C-2-120. Master associations.
 47C-2-121. Merger or consolidation of condominiums.

Article 3.

Management of the Condominium.

- 47C-3-101. Organization of unit owners' association.
 47C-3-102. Powers of unit owners' association.

Sec.

- 47C-3-103. Executive board members and officers.
 47C-3-104. Transfer of special declarant rights.
 47C-3-105. Termination of contracts and leases of declarant.
 47C-3-106. Bylaws.
 47C-3-107. Upkeep; damages; assessments for damages, fines.
 47C-3-107A. Charges for late payments, fines.
 47C-3-108. Meetings.
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 47C-3-110. Voting; proxies.
 47C-3-111. Tort and contract liability.
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 47C-3-117. Other liens affecting the condominium.
 47C-3-118. Association records.
 47C-3-119. Association as trustee.

Article 4.

Protection of Purchasers.

- 47C-4-101. Applicability; waiver.
 47C-4-102. Liability for public offering statement requirements.
 47C-4-103. Public offering statement; general provisions.
 47C-4-104. Same; condominiums subject to developmental rights.
 47C-4-105. Same; time share.
 47C-4-106. Conversion buildings.
 47C-4-107. Same; condominium securities.
 47C-4-108. Purchaser's right to cancel.
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 47C-4-112. [Reserved.]
 47C-4-113. Express warranties of quality.
 47C-4-114. Implied warranties of quality.
 47C-4-115. Exclusion of modification of implied warranties of quality.
 47C-4-116. Statute of limitations for warranties.
 47C-4-117. Effect of violations on rights of action; attorney's fees.
 47C-4-118. Labeling of promotional material.
 47C-4-119. Declarant's obligation to complete.
 47C-4-120. Substantial completion of units.

NORTH CAROLINA COMMENT

The revision of the condominium statutes of North Carolina was based upon the Uniform Condominium Act (1980) and the specific comments that follow will indicate how the North Carolina Act differs from the Uniform Act. A need for a revision of the previous "first generation" North Carolina statute was evident because that statute did not reflect the actual day to day experience of those who have contact with the condominium form of ownership. Specifically, the previous statute did not adequately address: building condominiums in stages; the important period of transition between the developer control and control by the owners association; the relationship between the owners association and the individual owners; the termination of a condominium; and, consumer protection for purchasers. The

revision provides guidelines in all of the preceding areas and provides additional guidance in areas that were addressed by the previous statute. Sections 1-110 through 1-114 (standard provisions in all Uniform Acts) were deleted as surplusage in North Carolina. Section 2-119 relating to the rights of secured creditors was also deleted as unnecessary in light of the protection accorded secured creditors under North Carolina law. Section 4-112 concerning the right of tenants to notice and to purchase units in conversion condominiums was deleted because of inconsistencies with the provisions of G.S. 47A-36 enacted in 1983. As used in this Commentary the term "Commission" refers to the North Carolina General Statutes Commission.

ARTICLE 1.

General Provisions.

§ 47C-1-101. Short title.

This chapter shall be known and may be cited as the North Carolina Condominium Act. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

NORTH CAROLINA COMMENT

Self-explanatory.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 877, s. 3 makes this Chapter effective October 1, 1986.

§ 47C-1-102. Applicability.

(a) This chapter applies to all condominiums created within this State after October 1, 1986. Sections 47C-1-105 (Separate Titles and Taxation), 47C-1-106 (Applicability of Local Ordinances, Regulations, and Building Codes), 47C-1-107 (Eminent Domain), 47C-2-103 (Construction and Validity of Declaration and Bylaws), 47C-2-104 (Description of Units), 47C-3-102(a)(1) through (6) and (11) through (16) (Powers of Unit Owners' Association), 47C-3-111 (Tort and Contract Liability), 47C-3-112 (Conveyance or Encumbrance of Common Elements), 47C-3-116 (Lien for Assessments), 47C-3-118 (Association Records), and 47C-4-117 (Effect of Violation on Rights of Action; Attorney's Fees), and G.S. 47C-1-103 (Definitions), to the extent necessary in construing any of those sections, apply to all condominiums created in this State before October 1, 1986; but those sections apply only with respect to events and circumstances occurring after October 1, 1986 and do not invalidate existing provisions of the declarations, bylaws, or plats or plans of those condominiums.

(b) The provisions of Chapter 47A, the Unit Ownership Act, do not apply to condominiums created after October 1, 1986 and do not invalidate any amendment to the declaration, bylaws, and plats and plans of any condominium created before October 1, 1986 if the amendment would be permitted by this chapter. The amendment must be adopted in conformity with the procedures and requirements specified by those instruments and by Chapter 47A, the Unit Ownership Act. If the amendment grants to any person any rights, powers, or privileges permitted by this chapter, all correlative obligations, liabilities, and restrictions in this chapter also apply to that person.

(c) This chapter does not apply to condominiums or units located outside this State, but the public offering statement provisions (G.S. 47C-4-102 through 47C-4-108) apply to all contracts for the dispositions thereof signed in this State by any party unless exempt under G.S. 47C-4-101(b). (1985 (Reg. Sess., 1986), c. 877, s. 1.)

NORTH CAROLINA COMMENT

This section is not significantly different from the Uniform Act. A reference to G.S. 47C-3-112 (Conveyance or Encumbrance of Common Elements) was added and a reference to G.S. 47C-4-109 (Resales of Units) was deleted from the list of sections made applicable to pre-existing condominiums. The addition of the reference to G.S. 47C-3-112 was made to provide an existing owners association with flexibility either in debt financing or in selling

off facilities no longer desired. The deletion of the references to G.S. 47C-4-109 reflects the Commission's belief that resales of pre-existing units should be governed by the previous statute so as not to change the responsibilities of owners who bought under the previous statute and also because the Commission was unaware of abuses in the one to one relationship involved in resales.

§ 47C-1-103. Definitions.

In the declaration and bylaws, unless specifically provided otherwise or the context otherwise requires, and in this chapter:

- (1) "Affiliate of a declarant" means any person who controls, is controlled by, or is under common control with a declarant. A person "controls" a declarant if the person (i) is a general partner, officer, director, or employer of the declarant, (ii) directly or indirectly or acting in concert with one or more other persons, or through one or more subsidiaries, owns, controls, holds with power to vote, or holds proxies representing, more than twenty percent (20%) of the voting interests in the declarant, (iii) controls in any manner the election of a majority of the directors of the declarant, or (iv) has contributed more than twenty percent (20%) of the capital of the declarant. A person "is controlled by" a declarant if the declarant (i) is a general partner, officer, director, or employer of the person, (ii) directly or indirectly or acting in concert with one or more other persons, or through one or more subsidiaries, owns, controls, holds with power to vote, or holds proxies representing, more than twenty percent (20%) of the voting interests in the person, (iii) controls in any manner the election of a majority of the directors of the person, or (iv) has contributed more than twenty percent (20%) of the capital of the person. Control does not exist if the powers described in this paragraph are held solely as security for an obligation and are not exercised.
- (2) "Allocated interests" means the undivided interests in the common elements, the common expense liability, and votes in the association allocated to each unit.

- (3) "Association" or "unit owners' associations" means the unit owners' associations organized under G.S. 47C-3-101.
- (4) "Common elements" means all portions of a condominium other than the units.
- (5) "Common expenses" means expenditures made by or financial liabilities of the association, together with any allocations to reserves.
- (6) "Common expense liability" means the liability for common expenses allocated to each unit pursuant to G.S. 47C-2-107.
- (7) "Condominium" means real estate, portions of which are designated for separate ownership and the remainder of which is designated for common ownership solely by the owners of those portions. Real estate is not a condominium unless the undivided interests in the common elements are vested in the unit owners.
- (8) "Conversion building" means a building that at any time before creation of the condominium was occupied wholly or partially by persons other than purchasers or by persons who occupy with the consent of purchasers.
- (9) "Declarant" means any person or group of persons acting in concert who (i) as part of a common promotional plan offers to dispose of his or its interest in a unit not previously disposed of or (ii) reserves or succeeds to any special declarant right.
- (10) "Declaration" means any instruments, however denominated, which create a condominium, and any amendments to those instruments.
- (11) "Development rights" means any right or combination of rights reserved by a declarant in the declaration to add real estate to a condominium; to create units, common elements, or limited common elements within a condominium; to subdivide units or convert units into common elements; or to withdraw real estate from a condominium.
- (12) "Dispose" or "disposition" means a voluntary transfer to a purchaser of any legal or equitable interest in a unit, but does not include the transfer or release of a security interest.
- (13) "Executive board" means the body, regardless of name, designated in the declaration to act on behalf of the association.
- (14) "Identifying number" means a symbol or address that identifies only one unit in a condominium.
- (15) "Leasehold condominium" means a condominium in which all or a portion of the real estate is subject to a lease the expiration or termination of which will terminate the condominium or reduce its size.
- (16) "Limited common element" means a portion of the common elements allocated by the declaration or by operation of G.S. 47C-2-102(2) or (4) for the exclusive use of one or more but fewer than all of the units.
- (17) "Master association" means an organization described in G.S. 47C-2-120, whether or not it is also an association described in G.S. 47C-3-101.
- (18) "Offering" means any advertisement, inducement, solicitation, or attempt to encourage any person to acquire any interest in a unit, other than as security for an obligation. An advertisement in a newspaper or other periodical of general circulation, or in any broadcast medium to the general public, of a condominium not located in this State, is not an offering if the advertisement states that an offering may be made only in compliance with the law of the jurisdiction in which the condominium is located.
- (19) "Person" means a natural person, corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision or agency, or other legal or commercial entity.

- (20) "Purchaser" means any person, other than a declarant or a person in the business of selling real estate for his own account, who by means of a voluntary transfer acquires a legal or equitable interest in a unit other than (i) a leasehold interest (including renewal options) of less than five years, or (ii) as security for an obligation.
- (21) "Real estate" means any leasehold or other estate or interest in, over, or under land, including structures, fixtures, and other improvements and interests which by custom, usage, or law, pass with a conveyance of land though not described in the contract of sale or instrument of conveyance. "Real estate" includes parcels, with or without upper or lower boundaries, and spaces that may be filled with air or water.
- (22) "Residential purposes" means use for dwelling or recreational purposes, or both.
- (23) "Special declarant rights" means rights reserved for the benefit of a declarant to complete improvements indicated on plats and plans filed with the declaration (G.S. 47C-2-109); to exercise any development right (G.S. 47C-2-110); to maintain sales offices, management offices, signs advertising the condominium, and models (G.S. 47C-2-115); to use easements through the common elements for the purpose of making improvements within the condominium or within real estate which may be added to the condominium (G.S. 47C-2-116); to make the condominium part of a larger condominium (G.S. 47C-2-121); or to appoint or remove any officer of the association or any executive board member during any period of declarant control (G.S. 47C-3-103(d)).
- (24) "Time share" means a "time share" as defined in G.S. 93A-41(9).
- (25) "Unit" means a physical portion of the condominium designated for separate ownership or occupancy, the boundaries of which are described pursuant to (G.S. 47C-2-105(a)(5)).
- (26) "Unit owner" means a declarant or other person who owns a unit, or a lessee of a unit in a leasehold condominium whose lease expires simultaneously with any lease the expiration or termination of which will remove the unit from the condominium, but does not include a person having an interest in a unit solely as security for an obligation.
- (27) "Lessee" means the party entitled to present possession of a leased unit whether lessee, sublessee or assignee. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

NORTH CAROLINA COMMENT

This section is not significantly different from the Uniform Act. The North Carolina Act adds a definition of "lessee" which may be helpful in establishing voting rights of persons who have short term possessory rights, see G.S. 47C-3-110(c). The period of twenty years was

changed to five years in the definition of purchaser to make that definition more inclusive. The definition of "time share" was amended to refer to the North Carolina Timeshare Act. The reference to master associations in the definition of special declarant rights was omitted.

§ 47C-1-104. Variation; power of attorney or proxy to declarant.

(a) Except as specifically provided in specific sections of this chapter, the provisions of this chapter may not be varied by the declaration or bylaws.

(b) The provisions of this chapter may not be varied by agreement; however, after breach of a provision of this chapter, rights created hereunder may be knowingly waived in writing.

(c) If a declarant, in good faith, has attempted to comply with the requirements of this chapter and has substantially complied with the chapter, non-material errors or omissions shall not be actionable.

(d) Notwithstanding any other provision of this chapter, a declarant may not act under a power of attorney or proxy or use any other device to evade the limitations or prohibitions of this chapter, the declaration, or the bylaws. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

NORTH CAROLINA COMMENT

The revision would allow a knowing written waiver of rights created under the act, but only after the fact, to address the Commission's concern about the absolute statement in the Uniform Act that "rights conferred by this Act

may not be waived." The section also provides that good faith nonmaterial errors are not actionable against a declarant who is in substantial compliance.

§ 47C-1-105. Separate titles and taxation.

(a) If there is any unit owner other than a declarant, each unit that has been created, together with its interest in the common elements, constitutes for all purposes a separate parcel of real estate.

(b) If there is any unit owner other than a declarant, each unit must be separately taxed and assessed, and no separate tax or assessment may be rendered against any common elements for which a declarant has reserved no developmental rights.

(c) Any portion of the common elements for which the declarant has reserved any developmental right must be separately taxed and assessed against the declarant, and the declarant alone is liable for payment of those taxes.

(d) If there is no unit owner other than a declarant, the real estate comprising the condominium may be taxed and assessed in any manner provided by law. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

NORTH CAROLINA COMMENT

This section is not significantly different from the Uniform Act.

§ 47C-1-106. Applicability of local ordinances, regulations, and building codes.

A zoning, subdivision, or building code or other real estate use law, ordinance, or regulation may not prohibit the condominium form of ownership or impose any requirement upon a condominium which it would not impose upon a substantially similar development under a different form of ownership. Otherwise, no provision of this chapter invalidates or modifies any provision of any zoning, subdivision, or building code or other real estate use law, ordinance, or regulation. No local ordinance or regulation may require the recording of a declaration prior to the date required by this chapter. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

NORTH CAROLINA COMMENT

This section is not significantly different from the Uniform Act, however, the phrase "substantially similar" was substituted for "physically identical" in order to prevent discrimination against condominiums based merely upon the form of ownership of a condo-

minium where there is only a minor difference in physical form. The last sentence was added to prevent a practice in certain municipalities of requiring premature filing of the declaration at a time when the information required to be in the declaration cannot be known.

§ 47C-1-107. Eminent domain.

(a) If a unit is acquired by eminent domain, or if part of a unit is acquired by eminent domain leaving the unit owner with a remnant which may not practically or lawfully be used for any purpose permitted by the declaration, the award must compensate the unit owner for his unit and its interest in the common elements, whether or not any common elements are acquired. Unless the condemnor acquires the right to use the unit's interest in common elements, that unit's allocated interests are automatically reallocated to the remaining units in proportion to the respective allocated interests of those units before the taking exclusive of the unit taken, and the association shall promptly prepare, execute, and record an amendment to the declaration reflecting the reallocations. Any remnant of a unit remaining after part of a unit is taken under this subsection is thereafter a common element.

(b) Except as provided in subsection (a), if part of a unit is acquired by eminent domain, the award must compensate the unit owner for the reduction in value of the unit and of its interest in the common elements, whether or not any common elements are acquired. Upon acquisition, unless the decree otherwise provides, (1) that unit's allocated interests are reduced in proportion to the reduction in the size of the unit, or on any other basis specified in the declaration, and (2) the portion of the allocated interests divested from the partially acquired unit is automatically reallocated to that unit and the remaining units in proportion to the respective allocated interests of those units before the taking, with the partially acquired unit participating in the reallocation on the basis of its reduced allocated interests.

(c) If part of the common elements is acquired by eminent domain, the portion of the award not payable to unit owners under subsection (a) must be paid to the association. Unless the declaration provides otherwise, any portion of the award attributable to the acquisition of a limited common element must be apportioned among the owners of the units to which that limited common element was allocated at the time of acquisition.

(d) The court decree shall be recorded in every county in which any portion of the condominium is located. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

NORTH CAROLINA COMMENT

This section is not significantly different, however, the revision contains changes intended to clarify the language and intent of the Uniform Act.

§ 47C-1-108. Supplemental general principles of law applicable.

The principles of law and equity supplement the provisions of this chapter, except to the extent inconsistent with this chapter. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

NORTH CAROLINA COMMENT

This section is not significantly different from the Uniform Act, however, the Commission removed an incomplete listing of specific areas of the law in order to avoid the application of the doctrine, *inclusio unius est exclusio alterius*.

§ 47C-1-109. Inconsistent time share provisions.

The provisions of this Chapter shall apply, so far as appropriate, to every time share program or project created within this State after October 1, 1986, except to the extent that specific statutory provisions in Chapter 93A are inconsistent with this Chapter, in which case the provisions of Chapter 93A shall prevail. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

NORTH CAROLINA COMMENT

This section was added to the North Carolina Act for purposes of clarification.

ARTICLE 2.

Creation, Alteration, and Termination of Condominiums.

§ 47C-2-101. Execution and recordation of declaration.

(a) A declaration creating a condominium shall be executed in the same manner as a deed, shall be recorded in every county in which any portion of the condominium is located, and shall be indexed in the Grantee index in the name of the condominium and in the Grantor index in the name of each person executing the declaration.

(b) A declaration or an amendment to a declaration adding units to a condominium, may not be recorded unless all structural components and mechanical systems of all buildings containing or comprising any units thereby created are substantially completed in accordance with the plans, as evidenced by a recorded certificate of completion executed by an architect licensed under the provisions of Chapter 83 of the General Statutes or an engineer registered under the provisions of Chapter 89C of the General Statutes. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

NORTH CAROLINA COMMENT

This section is not significantly different from the Uniform Act, however, the introductory language at the beginning of subsection (a) was changed to eliminate ambiguous language which may have been erroneously interpreted to indicate that the application of the

act was optional. As noted in the official commentary to the Uniform Act "a project which meets the definition of 'condominium' in Section 1-103(7) is subject to this Act even if this or other sections of the Act have not been complied with."

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 877, s. 3 makes this Chapter effective October 1, 1986.

Chapter 83, referred to in this section was rewritten by Session Laws 1979, c. 871, s. 1 and has been recodified as Chapter 83A.

§ 47C-2-102. Unit boundaries.

Except as provided by the declaration:

- (1) If walls, floors or ceilings are designated as boundaries of a unit, then all lath, furring, wallboard, plasterboard, plaster, paneling, tiles, wallpaper, paint, finished flooring and any other materials constituting any part of the finished flooring, and any other materials constituting any part of the finished surfaces thereof are a part of the unit; and all other portions of such walls, floors, or ceilings are a part of the common elements.
- (2) If any chute, flue, duct, wire, conduit, bearing wall, bearing column, or any other fixture lies partially within and partially outside the designated boundaries of a unit, any portion thereof serving only that unit is a limited common element allocated exclusively to that unit, and any portion thereof serving more than one unit or any portion of the common elements is a part of the common elements.
- (3) Subject to the provisions of paragraph (2), all spaces, interior partitions, and other fixtures and improvements within the boundaries of a unit are a part of the unit.
- (4) Any shutters, awnings, window boxes, doorsteps, stoops, decks, porches, balconies, patios, and all exterior doors and windows or other fixtures designed to serve a single unit but located outside the unit's boundaries are limited common elements allocated exclusively to that unit. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

NORTH CAROLINA COMMENT

This section is not significantly different from the Uniform Act.

§ 47C-2-103. Construction and validity of declaration and bylaws.

- (a) All provisions of the declaration and bylaws are severable.
- (b) The rule against perpetuities may not be applied to defeat any provision of the declaration, bylaws, or rules and regulations adopted pursuant to G.S. 47C-3-102(a)(1).
- (c) In the event of a conflict between the provisions of the declaration and the bylaws, the declaration prevails except to the extent the declaration is inconsistent with this chapter.

(d) Title to a unit and common elements is not rendered unmarketable or otherwise affected by reason of an insubstantial failure of the declaration to comply with this chapter. Whether a substantial failure to comply with this chapter impairs marketability shall be determined by the law of this State relating to marketability. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

NORTH CAROLINA COMMENT

This section is not significantly different from the Uniform Act.

§ 47C-2-104. Description of units.

A description of a condominium unit which sets forth the name of the condominium, the recording data for the declaration, and the identifying number of the unit or which otherwise complies with the general requirements of the laws of this State concerning description of real property is sufficient legal description of that unit and all rights, obligations, and interests appurtenant to that unit which were created by the declaration or bylaws. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

NORTH CAROLINA COMMENT

This section was redrafted to authorize a legal description which complies with the general requirements of the laws of North Carolina.

§ 47C-2-105. Contents of declaration.

- (a) The declaration for a condominium must contain:
- (1) The name of the condominium, which must include the word "condominium" or be followed by the words "a condominium", and the name of the association;
 - (2) The name of every county in which any part of the condominium is situated;
 - (3) A legally sufficient description of the real estate included in the condominium;
 - (4) A statement of the maximum number of units which the declarant reserves the right to create;
 - (5) A description (by reference to the plats or plans described in G.S. 47C-2-109) of the boundaries of each unit created by the declaration, including the unit's identifying number;
 - (6) A description of any limited common elements, other than those specified in subsections 47C-2-102(2) and (4), as provided in G.S. 47C-2-109(b)(7);
 - (7) A description of any real estate (except real estate subject to development rights) which may be allocated subsequently as limited common elements, other than limited common elements specified in subsections 47C-2-102(2) and (4), together with a statement that they may be so allocated;
 - (8) A description of any development rights and other special declarant rights reserved by the declarant, together with a legally sufficient description of the real estate to which each of those rights applies, and a time limit within which each of those rights must be exercised;
 - (9) If any development right may be exercised with respect to different parcels of real estate at different times, a statement to that effect,

together with (i) either a statement fixing the boundaries of those portions and regulating the order in which those portions may be subjected to the exercise of each development right or a statement that no assurances are made in those regards, and (ii) a statement as to whether, if any development right is exercised in any portion of the real estate subject to that development right, that development right must be exercised in all or in any other portion of the remainder of that real estate;

- (10) Any other conditions or limitations under which the rights described in paragraph (8) may be exercised or will lapse;
- (11) An allocation to each unit of the allocated interests in the manner described in G.S. 47C-2-107;
- (12) Any restrictions on use, occupancy, or alienation of the units;
- (13) The recording data for recorded easements and licenses appurtenant to or included in the condominium or to which any portion of the condominium is or may become subject by virtue of a reservation in the declaration; and
- (14) All matters required by G.S. 47C-2-106, 47C-2-107, 47C-2-108, 47C-2-109, 47C-2-115, 47C-2-116, and 47C-3-103(d).

(b) The declaration may contain any other matters the declarant deems appropriate. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

NORTH CAROLINA COMMENT

This section is not significantly different from the Uniform Act.

§ 47C-2-106. Leasehold condominiums.

(a) Any lease, or a memorandum thereof, the expiration or termination of which may terminate the condominium or reduce its size shall be recorded. Every lessor of those leases must sign the declaration, and the declaration shall state:

- (1) Where the complete lease may be inspected;
- (2) The date on which the lease is scheduled to expire;
- (3) A legally sufficient description of the real estate subject to the lease;
- (4) Any right of the unit owners to redeem the reversion and the manner whereby those rights may be exercised or a statement that they do not have those rights;
- (5) Any right of the unit owners to remove any improvements after the expiration or termination of the lease or a statement that they do not have those rights; and
- (6) Any rights of the unit owners to renew the lease and the conditions of any renewal or a statement that they do not have those rights.

(b) After the declaration for a leasehold condominium is recorded, neither the lessor nor his successor in interest may terminate the leasehold interest of a unit owner who, after demand, makes timely payment of his share of the rent determined in proportion to his common element interest and otherwise complies with all covenants which, if violated, would entitle the lessor to terminate the lease. A unit owner's leasehold interest is not affected by failure of any other person to pay rent or fulfill any other covenant under the lease.

(c) Acquisition of the leasehold interest of any unit owner by the owner of the reversion or remainder does not merge the leasehold and fee simple interests unless the leasehold interests of all unit owners subject to that reversion or remainder are acquired.

(d) If the expiration or termination of a lease decreases the number of units in a condominium, the allocated interests shall be reallocated in accordance with G.S. 47C-1-107(a) as though those units had been taken by eminent domain. Reallocations shall be confirmed by an amendment to the declaration prepared, executed, and recorded by the association. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

NORTH CAROLINA COMMENT

This section is not significantly different from the Uniform Act, however, the words "after demand" were added to subsection (b) to

require that demand be made to the unit owners to ensure their notification of the lessor's termination attempt.

§ 47C-2-107. Allocation of common element, interests, votes, and common expense liabilities.

(a) The declaration shall allocate a fraction or percentage of undivided interests in the common elements and in the common expenses of the association and a portion of the votes in the association to each unit and state the formulas used to establish those allocations. Those allocations may not discriminate in favor of units owned by the declarant.

(b) If units may be added to or withdrawn from the condominium, the declaration must state the formulas to be used to reallocate the allocated interests among all units included in the condominium after the addition or withdrawal.

(c) The declaration may provide: (i) that different allocations of votes shall be made to the units on particular matters specified in the declaration; (ii) for cumulative voting only for the purpose of electing members of the executive board; and (iii) for class voting on specified issues affecting the class if necessary to protect valid interests of the class. A declarant may not utilize cumulative or class voting for the purpose of evading any limitation imposed on declarants by this chapter nor may units constitute a class because they are owned by a declarant.

(d) Except for minor variations due to rounding, the sum of the undivided interests in the common elements and common expense liabilities allocated at any time to all the units must each equal one if stated as fractions or one hundred percent (100%) if stated as percentages. If the declaration allocates to each of the units a fraction or percentage of ownership of the common elements that results in an actual total of such fractions or percentages that is greater or less than the actual whole of such ownership, each unit's ownership of the common elements shall be automatically reallocated so that each unit is allocated the same fraction or percentage of ownership of the actual whole as that unit had of the actual total that was greater or less than the actual whole. The declarant or the association shall file an amendment to the declaration reflecting such reallocation which amendment need not be executed by any other party.

(e) The common elements are not subject to partition, and any purported conveyance, encumbrance, judicial sale, or other voluntary or involuntary transfer of an undivided interest in the common elements made without the unit to which that interest is allocated is void. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

NORTH CAROLINA COMMENT

This section does not differ significantly from the Uniform Act except for the second and third sentences of subsection (d) which provides for a mathematical reallocation to ensure

that the undivided shares in the common elements, stated as fractions or percentages, in the aggregate, equal either one or one hundred.

§ 47C-2-108. Limited common elements.

(a) Except for the limited common elements described in subsections 47C-2-102(2) and (4), the declaration shall specify to which unit or units each limited common element is allocated. That allocation may not be altered without the unanimous consent of the unit owners whose units are affected.

(b) Except as the declaration otherwise provides, a limited common element may be reallocated by an amendment to the declaration executed by all the unit owners between or among whose units the reallocations is made. The persons executing the amendment shall provide a copy thereof to the association, which shall record it. The amendment shall be recorded in the same manner as a deed in the names of the parties and the condominium.

(c) A common element not previously allocated as a limited common element may not be so allocated except by unanimous consent or pursuant to provisions in the declaration made in accordance with G.S. 47C-2-105(a)(7). All such allocations shall be made by amendments to the declaration and shall become effective in accordance with G.S. 47C-2-117(c). (1985 (Reg. Sess., 1986), c. 877, s. 1.)

NORTH CAROLINA COMMENT

This section is not significantly different from the Uniform Act, however, minor changes were made for clarification and subsection (c)

was amended to authorize a common element to be changed into a limited common element by unanimous consent of all the unit owners.

§ 47C-2-109. Plats and plans.

(a) The declarant shall file with the register of deeds in each county where the condominium is located the condominium's plat or plan prepared in accordance with this section. The plat or plan shall be considered a part of the declaration but shall be recorded separately, and the declaration shall refer by number to the file where such plat or plan is recorded. Each plat or plan shall be kept by the register of deeds in a separate file, indexed in the same manner as a conveyance entitled to be recorded, numbered serially in the order of receipt, and designated "Condominium" with the name of the building, if any, and shall contain a reference to the book and page numbers and date of the recording of the declaration. Each plat or plan must contain a certification by an architect licensed under the provisions of Chapter 83 of the General Statutes or an engineer registered under the provisions of Chapter 89C of the General Statutes that it contains all of the information required by this section.

(b) Each plat or plan or combination thereof must show:

- (1) The name and a survey or general schematic map of the entire condominium;
- (2) The location and dimensions of all real estate not subject to development rights or subject only to the development right to withdraw and the location and dimensions of all existing improvements within that real estate;

- (3) The location and dimensions of any real estate subject to development rights, labeled to identify the rights applicable to each parcel;
- (4) The extent of any encroachments by or upon any portion of the condominium;
- (5) The location and dimensions of all easements having specific location and dimensions and serving or burdening any portion of the condominium;
- (6) The verified statement of the architect licensed under the provisions of Chapter 83 of the General Statutes or a engineer registered under the provisions of Chapter 89C of the General Statutes certifying that such plats or plans fully and accurately depict the layout, location, ceiling and floor elevations, unit numbers and dimensions of the units, as built;
- (7) The locations and dimensions of limited common elements; however, parking spaces and the limited common elements described in subsections 47C-2-102(2) and (4) need not be shown, except for decks, stoops, porches, balconies, and patios;
- (8) A legally sufficient description of any real estate in which the unit owners will own only an estate for years, labeled as "leasehold real estate";
- (9) The distance between noncontiguous parcels of real estate comprising the condominium;
- (10) Any unit in which the declarant has reserved the right to create additional units or common elements.

(c) A plat may also show the intended location and dimensions of any contemplated improvement to be constructed anywhere within the condominium. Any contemplated improvement shown must be labeled either "MUST BE BUILT" or "NEED NOT BE BUILT".

(d) Upon exercising any development right, the declarant shall record either new plats and plans necessary to conform to the requirements of subsections (a), (b), and (c) or new certifications of plats and plans previously recorded if those plats and plans otherwise conform to the requirements of those subsections.

(e) In order to be recorded, plats or plans filed shall:

- (1) Be reproducible plats or plans on cloth, linen, film, or other permanent material and be submitted in that form; and
- (2) Have an outside marginal size of not more than 21 inches by 30 inches nor less than eight and one-half inches by 11 inches, including one and one-half inches for binding on the left margin and a one-half inch border on each of the other sides. Where size of the buildings or suitable scale to assure legibility require, plats or plans may be placed on two or more sheets with appropriate match lines.

(f) The fee for recording each plat or plan sheet submitted shall be as prescribed by G.S. 161-10(a)(3). (1985 (Reg. Sess., 1986), c. 877, s. 1.)

NORTH CAROLINA COMMENT

Subsection (a) was amended to make it clear that even though the plan or plat is filed with the declaration, it is to be recorded separately and to clearly provide that the declaration will be recorded in the deed books, but the plan or plat will be recorded in either the plat books or a special set of books for condominiums, elimi-

nating any presumption that plans or plats are to be recorded in the deed books along with the declarations. The language for the second and third sentences was taken from the previous statute. The term "surveyor" was deleted from the list of professionals authorized to certify the plats or plans.

Subsection (b) was amended to delete the phrase "legally sufficient" before "description" as unnecessary and to require that the plan or plat contain the same description for horizon-

tal and vertical units. Additionally, subdivision (b)(10) was taken from (d)(3) of the Uniform Act. Subsections (e) and (f) were brought forward from the previous statute.

Editor's Note. — Chapter 83, referred to in this section was rewritten by Session Laws 1979, c. 871, s. 1 and has been recodified as Chapter 83A.

§ 47C-2-110. Exercise of development rights.

(a) To exercise any development right reserved under G.S. 47C-2-105(a)(8), the declarant shall record an amendment to the declaration (G.S. 47C-2-117) and comply with G.S. 47C-2-109. The declarant is the unit owner of any units thereby created. The amendment to the declaration must assign an identifying number to each new unit created and, except in the case of subdivision or conversion of units described in subsection (c), reallocate the allocated interests among all units. The amendment must describe any common elements and any limited common elements thereby created and, in the case of limited common elements, designate the unit to which each is allocated to the extent required by G.S. 47C-2-108 (Limited Common Elements).

(b) Development rights may be reserved within any real estate added to the condominium if the amendment adding that real estate includes all matters required by, and is in compliance with, G.S. 47C-2-105 and, if a leasehold condominium, G.S. 47C-2-106 and also if the plats and plans include all matters required by G.S. 47C-2-109. This provision does not extend the limit on the exercise of developmental rights imposed by the declaration pursuant to G.S. 47C-2-105(a)(8).

(c) When a declarant exercises a development right to subdivide or convert a unit previously created into additional units, common elements, or both:

- (1) If the declarant converts the unit entirely to common elements, the amendment to the declaration must reallocate all the allocated interests of that unit among the other units as if that unit had been taken by eminent domain; or
- (2) If the declarant subdivides the unit into two or more units, whether or not any part of the unit is converted into common elements, the amendment to the declaration must reallocate all the allocated interests of the unit among the units created by the subdivision in any reasonable manner prescribed by the declarant.

(d) If the declaration provides pursuant to G.S. 47C-2-105(a)(8) that all or a portion of the real estate is subject to the development right of withdrawal:

- (1) If all the real estate is subject to withdrawal, and the declaration does not describe separate portions of real estate subject to that right, no part of the real estate may be withdrawn after a unit has been conveyed to a purchaser; and
- (2) If a portion or portions are subject to withdrawal, no part of a portion may be withdrawn after a unit in that portion has been conveyed to a purchaser. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

NORTH CAROLINA COMMENT

This section is not significantly different from the Uniform Act.

§ 47C-2-111. Alterations of units.

Subject to the provisions of the declaration and other provisions of law, a unit owner:

- (1) May make any improvements or alterations to his unit that do not impair the structural integrity or mechanical systems or lessen the support of any portion of the condominium;
- (2) May not change the appearance of the common elements or the exterior appearance of a unit or any other portion of the condominium without permission of the association; and
- (3) May, after acquiring an adjoining unit, remove or alter any intervening partition or create apertures therein, even if the partition is a common element, if those acts do not impair the structural integrity or mechanical systems or lessen the support of any portion of the condominium. Removal of partitions or creation of apertures under this paragraph is not an alteration of boundaries. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

NORTH CAROLINA COMMENT

This section is not significantly different from the Uniform Act, however, subdivision (3) was amended to delete references to the acquisition of an adjoining part of an adjoining unit

because of confusion that would arise from maintaining the same allocated interest and because it is unlikely that the situation will occur.

§ 47C-2-112. Relocation of boundaries between adjoining units.

(a) Subject to the provisions of the declaration and other provisions of law, the boundaries between adjoining units may be relocated upon application to the association by the owners of those units. Any such application to the association must be in such form and contain such data as may be reasonably required by the association and be accompanied by a plat prepared by an architect licensed under the provisions of Chapter 83 of the General Statutes or an engineer registered under the provisions of Chapter 89C of the General Statutes detailing the relocation of the boundaries between the affected units. If the owners of the adjoining units have specified a reallocation between their units of their allocated interests, the application must state the proposed reallocations. Unless the executive board determines within 30 days that the reallocations are unreasonable, the association, at the expense of the owners filing the application, shall prepare and record an amendment to the declaration that identifies the units involved, states the reallocations, is executed by those unit owners and the association, contains words of conveyance, and is indexed in the name of the grantor and the grantee by the register of deeds.

(b) The association, at the expense of the unit owners filing the application, shall prepare and record plats or plans necessary to show the altered boundaries between adjoining units and their dimensions and identifying numbers. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

NORTH CAROLINA COMMENT

Subsection (a) was amended by adding the second sentence which requires that any application must be in such form and contain such data as may be reasonably required by the association and be accompanied by a plat prepared by a registered engineer or surveyor. The requirement allows the association to make a more informed decision on the application. The third sentence was amended to read

"the association, at the expense of the owners filing the application, shall prepare and record" in order to require the applicant to bear the expense of preparation and recordation of the amendment to the declaration.

Subsection (b) was amended by adding the same language regarding expenses to this subsection requiring that plats or plans reflect the altered boundaries.

Editor's Note. — Chapter 83, referred to in this section was rewritten by Session Laws

1979, c. 871, s. 1 and has been recodified as Chapter 83A.

§ 47C-2-113. Subdivision of units.

(a) If the declaration expressly so permits, a unit may be subdivided into two or more units. Subject to the provisions of the declaration and other provisions of law, upon application of a unit owner to subdivide a unit, the association, at the expense of the unit owner, shall prepare, execute, and record an amendment to the declaration, including the plats and plans, subdividing that unit.

(b) The amendment to the declaration must be executed by the owner of the unit to be subdivided, assign an identifying number to each unit created, and reallocate the allocated interests formerly allocated to the subdivided unit to the new units in any reasonable manner prescribed by the owner of the subdivided unit. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

NORTH CAROLINA COMMENT

This section is not significantly different from the Uniform Act, however, language was

added to ensure that the appropriate unit owners bear the administrative costs.

§ 47C-2-114. Easement for encroachments.

(a) To the extent that any unit or common element encroaches on any other unit or common element, a valid easement for the encroachment exists. The easement does not relieve a unit owner of liability in case of his willful misconduct nor relieve a declarant or any other person of liability for failure to adhere to the plats and plans.

(b) With respect to all condominiums created prior to October 1, 1986, the provisions of subsection (a) of this section shall be deemed to apply to such condominiums, unless an action asserting otherwise shall have been brought within six months from October 1, 1986. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

NORTH CAROLINA COMMENT

Subsection (a) of this section is identical to Alternate A of the Uniform Act. Subsection (b) provides a six month period within which the

owner of a condominium unit in existence before the effective date of the act may challenge the easement described in subsection (a).

§ 47C-2-115. Use for sales purposes.

A declarant may maintain sales offices, management offices, and models in units or on common elements in the condominium only if the declaration so provides and specifies the rights of a declarant with regard to the number, size, location, and relocation thereof. Any sales office, management office, or model not designated a unit by the declaration is a common element, and if a declarant ceases to be a unit owner, he ceases to have any rights with regard thereto unless it is removed promptly from the condominium in accordance with a right to remove reserved in the declaration. Subject to any limitations in the declaration, a declarant may maintain signs on the common elements advertising the condominium. The provisions of this section are subject to the provisions of other State law and to local ordinances. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

NORTH CAROLINA COMMENT

This section is not significantly different from the Uniform Act.

§ 47C-2-116. Easement to facilitate exercise of special declarant rights.

Subject to the provisions of the declaration, a declarant has such easements through the common elements as may be reasonably necessary for the purpose of discharging a declarant's obligations or exercising special declarant rights whether arising under this Chapter or reserved in the declaration. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

NORTH CAROLINA COMMENT

This section is not significantly different from the Uniform Act.

§ 47C-2-117. Amendment of declaration.

(a) Except in cases of amendments that may be executed by a declarant under G.S. 47C-2-109(d) or 47C-2-110, the association under G.S. 47C-1-107, 47C-1-106(d), 47C-2-112(a), or 47C-2-113, or certain unit owners under G.S. 47C-2-108(b), 47C-2-112(a), 47C-2-113(b), or 47C-2-118(b), and except as limited by subsection (d), the declaration may be amended only by affirmative vote of or a written agreement signed by, unit owners of units to which at least sixty-seven percent (67%) of the votes in the association are allocated or any larger majority the declaration specifies. The declaration may specify a smaller number only if all of the units are restricted exclusively to nonresidential use.

(b) No action to challenge the validity of an amendment adopted by the association pursuant to this section may be brought more than one year after the amendment is recorded.

(c) Every amendment to the declaration must be recorded in every county in which any portion of the condominium is located and is effective only upon recordation. An amendment shall be indexed in the Grantee's index in the name of the condominium and the association and in the Grantor's index in the name of the parties executing the amendment.

(d) Except to the extent expressly permitted or required by other provisions of this Chapter, no amendment may create or increase special declarant rights, increase the number of units, or change the boundaries of any unit, the allocated interest of a unit, or the uses to which any unit is restricted, in the absence of unanimous consent of the unit owners.

(e) Amendments to the declaration required by this Chapter to be recorded by the association shall be prepared, executed, recorded, and certified on behalf of the association by any officer of the association designated for that purpose or, in the absence of designation, by the president of the association. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

NORTH CAROLINA COMMENT

This section is not significantly different from the Uniform Act.

§ 47C-2-118. Termination of condominium.

(a) Except in the case of a taking of all the units by eminent domain (G.S. 47C-1-107), a condominium may be terminated only by agreement of unit owners of units to which at least eighty percent (80%) of the votes in the association are allocated, or any larger percentage the declaration specifies. The declaration may specify a smaller percentage only if all of the units in the condominium are restricted exclusively to nonresidential uses.

(b) An agreement to terminate must be evidenced by the execution of a termination agreement, or ratifications thereof, in the same manner as a deed, by the requisite number of unit owners. The termination agreement must specify a date after which the agreement will be void unless recorded before that date. A termination agreement and all ratifications thereof must be recorded in every county in which a portion of the condominium is situated, and is effective only upon recordation.

(c) In the case of a condominium containing only units having horizontal boundaries described in the declaration, a termination agreement may provide that all the common elements and units of the condominium shall be sold following termination. If, pursuant to the agreement, any real estate in the condominium is to be sold following termination, the termination agreement must set forth the minimum terms of the sale.

(d) In the case of a condominium containing any units not having horizontal boundaries described in the declaration, a termination agreement may provide for sale of the common elements, but may not require that the units be sold following termination, unless the declaration as originally recorded provided otherwise or unless all the unit owners consent to the sale.

(e) The association, on behalf of the unit owners, may contract for the sale of real estate in the condominium, but the contract is not binding on the unit owners until approved pursuant to subsections (a) and (b). If any real estate in the condominium is to be sold following termination, title to that real estate, upon termination, vests in the association as trustee for the holders of all interests in the units. Thereafter, the association has all powers necessary and appropriate to effect the sale. Until the sale has been concluded and the proceeds thereof distributed, the association continues in existence with all powers it had before termination. Proceeds of the sale must be distributed to unit owners and lienholders as their interests may appear, in proportion to the respective interests of unit owners as provided in subsection (h). Unless otherwise specified in the termination agreement, as long as the association holds title to the real estate, each unit owner and his successors in interest

have an exclusive right to occupancy of the portion of the real estate that formerly constituted his unit. During the period of that occupancy, each unit owner and his successors in interest remain liable for all assessments and other obligations imposed on unit owners by this Chapter or the declaration.

(f) If the real estate constituting the condominium is not to be sold following termination, title to the common elements and, in a condominium containing only units having horizontal boundaries described in the declaration, title to all the real estate in the condominium, vests in the unit owners upon termination as tenants in common in proportion to their respective interests as provided in subsection (h), and liens on the units shift accordingly. While the tenancy in common exists, each unit owner and his successors in interest have an exclusive right to occupancy of the portion of the real estate that formerly constituted his unit.

(g) Following termination of the condominium, the proceeds of any sale of real estate, together with the assets of the association, are held by the association as trustee for unit owners and holders of liens on the units as their interests may appear. Following termination, creditors of the association holding liens on the units, which were recorded before termination, may enforce those liens in the same manner as any lienholder. All other creditors of the association are to be treated as if they had perfected liens on the units immediately before termination.

(h) The respective interests of unit owners referred to in subsections (e), (f) and (g) are as follows:

- (1) Except as provided in paragraph (2), the respective interests of unit owners are the fair market value of their units, limited common elements, and common element interests immediately before the termination, as determined by one or more independent appraisers selected by the association. The decision of the independent appraisers shall be distributed to the unit owners and becomes final unless disapproved within 30 days after distribution by unit owners of units to which twenty-five percent (25%) of the votes in the association are allocated. The proportion of any unit owner's interest to that of all unit owners is determined by dividing the fair market value of that unit owner's unit and common element interest by the total fair market values of all the units and common elements.
- (2) If any unit or any limited common element is destroyed to the extent that an appraisal of the fair market value thereof prior to destruction cannot be made, the interests of all unit owners are their respective common element interests immediately before the termination.
- (i) Except as provided in subsection (j), foreclosure or enforcement of a lien or encumbrance against the entire condominium does not of itself terminate the condominium, and foreclosure or enforcement of a lien or encumbrance against a portion of the condominium, other than withdrawable real estate, does not withdraw that portion from the condominium. Foreclosure or enforcement of a lien or encumbrance against withdrawable real estate does not of itself withdraw that real estate from the condominium, but the person taking title thereto has the right to require from the association, upon request, an amendment excluding the real estate from the condominium.
- (j) If a lien or encumbrance against a portion of the real estate comprising the condominium has priority over the declaration, and the lien or encumbrance has not been released, the parties foreclosing the lien or encumbrance may upon foreclosure, record an instrument excluding the real estate subject to that lien or encumbrance from the condominium. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

NORTH CAROLINA COMMENT

This section is not significantly different from the Uniform Act.

§ 47C-2-119: Reserved for future codification purposes.

§ 47C-2-120. Master associations.

(a) If the declaration for a condominium provides that any of the powers described in G.S. 47C-3-102 are to be exercised by or may be delegated to a profit or nonprofit corporation (or unincorporated association) which exercises those or other powers on behalf of one or more condominiums or for the benefit of the unit owners of one or more condominiums, all provisions of this chapter applicable to unit owners' associations apply to any such corporation (or unincorporated association), except as modified by this section.

(b) Unless a master association is acting in the capacity of an association described in G.S. 47C-3-101, it may exercise the powers set forth in G.S. 47C-3-102(a)(2) only to the extent expressly permitted in the declarations of condominiums which are part of the master association or expressly described in the delegations of power from those condominiums to the master association.

(c) If the declaration of any condominium provides that the executive board may delegate certain powers to a master association, the members of the executive board have no liability for the acts or omissions of the master association with respect to those powers following delegation.

(d) The rights and responsibilities of unit owners with respect to the unit owners' association set forth in G.S. 47C-3-103, 47C-3-108, 47C-3-109, and 47C-3-110 apply in the conduct of the affairs of a master association only to those persons who elect the board of a master association, whether or not those persons are otherwise unit owners within the meaning of this Chapter.

(e) Notwithstanding the provisions of G.S. 47C-3-103(f) with respect to the election of the executive board of an association by all unit owners after the period of declarant control ends and even if a master association is also an association described in G.S. 47C-3-101, the certificate of incorporation or other instrument creating the master association and the declaration of each condominium, the powers of which are assigned by the declaration or delegated to the master association, may provide that the executive board of the master association must be elected after the period of declarant control in any of the following ways:

- (1) All unit owners of all condominiums subject to the master association may elect all members of that executive board.
- (2) All members of the executive boards of all condominiums subject to the master association may elect all members of that executive board.
- (3) All unit owners of each condominium subject to the master association may elect specified members of that executive board.
- (4) All members of the executive board of each condominium subject to the master association may elect specified members of that executive board. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

NORTH CAROLINA COMMENT

This section is not significantly different from the Uniform Act.

§ 47C-2-121. Merger or consolidation of condominiums.

(a) Any two or more condominiums may, by agreement of the unit owners as provided in subsection (b), be merged or consolidated into a single condominium. In the event of a merger or consolidation, unless the agreement otherwise provides, the resultant condominium shall be, for all purposes, the legal successor of all of the pre-existing condominiums, and the operations and activities of all associations of the pre-existing condominiums shall be merged or consolidated into a single association which shall hold all powers, rights, obligations, assets and liabilities of all pre-existing associations.

(b) An agreement of two or more condominiums to merge or consolidate pursuant to subsection (a) must be evidenced by an agreement prepared, executed, recorded and certified by the president of the association of each of the pre-existing condominiums following approval by owners of units to which are allocated the percentage of votes in each condominium required to terminate that condominium. Any such agreement must be executed in the same manner as a deed and recorded in every county in which a portion of the condominium is located and is not effective until recorded.

(c) Every merger or consolidation agreement must provide for the reallocation of the allocated interests in the new association among the units of the resultant condominium either (i) by stating such reallocations or the formulas upon which they are based or (ii) by stating the percentage of overall allocated interests of the new condominium which are allocated to all of the units comprising each of the pre-existing condominiums and providing that the portion of such percentages allocated to each unit formerly comprising a part of such pre-existing condominium shall be equal to the percentages of allocated interests allocated to such unit by the declaration of the pre-existing condominiums. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

NORTH CAROLINA COMMENT

This section is not significantly different from the Uniform Act.

ARTICLE 3.

*Management of the Condominium.***§ 47C-3-101. Organization of unit owners' association.**

A unit owners' association shall be organized no later than the date the first unit in the condominium is conveyed. The membership of the association at all times shall consist exclusively of all the unit owners, or following termination of the condominium, of all persons entitled to distributions of proceeds under G.S. 47C-2-118. The association shall be organized as a profit or non-profit corporation or as an unincorporated association. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

NORTH CAROLINA COMMENT

This section is not significantly different from the Uniform Act.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 877, s. 3 makes this Chapter effective October 1, 1986.

§ 47C-3-102. Powers of unit owners' association.

(a) Subject to the provisions of the declaration, the association, even if unincorporated, may:

- (1) Adopt and amend bylaws and rules and regulations;
- (2) Adopt and amend budgets for revenues, expenditures, and reserves and collect assessments for common expenses from unit owners;
- (3) Hire and terminate managing agents and other employees, agents, and independent contractors;
- (4) Institute, defend, or intervene in its own name in litigation or administrative proceedings on matters affecting the condominium;
- (5) Make contracts and incur liabilities;
- (6) Regulate the use, maintenance, repair, replacement, and modification of common elements;
- (7) Cause additional improvements to be made as a part of the common elements;
- (8) Acquire, hold, encumber, and convey in its own name any right, title, or interest to real or personal property, provided that common elements may be conveyed or subjected to a security interest only pursuant to G.S. 47C-3-112;
- (9) Grant easements, leases, licenses, and concessions through or over the common elements;
- (10) Impose and receive any payments, fees, or charges for the use, rental, or operation of the common elements other than limited common elements described in subsections 47C-2-102(2) and (4) and for services provided to unit owners;
- (11) Impose charges for late payment of assessments and, after notice and an opportunity to be heard, levy reasonable fines not to exceed one hundred fifty dollars (\$150.00) (G.S. 47C-3-107A) for violations of the declaration, bylaws, and rules and regulations of the association;
- (12) Impose reasonable charges for the preparation and recordation of amendments to the declaration, resale certificates required by G.S. 47C-4-109, or statements of unpaid assessments;
- (13) Provide for the indemnification of and maintain liability insurance for its officers, executive board, directors, employees and agents;
- (14) Assign its right to future income, including the right to receive common expense assessments, but only to the extent the declaration expressly so provides;
- (15) Exercise all other powers that may be exercised in this State by legal entities of the same types as the association; and
- (16) Exercise any other powers necessary and proper for the governance and operation of the association.

(b) Notwithstanding subsection (a), the declaration may not impose limitations on the power of the association to deal with the declarant that are more restrictive than the limitations imposed on the power of the association to deal with other persons. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

NORTH CAROLINA COMMENT

This section is not significantly different from the Uniform Act, however, subdivision (4) was amended to delete the requirement that the association act on behalf of "2 or more unit owners" because of a belief that the association should be able to act in its own name. Subdivi-

sion (11) was amended to insert a limitation of \$150 on the amount of late charges or fines for violations of the declaration, bylaws, or regulations of the association. Subdivision (15) was deleted as unnecessary.

§ 47C-3-103. Executive board members and officers.

(a) Except as provided in the declaration, the bylaws, or subsection (b) or other provisions of this chapter, the executive board may act in all instances on behalf of the association. In the performance of their duties, the officers and members of the executive board shall be deemed to stand in a fiduciary relationship to the association and the unit owners and shall discharge their duties in good faith, and with that diligence and care which ordinarily prudent men would exercise under similar circumstances in like positions.

(b) The executive board may not act on behalf of the association to amend the declaration (G.S. 47C-2-117), to terminate the condominium (G.S. 47C-2-118), or to elect members of the executive board or determine the qualifications, powers and duties, or terms of office of executive board members (G.S. 47C-3-103(f)), but the executive board may fill vacancies in its membership for the unexpired portion of any term. Notwithstanding any provision of the declaration or bylaws to the contrary, the unit owners, by at least sixty-seven percent (67%) vote of all persons present and entitled to vote at any meeting of the unit owners at which a quorum is present, may remove any member of the executive board with or without cause, other than members appointed by the declarant.

(c) Within 30 days after adoption of any proposed budget for the condominium, the executive board shall provide a summary of the budget to all the unit owners, and shall set a date for a meeting of the unit owners to consider ratification of the budget not less than 14 nor more than 30 days after mailing of the summary. There shall be no requirement that a quorum be present at the meeting. The budget is ratified unless at that meeting a majority of all the unit owners or any larger vote specified in the declaration rejects the budget. In the event the proposed budget is rejected, the periodic budget last ratified shall be continued until such time as the unit owners ratify a subsequent budget proposed by the executive board.

(d) Subject to subsection (e), the declaration may provide for a period of declarant control of the association, during which period a declarant, or persons designated by him, may appoint and remove the officers and members of the executive board. Regardless of the period provided in the declaration, a period of declarant control terminates no later than the earlier of: (i) 120 days after conveyance of seventy-five percent (75%) of the units (including units which may be created pursuant to special declarant rights) to unit owners other than a declarant; (ii) two years after all declarants have ceased to offer units for sale in the ordinary course of business; or (iii) two years after any development right to add new units was last exercised. A declarant may voluntarily surrender the right to appoint and remove officers and members of the executive board before termination of that period, but in that event he may require, for the duration of the period of declarant control, that specified actions of the association or executive board, as described in a recorded instrument executed by the declarant, be approved by the declarant before they become effective.

(e) Not later than 60 days after conveyance of twenty-five percent (25%) of the units (including units which may be created pursuant to special rights) to unit owners other than a declarant, at least one member and not less than twenty-five percent (25%) of the members of the executive board shall be elected by unit owners other than the declarant. Not later than 60 days after conveyance of fifty percent (50%) of the units (including units which may be created pursuant to special declarant rights) to unit owners other than a declarant, not less than thirty-three percent (33%) of the members of the executive board shall be elected by unit owners other than the declarant.

(f) Not later than the termination of any period of declarant control, the unit owners shall elect an executive board of at least three members, at least a majority of whom must be unit owners. The executive board shall elect the officers. The executive board members and officers shall take office upon election. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

NORTH CAROLINA COMMENT

The second sentence of subsection (a) was amended to state expressly that the executive board acts as a fiduciary to the association and not the declarant, and by adding the standard of care set out in Chapter 55 of the General Statutes for directors of business corporations.

Changes in subsection (c) were for clarification purposes. The change in subsection (d)

from a period of 60 days to 120 days for the termination of declarant control was seen as a more practical period.

In subsection (b) the provision in the Uniform Act (subsection (g)) requiring a two-thirds vote was changed to a requirement of 67 percent to simplify computation.

§ 47C-3-104. Transfer of special declarant rights.

(a) No special declarant right (G.S. 47C-1-103(23)) created or reserved under this chapter may be transferred except by an instrument evidencing the transfer recorded in every county in which any portion of the condominium is located. The instrument is not effective unless executed by the transferee.

(b) Upon transfer of any special declarant right, the liability of a transferor declarant is as follows:

- (1) A transferor is not relieved of any obligation or liability arising before the transfer, including, but not limited to, liability or obligations relating to warranties. Lack of privity does not deprive any unit owner of standing to bring an action to enforce any obligation of the transferor.
- (2) If the successor to any special declarant right is an affiliate of a declarant (G.S. 47C-1-103(1)), the transferor is jointly and severally liable with the successor for any obligation or liability of the successor which relates to the condominium.
- (3) If a transferor retains any special declarant right, but transfers other special declarant rights to a successor who is not an affiliate of the declarant, the transferor is liable for any obligations or liabilities imposed on a declarant by this chapter or by the declaration relating to the retained special declarant rights and arising after the transfer.
- (4) A transferor has no liability for any act or omission or any breach of a contractual or warranty obligation arising from the exercise of a special declarant right by a successor declarant who is not an affiliate of the transferor.

(c) Unless otherwise provided in a mortgage instrument or deed of trust, in case of foreclosure of a mortgage, tax sale, judicial sale, sale by a trustee under a deed of trust, or sale under Bankruptcy Code or receivership proceedings, of any units owned by a declarant, or real estate in a condominium

subject to development rights, a person acquiring title to all the real estate being foreclosed or sold, but only upon his request, succeeds to all special declarant rights related to that real estate held by that declarant, or only to any rights reserved in the declaration and held by that declarant to maintain models, sales offices and signs. The judgment or instrument conveying title shall provide for transfer of only the special declarant rights requested.

(d) Upon foreclosure, tax sale, judicial sale, sale by a trustee under a deed of trust, or sale under Bankruptcy Code or receivership proceedings, of all units and other real estate in a condominium owned by a declarant the declarant ceases to have any special declarant rights.

(e) The liabilities and obligations of persons who succeed to special declarant rights are as follows:

- (1) A successor to any special declarant right who is an affiliate of a declarant is subject to all obligations and liabilities imposed on the transferor related to the condominium.
- (2) A successor to any special declarant right, other than a successor described in paragraphs (3) and (4) who is not an affiliate of a declarant, is subject to all obligations and liabilities:
 - a. On a declarant which relate to his exercise or nonexercise of special declarant rights; or
 - b. On his transferor, other than:
 - (i) Misrepresentations by any prior declarant;
 - (ii) Warranty obligations on improvements made by any previous declarant, or made before the condominium was created;
 - (iii) Breach of any fiduciary obligation by any previous declarant or his appointees to the executive board; or
 - (iv) Any liability or obligation imposed on the transferor as a result of the transferor's acts or omissions after the transfer.
- (3) A successor to only a right reserved in the declaration to maintain models, sales offices, and signs (G.S. 47C-2-115), if he is not an affiliate of a declarant, may not exercise any other special declarant right, and is not subject to any liability or obligation as a declarant, except the obligation to provide a public offering statement, and any liability arising as a result thereof.
- (4) A successor to all special declarant rights held by his transferor who is not an affiliate of that declarant and who succeeded to those rights pursuant to a deed in lieu of foreclosure or a judgment or instrument conveying title to units under subsection (c), may declare his intention in a recorded instrument to hold those rights solely for transfer to another person. Thereafter, until transferring all special declarant rights to any person acquiring title to any unit owned by the successor, or until recording an instrument permitting exercise of all those rights other than the right held by his transferor to control the executive board in accordance with the provisions of G.S. 47C-3-103(d) for the duration of any period of declarant control, and any attempted exercise of those rights is void. So long as a successor declarant may not exercise special declarant rights under this subsection, he is not subject to any liability or obligation as a declarant other than liability for his acts and omissions under G.S. 47C-3-103(d). (1985 (Reg. Sess., 1986), c. 877, s. 1.)

NORTH CAROLINA COMMENT

This section is not significantly different from the Uniform Act, however, in subsection (b)(1) the qualifying phrase "imposed upon him by this act" was deleted.

Subsection (d)(2) of the Uniform Act was deleted as an unnecessary restrictive provision

which would serve only to reduce the value of a condominium to a prospective purchaser at a foreclosure sale.

Subsection (f) of the Uniform Act was omitted.

§ 47C-3-105. Termination of contracts and leases of declarant.

If entered into by or on behalf of the association before the executive board elected by the unit owners pursuant to G.S. 47C-3-103(f) takes office, (1) any management contract, employment contract, or lease of recreational or parking areas or facilities, (2) any other contract or lease between the association and a declarant or an affiliate of a declarant, or (3) any contract or lease that is not bona fide or was unconscionable to the unit owners at the time entered into under the circumstances then prevailing may be terminated without penalty by the association at any time after the executive board elected by the unit owners pursuant to G.S. 47C-3-103(f) takes office upon not less than 90 days' notice to the other party. Notice of the substance of the provisions of this section shall be set out in each contract entered into by or on behalf of the association before the executive board elected by the unit owners pursuant to G.S. 47C-3-103(f) takes office. Failure of the contract to contain such a provision shall not effect the rights of the association under this section. This section does not apply to any lease the termination of which would terminate the condominium or reduce its size, unless the real estate subject to that lease was included in the condominium for the purpose of avoiding the right of the association to terminate a lease under this section. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

NORTH CAROLINA COMMENT

This section is not significantly different from the Uniform Act, however, because of a concern for persons who in good faith enter into a contract with the executive board and expend capital towards fulfilling that contract,

a sentence was added to provide that any contract or lease described by the section must contain a provision that it may be terminated by the executive board elected by the unit owners upon not less than 90 days notice.

§ 47C-3-106. Bylaws.

(a) The bylaws of the association shall provide for:

- (1) The number of members of the executive board and the titles of the officers of the association;
- (2) Election by the executive board of the officers of the association;
- (3) The qualifications, powers and duties, terms of office, and manner of electing and removing executive board members and officers and filling vacancies;
- (4) Which, if any, of its powers the executive board or officers may delegate to other persons or to a managing agent;
- (5) Which of its officers may prepare, execute, certify, and record amendments to the declaration on behalf of the association; and
- (6) The method of amending the bylaws.

(b) Any other matters the association deems necessary or appropriate. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

NORTH CAROLINA COMMENT

This section is not significantly different from the Uniform Act but does contain minor stylistic changes.

§ 47C-3-107. Upkeep; damages; assessments for damages, fines.

(a) Except as provided in G.S. 47C-3-113(h), the association is responsible for causing the common elements to be maintained, repaired, and replaced when necessary and to assess the unit owners as necessary to recover the costs of such maintenance, repair, or replacement except that the cost of maintenance, repair or replacement of a limited common element shall be assessed as provided in G.S. 47C-3-115(b). Each unit owner is responsible for maintenance, repair and replacement of his unit. Each unit owner shall afford to the association and when necessary to another unit owner access through his unit reasonably necessary for any such maintenance, repair or replacement activity.

(b) If damage, for which a unit owner is legally responsible and which is not covered by insurance provided by the association pursuant to G.S. 47C-3-113 is inflicted on any common element, the association may direct such unit owner to repair such damage or the association may itself cause the repairs to be made and recover the costs thereof from the responsible unit owner.

(c) If damage is inflicted on any unit by an agent of the association in the scope of his activities as such agent, the association is liable to repair such damage or to reimburse the unit owner for the cost of repairing such damages. The association shall also be liable for any losses to the unit owner.

(d) The bylaws of the association may in cases when the claim under subsection (b) or (c) is five hundred dollars (\$500.00) or less provide for hearings before an adjudicatory panel to determine if a unit owner is responsible for damages to any common element or whether the association is responsible for damages to any unit. Such panel shall accord to the party charged with causing damages notice of the charge, opportunity to be heard and to present evidence, and notice of the decision. This panel may assess a liability for each damage incident not in excess of five hundred dollars (\$500.00) against each unit owner charged or against the association. Liabilities of unit owners so assessed shall be assessments secured by lien under G.S. 47C-3-116. Liabilities of the association may be offset by the unit owner against sums owing the association and if so offset shall reduce the amount of any lien of the association against the unit at issue.

(e) The declarant alone is liable for maintenance, repair and all other expenses in connection with real estate subject to development rights. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

NORTH CAROLINA COMMENT

Subsections (a), (b), (c) and (e) reflect revisions in language and structure (but not substance) of the Uniform Act. Subsection (d) is new and allows the association in cases when the claim for damages to a common element is \$500 or less to hold hearings before an adjudicatory panel to determine whether a unit owner or the association is responsible for the

damages. The subsection provides for minimal due process for the party charged with causing the damages. The subsection also provides that the liabilities of unit owners shall be assessments secured by lien under Section 47C-3-116 and the liabilities of the association may be offset by the unit owner against sums owing the association.

§ 47C-3-107A. Charges for late payments, fines.

The bylaws of the association may provide for a hearing before an adjudicatory panel to determine if a unit owner should be fined not to exceed one hundred fifty dollars (\$150.00) for a violation of the declaration, bylaws or rules and regulations of the association. Such panel shall accord to the party charged with the violation notice of the charge, opportunity to be heard and to present evidence, and notice of the decision. Such a fine shall be an assessment secured by lien under G.S. 47C-3-116. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

NORTH CAROLINA COMMENT

This section was added to authorize an adjudicatory hearing, when permitted by the declaration, for fines, late payments, and violations of the condominium's rules and regulations for

up to \$150.00 and is similar to the provisions of G.S. 47C-3-107(d) for a hearing on minor damages.

§ 47C-3-108. Meetings.

A meeting of the association shall be held at least once each year. Special meetings of the association may be called by the president, a majority of the executive board, or by unit owners having twenty percent (20%) or any lower percentage specified in the bylaws of the votes in the association. Not less than 10 nor more than 50 days in advance of any meeting, the secretary or other officer specified in the bylaws shall cause notice to be hand-delivered or sent prepaid by United States mail to the mailing address of each unit or to any other mailing address designated in writing by the unit owner. The notice of any meeting must state the time and place of the meeting and the items on the agenda, including the general nature of any proposed amendment to the declaration or bylaws, any budget changes, and any proposal to remove a director or officer. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

NORTH CAROLINA COMMENT

This section is not significantly different from the Uniform Act. The notice provision

uses a period of 50 days to conform to Chapter 55A, the Nonprofit Corporation Act.

§ 47C-3-109. Quorums.

(a) Unless the bylaws provide otherwise, a quorum is deemed present throughout any meeting of the association if persons entitled to cast twenty percent (20%) of the votes which may be cast for election of the executive board are present in person or by proxy at the beginning of the meeting.

(b) Unless the bylaws specify a larger percentage, a quorum is deemed present throughout any meeting of the executive board of persons entitled to cast fifty percent (50%) of the votes on that board are present at the beginning of the meeting. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

NORTH CAROLINA COMMENT

This section is not significantly different from the Uniform Act and there was a deliberate choice for uniformity over the provisions of Chapter 55A, the Nonprofit Corporation Act.

§ 47C-3-110. Voting; proxies.

(a) If only one of the multiple owners of a unit is present at a meeting of the association, he is entitled to cast all the votes allocated to that unit. If more than one of the multiple owners are present, the votes allocated to that unit may be cast only in accordance with the agreement of a majority in interest of the multiple owners, unless the declaration or bylaws expressly provides otherwise. Majority agreement is conclusively presumed if any one of the multiple owners casts the votes allocated to that unit without protest being made promptly to the person presiding over the meeting by any of the other owners of the unit.

(b) Votes allocated to a unit may be cast pursuant to a proxy duly executed by a unit owner. If a unit is owned by more than one person, each owner of the unit may vote or register protest to the casting of votes by the other owners of the unit through a duly executed proxy. A unit owner may not revoke a proxy given pursuant to this section except by written notice of revocation delivered to the person presiding over a meeting of the association. A proxy is void if it is not dated. A proxy terminates one year after its date, unless it specifies a shorter term.

(c) If the declaration requires that votes on specified matters affecting the condominium be cast by lessees rather than unit owners of leased units: (i) the provisions of subsection (a) and (b) apply to lessees as if they were unit owners; (ii) unit owners who have leased their units to other persons may not cast votes on those specified matters; and (iii) lessees are entitled to notice of meetings, access to records, and other rights respecting those matters as if they were unit owners. Unit owners must also be given notice, in the manner provided in G.S. 47C-3-108, of all meetings at which lessees may be entitled to vote.

(d) No votes allocated to a unit owned by the association may be cast.

(e) The declaration may provide that on specified issues only a defined subgroup of unit owners may vote provided:

(1) The issue being voted on is of special interest solely to members of the subgroup; and

(2) All except *de minimis* costs that will be incurred based on the vote taken will be assessed solely against those unit owners entitled to vote.

(f) For purposes of subdivision (e)(1) above an issue to be voted on is not of special interest solely to a subgroup if it substantially affects the overall appearance of the condominium or substantially affects living conditions of

unit owners not included in the voting subgroup. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

NORTH CAROLINA COMMENT

Subsections (a) (c) and (d) are not significantly different from the Uniform Act. In subsection (b) the words "or purports to be revocable without notice" was deleted because such a proxy was deemed to be inconceivable.

Subsection (e) was added and authorizes provision to be made in the declaration for subgroup voting when an issue is of special in-

terest solely to members of a defined subgroup of unit owners.

Subsection (f), also added, does not allow subgroup voting when the issue to be voted upon substantially affects the overall appearance of the condominium or the living conditions of unit owners not included in the voting subgroup.

§ 47C-3-111. Tort and contract liability.

(a) Neither the association nor any unit owner except the declarant is liable for that declarant's torts in connection with any part of the condominium which that declarant has the responsibility to maintain.

(b) An action alleging a wrong done by the association must be brought against the association and not against a unit owner.

(c) If an action is brought against the association for a wrong which occurred during any period of declarant control, and if the association gives the declarant who then controlled the association reasonable notice of and an opportunity to defend against the action, such declarant is liable to the association:

- (1) for all tort losses not covered by insurance carried by the association suffered by the association or that unit owner, and
- (2) for all losses which the association would not have incurred but for a breach of contract. Nothing in this subsection shall be construed to impose strict or absolute liability upon the declarant for wrongs or actions which occurred during the period of declarant control.

(d) In any case where the declarant is liable to the association under this section, the declarant is also liable for all litigation expenses, including reasonable attorneys' fees, incurred by the association. Any statute of limitation affecting the association's right of action under this section is tolled until the period of declarant control terminates. A unit owner is not precluded from bringing an action contemplated by this section because he is a unit owner or a member or officer of the association. Liens resulting from judgments against the association are governed by G.S. 47C-3-117 (Other Liens Affecting the Condominium). (1985 (Reg. Sess., 1986), c. 877, s. 1.)

NORTH CAROLINA COMMENT

This section is not significantly different from the Uniform Act, however, references in the Uniform Act to owners of individual units

were deleted. These references were felt to be unnecessary, and to diffuse the thrust of the section.

§ 47C-3-112. Conveyance or encumbrance of common elements.

(a) Portions of the common elements may be conveyed or subjected to a security interest by the association if persons entitled to cast at least eighty percent (80%) of the votes in the association, including eighty percent (80%) of the votes allocated to units not owned by a declarant, or any larger percentage the declaration specifies, agree to that action; provided, that all the owners of units to which any limited common element is allocated must agree in order to convey that limited common element or subject it to a security interest. The declaration may specify a smaller percentage only if all of the units are restricted exclusively to nonresidential uses. Distribution of the proceeds of the sale of a limited common element shall be as provided by agreement between the unit owners to which it is allocated and the association. Proceeds of the sale or financing of a common element (other than a limited common element) shall be an asset of the association.

(b) An agreement to convey common elements or subject them to a security interest must be evidenced by the execution of an agreement, or ratifications thereof, in the same manner as a deed, by the requisite number of unit owners. The agreement must specify a date after which the agreement will be void unless recorded before that date. The agreement and all ratifications thereof must be recorded in every county in which a portion of the condominium is situated, and is effective only upon recordation.

(c) The association, on behalf of the unit owners, may contract to convey common elements, or subject them to a security interest, but the contract is not enforceable against the association until approved pursuant to subsections (a) and (b). Thereafter, the association has all powers necessary and appropriate to effect the conveyance or encumbrance, including the power to execute deeds or other instruments.

(d) Any purported conveyance, encumbrance, judicial sale or other voluntary transfer of common elements, unless made pursuant to this section, is void.

(e) A conveyance or encumbrance of common elements pursuant to this section shall not deprive any unit of its rights of access and support. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

NORTH CAROLINA COMMENT

This section is not significantly different from the Uniform Act, however, in subsection (a) a special provision is set out concerning the distribution of the proceeds of any sale of a

limited common element; and subsections (d) and (f) of the Uniform Act were deleted as unnecessary.

§ 47C-3-113. Insurance.

(a) Commencing not later than the time of the first conveyance of a unit to a person other than a declarant, the association shall maintain, to the extent available:

- (1) Property insurance on the common elements and units insuring against all risks of direct physical loss commonly insured against including fire and extended coverage perils. The total amount of insurance after application of any deductibles shall be not less than eighty percent (80%) of the replacement cost of the insured property at the time the insurance is purchased and at each renewal date,

exclusive of land, excavations, foundations and other items normally excluded from property policies; and

- (2) Liability insurance in reasonable amounts, covering all occurrences commonly insured against death, bodily injury and property damage arising out of or in connection with the use, ownership, or maintenance of the common elements.

(b) The insurance maintained under subdivision (a)(1) need not include improvements and betterments installed by unit owners.

(c) If the insurance described in subsection (a) is not reasonably available, the association promptly shall cause notice of that fact to be hand-delivered or sent prepaid by United States mail to all unit owners. The declaration may require the association to carry any other insurance, and the association in any event may carry any other insurance it deems appropriate to protect the association or the unit owners.

(d) Insurance policies carried pursuant to subsection (a) must provide that:

- (1) Each unit owner is an insured person under the policy with respect to liability arising out of his interest in the common elements or membership in the association;
- (2) The insurer waives its right to subrogation under the policy against any unit owner or members of his household;
- (3) No act or omission by any unit owner, unless acting within the scope of his authority on behalf of the association, will preclude recovery under the policy; and
- (4) If, at the time of a loss under the policy, there is other insurance in the name of a unit owner covering the same risk covered by the policy, the association's policy provides primary insurance.

(e) Any loss covered by the property policy under subsections (a)(1) and (b) shall be adjusted with the association, but the insurance proceeds for that loss shall be payable to any insurance trustee designated for that purpose, or otherwise to the association, and not to any mortgagee or beneficiary under a deed of trust. The insurance trustee or the association shall hold any insurance proceeds in trust for unit owners and lienholders as their interests may appear. Subject to the provisions of subsection (h), the proceeds shall be disbursed first for the repair or restoration of the damaged property, and unit owners and lienholders are not entitled to receive payment of any portion of the proceeds unless there is a surplus of proceeds after the property has been completely repaired or restored, or the condominium is terminated.

(f) An insurance policy issued to the association does not prevent a unit owner from obtaining insurance for his own benefit.

(g) An insurer that has issued an insurance policy under this section shall issue certificates or memoranda of insurance to the association and, upon written request, to any unit owner, mortgagee, or beneficiary under a deed of trust. The insurer issuing the policy may not cancel or refuse to renew it until 30 days after notice of the proposed cancellation or nonrenewal has been mailed to the association, each unit owner and each mortgagee or beneficiary under a deed of trust to whom certificates or memoranda of insurance have been issued at their respective last known addresses.

(h) Any portion of the condominium for which insurance is required under this section which is damaged or destroyed shall be repaired or replaced promptly by the association unless (1) the condominium is terminated, (2) repair or replacement would be illegal under any State or local health or safety statute or ordinance, or (3) the unit owners decide not to rebuild by an eighty percent (80%) vote, including one hundred percent (100%) approval of owners of units not to be rebuilt or owners assigned to limited common elements not to be rebuilt. The cost of repair or replacement in excess of insurance proceeds and reserves is a common expense. If the entire condominium is

not repaired or replaced, (1) the insurance proceeds attributable to the damaged common elements shall be used to restore the damaged area to a condition compatible with the remainder of the condominium, (2) the insurance proceeds attributable to units and limited common elements which are not rebuilt shall be distributed to the owners of those units and the owners of the units to which those limited common elements were allocated or to lienholders, as their interest may appear, and (3) the remainder of the proceeds shall be distributed to all the unit owners or lienholders, as their interest may appear, in proportion to their common element interest. If the unit owners vote not to rebuild any unit, that unit's allocated interests are automatically reallocated upon the vote as if the unit had been condemned under G.S. 47C-1-107(a), and the association promptly shall prepare, execute, and record an amendment to the declaration reflecting the reallocations. Notwithstanding the provisions of this subsection, G.S. 47C-2-118 governs the distribution of insurance proceeds if the condominium is terminated.

(i) The provisions of this section may be varied or waived in the case of a condominium all of whose units are restricted to nonresidential use. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

NORTH CAROLINA COMMENT

This section is not significantly different from the Uniform Act, however, minor changes have been made for the sake of clarity and

minor deletions have been made to eliminate unnecessary language. The term "actual cash value" was changed to "replacement cost".

§ 47C-3-114. Surplus funds.

Unless otherwise provided in the declaration, any surplus funds of the association remaining after payment of or provisions for common expenses and any prepayment of reserves must be paid to the unit owners in proportion to their common expense liabilities or credited to them to reduce their future common expense assessments. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

NORTH CAROLINA COMMENT

This section is not significantly different from the Uniform Act.

§ 47C-3-115. Assessments for common expense.

(a) Until the association makes a common expense assessment, the declarant shall pay all the common expenses. After any assessment has been made by the association, assessments thereafter must be made at least annually by the association.

(b) Except for assessments under subsections (c), (d), and (e), all common expenses must be assessed against all the units in accordance with the allocations set forth in the declaration pursuant to G.S. 47C-2-107(a). Any past due common expense assessment or installment thereof bears interest at the rate established by the association not exceeding eighteen percent (18%) per year.

(c) To the extent required by the declaration:

- (1) Any common expense associated with the maintenance, repair, or replacement of a limited common element must be assessed against the units to which that limited common element is assigned, equally, or in any other proportion that the declaration provides;

- (2) Any common expense or portion thereof benefiting fewer than all of the units must be assessed exclusively against the units benefited; and
- (3) The costs of insurance must be assessed in proportion to risk and the costs of utilities must be assessed in proportion to usage.
- (d) Assessments to pay a judgment against the association (G.S. 47C-3-117(a)) may be made only against the units in the condominium at the time the judgment was entered, in proportion to their common expense liabilities.
- (e) If any common expense is caused by the misconduct of any unit owner, the association may assess that expense exclusively against his unit.
- (f) If common expense liabilities are reallocated, common expense assessments and any installment thereof not yet due shall be recalculated in accordance with the reallocated common expense liabilities. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

NORTH CAROLINA COMMENT

This section is not significantly different from the Uniform Act.

§ 47C-3-116. Lien for assessments.

- (a) Any assessment levied against a unit remaining unpaid for a period of 30 days or longer shall constitute a lien on that unit when filed of record in the office of the clerk of superior court of the county in which the unit is located in the manner provided therefor by Article 8 of Chapter 44 of the General Statutes. The association's lien may be foreclosed in like manner as a mortgage on real estate under power of sale under Article 2A of Chapter 45 of the General Statutes. Unless the declaration otherwise provides, fees, charges, late charges, fines, and interest charged pursuant to G.S. 47C-3-102(10), (11), and (12), G.S. 47C-3-107(d), and 47C-3-107A, are enforceable as assessments under this section.
- (b) The lien under this section is prior to all other liens and encumbrances on a unit except (i) liens and encumbrances (specifically including, but not limited to, a mortgage or deed of trust on the unit) recorded before the docketing of the lien in the office of the clerk of superior court, and (ii) liens for real estate taxes and other governmental assessments or charges against the unit. This subsection does not affect the priority of mechanics' or materialmen's liens.
- (c) A lien for unpaid assessments is extinguished unless proceedings to enforce the lien are instituted within three years after the docketing thereof in the office of the clerk of superior court.
- (d) This section does not prohibit actions to recover sums for which subsection (a) creates a lien or prohibit an association taking a deed in lieu of foreclosure.
- (e) A judgment, decree or order in any action brought under this section must include costs and reasonable attorney's fees for the prevailing party.
- (f) Where the holder of a first mortgage or first deed of trust of record, or other purchaser of a unit, obtains title to the unit as a result of foreclosure of a first mortgage or first deed of trust, such purchaser, and its heirs, successors and assigns, shall not be liable for the assessments against such unit which became due prior to acquisition of title to such unit by such purchaser. Such unpaid assessments shall be deemed to be common expenses collectible from all the unit owners including such purchaser, and its heirs, successors and assigns. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

NORTH CAROLINA COMMENT

This section differs from the Uniform Act and follows previous North Carolina law by requiring that liens of the owners association must be recorded to be perfected and by preserving the priority of purchase money mort-

gages in order to comply with requirements established by federal mortgage agencies. The act provides for automatic attorney's fees to the prevailing party thereby enhancing the association's ability to enforce the lien.

§ 47C-3-117. Other liens affecting the condominium.

(a) A judgment for money against the association is not a lien on the common elements, but if docketed is a lien in favor of the judgment lienholder against all of the units in the condominium at the time the judgment was entered. No other property of a unit owner is subject to the claims of creditors of the association.

(b) Notwithstanding the provisions of subsection (a), if the association has granted a security interest in the common elements to a creditor of the association pursuant to G.S. 47C-3-112, the holder of that security interest must exercise its right against the common elements before its judgment lien on any unit may be enforced.

(c) Whether perfected before or after the creation of the condominium, if a lien other than a deed of trust or mortgage, including a judgment lien or lien attributable to work performed or materials supplied before creation of the condominium, becomes effective against two or more units, the unit owner of an affected unit may pay the lienholder the amount of the lien attributable to his unit, and the lienholder, upon receipt of payment, promptly shall deliver a release of the lien covering that unit. The amount of the payment must be proportionate to the ratio which that unit owner's common expense liability bears to the common expense liabilities of all unit owners whose units are subject to the lien. After payment, the association may not assess or have a lien against that unit owner's unit for any portion of the common expenses incurred in connection with that lien.

(d) A judgment against the association shall be indexed in the name of the condominium and the association and, if so indexed, is notice of the lien against the units. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

NORTH CAROLINA COMMENT

This section is not significantly different from the Uniform Act.

§ 47C-3-118. Association records.

The association shall keep financial records sufficiently detailed to enable the association to comply with this chapter. All financial and other records shall be made reasonably available for examination by any unit owner and his authorized agents. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

NORTH CAROLINA COMMENT

This section is not significantly different from the Uniform Act.

§ 47C-3-119. Association as trustee.

With respect to a third person dealing with the association in the association's capacity as a trustee under G.S. 47C-2-118 following termination or G.S. 47C-3-113 for insurance proceeds, the existence of trust powers and their proper exercise by the association may be assumed without inquiry. A third person is not bound to inquire whether the association has power to act as trustee or is properly exercising trust powers and a third person, without actual knowledge that the association is exceeding or improperly exercising its powers, is fully protected in dealing with the association as if it possessed and properly exercised the powers it purports to exercise. A third person is not bound to assure the proper application of trust assets paid or delivered to the association in its capacity as such trustee. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

NORTH CAROLINA COMMENT

This section is not significantly different from the Uniform Act.

ARTICLE 4.*Protection of Purchasers.***§ 47C-4-101. Applicability; waiver.**

(a) This Article applies to all units subject to this chapter, except as provided in subsection (b) or as modified or waived by agreement of purchasers of units in a condominium in which all units are restricted to nonresidential use.

(b) Neither a public offering statement nor a resale certificate need be prepared or delivered in the case of a disposition which is:

- (1) Gratuitous;
- (2) Pursuant to court order;
- (3) By a government or governmental agency;
- (4) By foreclosure or deed in lieu of foreclosure;
- (5) To a person in the business of selling real estate who intends to offer those units to purchasers; or
- (6) Subject to cancellation at any time for any reason by the purchasers without penalty. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

NORTH CAROLINA COMMENT

This section is not significantly different from the Uniform Act.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 877, s. 3 makes this Chapter effective October 1, 1986.

§ 47C-4-102. Liability for public offering statement requirements.

(a) Except as provided in subsection (b), a declarant must, prior to the offering of any interest in a unit to the public, prepare a public offering statement conforming to the requirements of G.S. 47C-4-103, 47C-4-104, 47C-4-105, and 47C-4-106.

(b) A declarant may transfer responsibility for preparation of all or a part of the public offering statement to a successor declarant or to a person in the business of selling real estate who intends to offer units in the condominium for his own account. In the event of any such transfer, the transferor must provide the transferee with any information necessary to enable the transferee to fulfill the requirements of subsection (a).

(c) Any declarant or other person in the business of selling real estate who offers a unit for his own account to a purchaser shall deliver a public offering statement in the manner prescribed in G.S. 47C-4-108(a). The person who prepared all or a part of or delivered the public offering statement is subject to G.S. 47C-4-117 for any false or misleading statement set forth therein or for any omission of material fact therefrom with respect to that portion of the public offering statement which he prepared. If a declarant did not prepare any part of or deliver a public offering statement, he is not liable for any false or misleading statement set forth therein or for any omission of material fact therefrom unless he had actual knowledge of the statement or omission. A declarant, who has transferred responsibility for preparation of all or a part of the public offering statement under subsection (b), shall be liable when a false or misleading statement in the public offering statement prepared by another results from the declarant's failure to provide the information required in subsection (b).

(d) If a unit is a part of a condominium and is part of any other real estate regime in connection with the sale of which the delivery of a public offering statement is required under the laws of this State, a single public offering statement conforming to the requirements of G.S. 47C-4-103, 47C-4-104, 47C-4-105, and 47C-4-106 as those requirements relate to all real estate regimes in which the unit is located, and to any other requirements imposed under the laws of this State, may be prepared and delivered in lieu of providing two or more public offering statements. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

NORTH CAROLINA COMMENT

Subsection (c) was rewritten to provide that a declarant or realtor who delivers a public offering statement shall be liable for incorrect information regardless of who prepared the statement, and that a declarant shall be liable for errors in a public offering statement deliv-

ered and prepared by a realtor when the error was the result of the declarant's failure to provide the required information. With that exception the section is not significantly different from the Uniform Act.

§ 47C-4-103. Public offering statement; general provisions.

(a) A public offering statement must contain or fully and accurately disclose:

- (1) The name and principal address of the declarant and of the condominium;
- (2) A general description of the condominium, including to the extent possible, the types, number, and declarant's schedule of commencement and completion of construction of buildings and amenities which declarant anticipates including as part of the condominium;
- (3) The number of units in the condominium;
- (4) Copies of the recorded or proposed declaration (other than the plats and plans) and any other recorded covenants, conditions, restrictions and reservations affecting the condominium; the bylaws, and any rules or regulations of the association; copies of any contracts and leases to be signed by purchasers at closing, and copies of or a brief narrative description of any contracts or leases that will or may be subject to cancellation by the association under G.S. 47C-3-105;
- (5) Any current balance sheet and a projected budget for the association, either within or as an exhibit to the public offering statement, for one year after the date of the first conveyance to a purchaser, and thereafter the current budget of the association, a statement of who prepared the budget, and a statement of the budget's assumptions concerning occupancy and inflation factors. The budget must include, without limitation:
 - (i) A statement of the amount, or a statement that there is no amount, included in the budget as a reserve for repairs and replacement;
 - (ii) A statement of any other reserves;
 - (iii) The projected common expense assessment by category of expenditures for the association; and
 - (iv) The projected monthly common expense assessment for each type of unit;
- (6) Any services that the declarant provides or expenses that he pays which are not reflected in the budget and that he expects may become at any subsequent time a common expense of the association and the projected common expense assessment attributable to each of those services or expenses for the association and for each type of unit;
- (7) Any initial or special fee due from the purchaser at closing, together with a description of the purpose and method of calculating the fee;
- (8) A description of any known or recorded liens, encumbrances or defects affecting the title to the condominium;
- (9) The terms and limitations of any warranties provided by the declarant;
- (10) A statement that the purchaser must receive a public offering statement before signing a contract for purchase and that no conveyance can occur until seven calendar days following the signing of a contract for purchase; and that the purchaser has the absolute right to cancel the contract during the seven calendar days period;
- (11) A statement of any known or recorded unsatisfied judgments or pending suits against the association, and the status of any pending suits material to the condominium of which a declarant has actual knowledge;
- (12) A statement that any deposit made in connection with the purchase of a unit will be held in an escrow account pursuant to G.S. 47C-4-108, together with the name and address of the escrow agent;

- (13) Any restraints on alienation of any portion of the condominium;
 - (14) A description of the insurance coverage provided for the benefit of unit owners;
 - (15) Any current or known future fees or charges to be paid by unit owners for the use of the common elements and other facilities related to the condominium;
 - (16) The extent to which financial arrangements have been provided for completion of all improvements labeled "MUST BE BUILT" pursuant to G.S. 47C-4-119;
 - (17) A brief narrative description of any existing zoning and other land use requirements governing the condominium; and
 - (18) A statement that any common element may be alienated or conveyed in accordance with G.S. 47C-3-112.
- (b) A declarant promptly shall amend the public offering statement to report any material change in the information required by this section and provide a copy of any such material changes to any purchaser who has executed a contract. If any material change is made in a proposed declaration after a contract for purchase of a unit has been signed but before conveyance, the purchaser may rescind the contract within seven days after receipt of the notice of the change. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

NORTH CAROLINA COMMENT

The North Carolina Act makes the following changes in the requirements relating to the contents of the public offering statement set out in subsection (a): Subdivision (4) was amended to allow the delivery of a "proposed" declaration before it has been recorded in recognition of the fact that the actual boundaries of units and buildings after construction differ from the planned boundaries; Subdivision (9) of the Uniform Act requiring information about available financing was deleted because of rapid changes in the terms of such financing and because such information would be supplied to the purchaser as a business practice; amendments to Subdivision (9) of the North

Carolina Act reflects the changes to the rescission period set out in Section 47C-4-108; and, modifications reflecting the Commission's decision to eliminate ambiguous requirements or subjective determinations in favor of more definite information.

Subsection (b) of the North Carolina Act adds a seven day rescission period after notice of a material change in the public offering statement. Subsection (c) of the Uniform Act authorizing the omission of certain information for small condominiums was deleted because it was felt that the potential cost savings did not justify the exemption.

§ 47C-4-104. Same; condominiums subject to development rights.

If the declaration provides that a condominium is subject to any development rights reserved by the declarant, the public offering statement shall disclose, in addition to the information required by G.S. 47C-4-103:

- (1) The maximum number of units, and the maximum number of units per acre, that may be created;
- (2) How many or what percentage of the units which may be created will be restricted exclusively to residential use, or a statement that no representations are made regarding use restrictions;
- (3) If any of the units that may be built within real estate subject to development rights are not to be restricted exclusively to residential use, a statement, with respect to each portion of that real estate, of the maximum percentage of the real estate areas and the maximum percentage of the floor areas of all units that may be created therein that are not restricted exclusively to residential use;

- (4) A brief narrative description of any development rights and of any conditions relating to or limitations upon the exercise of development rights;
- (5) The maximum extent to which each unit's allocated interests may be changed by the exercise of any development right;
- (6) The extent to which any buildings or other improvements that may be erected pursuant to any development right in any part of the condominium will be compatible with existing buildings and improvements in the condominium in terms of architectural style, quality of construction, and size, or a statement that no assurances are made in those regards;
- (7) General descriptions of all other improvements that may be made and limited common elements that may be created within any part of the condominium pursuant to any development right, or a statement that no assurances are made in that regard;
- (8) Any limitations as to the locations of any building or other improvement that may be made within any part of the condominium pursuant to any development right, or a statement that no assurances are made in that regard;
- (9) A statement that any limited common elements created pursuant to any development right will be of the same general types and sizes as the limited common elements within other parts of the condominium, or a statement of the types and sizes planned, or a statement that no assurances are made in that regard;
- (10) A statement that the proportion of limited common elements to units created pursuant to any development right will be approximately equal to the proportion existing within other parts of the condominium, or a statement of any other assurances in that regard, or a statement that no assurances are made in that regard;
- (11) A statement that all restrictions in the declaration affecting use, occupancy, and alienation of units will apply to any units created pursuant to any development right, or a statement of any differentiations that may be made as to those units, or a statement that no assurances are made in that regard; and
- (12) A statement of the extent to which any assurances made pursuant to this section apply or do not apply in the event that any development right is not exercised by the declarant. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

NORTH CAROLINA COMMENT

This section is not significantly different from the Uniform Act.

§ 47C-4-105. Same; time share.

(a) If the declaration provides that ownership or occupancy of any units are or may be owned in time shares, the public offering statement shall disclose, in addition to the information required by G.S. 47C-4-103:

- (1) The number and identity of units in which time shares may be created;
- (2) The total number of time shares that may be created;
- (3) The minimum duration of any time shares which may be created; and

(4) The extent to which the creation of time shares will or may affect the enforceability of the association's lien for assessments provided in G.S. 47C-3-116.

(b) The provisions of subsection (a) apply to all purchasers of units in the condominium. In addition, the purchaser of time shares shall receive the information required by G.S. 93A-44. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

NORTH CAROLINA COMMENT

Subsection (b) was added to make it clear that the purchaser of any unit is to receive the information in subsection (a) and that a pur-

chaser of a time share must be provided the additional information required by G.S. 93A-44.

§ 47C-4-106. Conversion buildings.

Condominiums containing conversion buildings shall be subject to the provisions of Article 2 of Chapter 47A. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

NORTH CAROLINA COMMENT

This section was amended to incorporate the requirements of Article 2 of Chapter 47A.

§ 47C-4-107. Same; condominium securities.

(a) If an interest in a condominium is registered with the Securities and Exchange Commission of the United States, a declarant satisfies the requirements relating to the preparation of a public offering statement of this chapter if he delivers to the purchaser a copy of the public offering statement filed with the Securities and Exchange Commission to the extent such statement provides the information required by G.S. 47C-4-103, 47C-4-104, 47C-4-105 and 47C-4-106.

(b) The North Carolina Securities Act, Chapter 78A, shall apply to condominiums deemed to be investment contracts or to other securities offered with or incident to a condominium. In the event of such applicability of the North Carolina Securities Act, any real estate broker or salesman registered under Article 1 of Chapter 93A shall not be subject to the provisions of G.S. 78A-36. The exemption provided by the preceding sentence shall not apply to any person who is required to register with the Securities Exchange Commission as a broker or dealer under the Securities and Exchange Act of 1934. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

NORTH CAROLINA COMMENT

Subsection (a) is not significantly different from the Uniform Act. Subsection (b) was added to provide an exemption from the securi-

ties licensing requirements for licensed real estate agents.

§ 47C-4-108. Purchaser's right to cancel.

(a) A person required to deliver a public offering statement pursuant to G.S. 47C-4-102(c) shall provide a purchaser of a unit or the spouse of such purchaser with a copy of the public offering statement and all amendments thereto before a contract to purchase the unit is executed. No conveyance pursuant to the contract to purchase may occur until seven calendar days following the execution of the contract and a purchaser has the absolute right to cancel the contract at any time during this seven calendar period. Cancellation is without penalty, and all payments made by the purchaser before cancellation shall be refunded promptly.

(b) If a purchaser elects to cancel a contract pursuant to subsection (a), he may do so by hand-delivering notice thereof to the offeror or by mailing notice thereof by prepaid United States mail to the offeror or to his agent for service of process. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

NORTH CAROLINA COMMENT

This section was amended to expressly provide that the public offering statement is to be provided to a purchaser before a sales contract is executed. The cancellation or 'cooling off' pe-

riod of seven days begins on the day the contract is executed and the conveyance is not to occur until after the cancellation period.

§ 47C-4-109. Resales of units.

Except in the case of a sale where delivery of a public offering statement is required, or unless exempt under G.S. 47C-4-101(b), a unit owner shall furnish to a prospective purchaser before conveyance a statement setting forth the monthly common expense assessment and any other fees payable by unit owners. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

NORTH CAROLINA COMMENT

This section was rewritten to reduce the burden upon a seller in a resale situation. The Commission was of the opinion that a resale occurs in an arms length bargaining setting and the requirements placed upon the seller in

such a situation seemed unjustified by the current experience in North Carolina. Finally, the Commission was unsure of the consequences of the seller's failure to comply with the requirements of the Uniform Act.

§ 47C-4-110. Escrow of deposits.

(a) Any deposit made in connection with the purchase or reservation of a unit from a person required to deliver a public offering statement pursuant to G.S. 47C-4-102(c) shall be immediately deposited in a trust or escrow account in an insured bank or savings and loan association in North Carolina and shall remain in such account for such period of time as a purchaser is entitled to cancel pursuant to G.S. 47C-4-108 or cancellation by the purchaser thereunder whichever occurs first. Payments held in such trust or escrow accounts shall be deemed to belong to the purchaser and not the seller.

(b) Except as provided in G.S. 47C-4-108, nothing in subsection (a) is intended to preclude the parties to a contract from providing for the use of progress payments by the declarant during construction. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

NORTH CAROLINA COMMENT

This section was rewritten to make it clear that the escrow period referred to is the period during which the purchaser has the right to cancel. The last sentence of subsection (a) is to negate any reference or argument in favor of

ownership or right of possession to the deposit on the part of anyone other than the purchaser. Subsection (b) provides that the parties can contract for the disposition of other payments made prior to the closing.

§ 47C-4-111. Release of liens or encumbrances.

(a) In the case of a sale of a unit where delivery of a public offering statement is required pursuant to G.S. 47C-4-102(c), a seller shall, at or before conveying a unit, record or furnish to the purchaser, releases of all liens or encumbrances affecting that unit and its common element interest which the purchaser does not expressly agree to take subject to or assume, or shall provide a surety bond or substitute collateral for or insurance against the lien or encumbrance as provided for liens or encumbrances on real estate in G.S. 44A-16(5) and (6) or insurance against the lien or encumbrance acceptable to the purchaser. This subsection does not apply to any real estate which a declarant has the right to withdraw.

(b) Before conveying real estate to the association the declarant shall have that real estate released from: (1) all liens or encumbrances the foreclosure of which would deprive unit owners of any right of access to or easement of support of their units, and (2) all other liens or encumbrances on that real estate unless the public offering statement describes certain real estate which may be conveyed subject to liens or encumbrances in specified amounts. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

§ 47C-4-112: Reserved for future codification purposes.

§ 47C-4-113. Express warranties of quality.

The law relating to express warranties is applicable to the sale of a condominium unit and supplements the provisions of this chapter; provided, however, that the existence of express warranties shall not constitute a disclaimer of implied warranties. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

NORTH CAROLINA COMMENT

The North Carolina Act rewrote this section to provide that the North Carolina express warranty law applicable to single family residential dwellings should also be applicable to condominiums. The Commission was persuaded that the law of North Carolina (based

upon a theory of negligence as opposed to contract) provides as much protection to a purchaser as the express warranty provisions of the Uniform Act, see *Oates v. JAG, Inc.*, 314 N.C. 276, 333 S.E.2d 222 (1985).

§ 47C-4-114. Implied warranties of quality.

The law relating to implied warranties, including but not limited to, implied warranties that the premises are free from defective materials, constructed in a workmanlike manner, constructed according to sound engineering and construction standards and that the premises may be used for a particular purpose, is applicable to the sale of a condominium unit and supplements the provisions of this chapter. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

NORTH CAROLINA COMMENT

This section was rewritten to provide that the implied warranty law of North Carolina applicable to single family residential dwellings should also be applicable to condominiums. The Commission was of the belief that

the common law of North Carolina provides adequate protection to purchasers of condominiums, see North Carolina commentary to G.S. 47C-4-113, and that the law in this area is evolving through the courts.

§ 47C-4-115. Exclusion of modification of implied warranties of quality.

(a) Except as limited by subsection (b) with respect to a purchaser of a unit that may be used for residential use, implied warranties of quality:

- (1) May be excluded or modified by agreement of the parties; and
- (2) Are excluded by expression of disclaimer, such as "as is," "with all faults," or other language which in common understanding calls the buyer's attention to the exclusion of warranties.

(b) With respect to a purchaser of a unit that may be occupied for residential use, no general disclaimer of implied warranties of quality is effective, but a declarant and any person in the business of selling real estate for his own account may disclaim liability in an instrument signed by the purchaser for a specified defect or specified failure to comply with applicable law, if the defect or failure entered into and became a part of the basis of the bargain. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

NORTH CAROLINA COMMENT

This section is not significantly different from the Uniform Act.

§ 47C-4-116. Statute of limitations for warranties.

(a) A judicial proceeding for breach of any obligation arising under G.S. 47C-4-113 or 47C-4-114 must be commenced within the applicable period of limitations set out in Chapter 1 of the North Carolina General Statutes.

(b) If a warranty of quality explicitly extends to future performance or duration of any improvement or component of the condominium, the cause of action accrues at the time the breach is discovered or at the end of the period for which the warranty explicitly extends, whichever is earlier. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

NORTH CAROLINA COMMENT

Subsection (a) of the North Carolina Act reflects the Commission's belief that the general statute of limitations provisions of North Carolina law should apply to condominiums.

§ 47C-4-117. Effect of violations on rights of action; attorney's fees.

If a declarant or any other person subject to this chapter fails to comply with any provision hereof or any provision of the declaration or bylaws, any person or class of person adversely affected by that failure has a claim for appropriate relief. The court may award reasonable attorney's fees to the prevailing party. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

NORTH CAROLINA COMMENT

This section is not significantly different from the Uniform Act, however, the reference to punitive damages was deleted. The Commission was of the opinion that punitive damages or other deterrent provisions of law (e.g. treble damages for unfair trade practices) should be applied within the context of the general law of the state of North Carolina which is expressly made applicable to condominiums in G.S. 47C-1-108.

§ 47C-4-118. Labeling of promotional material.

If any improvement contemplated in a condominium is labeled "NEED NOT BE BUILT" on a plat or plan, or is to be located within a portion of the condominium with respect to which the declarant has reserved a development right, no promotional material may be displayed or delivered to prospective purchasers which describes or portrays that improvement unless the description or portrayal of the improvement in the promotional material is conspicuously labeled or identified as "NEED NOT BE BUILT". (1985 (Reg. Sess., 1986), c. 877, s. 1.)

NORTH CAROLINA COMMENT

This section is not significantly different from the Uniform Act.

§ 47C-4-119. Declarant's obligation to complete.

(a) The declarant shall complete all improvements labeled "MUST BE BUILT" on plats or plans prepared pursuant to G.S. 47C-2-109.

(b) The declarant is subject to liability for the prompt repair and restoration, to a condition compatible with the remainder of the condominium, of any portion of the condominium affected by the exercise of rights reserved pursuant to or created by G.S. 47C-2-110, 47C-2-111, 47C-2-112, 47C-2-113, 47C-2-115, and 47C-2-116. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

NORTH CAROLINA COMMENT

This section is not significantly different from the Uniform Act.

§ 47C-4-120. Substantial completion of units.

In the case of a sale of a unit where delivery of a public offering statement is required, a contract of sale may be executed, but no interest in that unit may be conveyed until the declaration is recorded and the unit is substantially completed, as evidenced by a recorded certificate of substantial completion executed by an architect licensed under the provisions of Chapter 83 of the General Statutes or an engineer registered under the provisions of Chapter 89C of the General Statutes, or by issuance of a certificate of occupancy authorized by law. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

NORTH CAROLINA COMMENT

This section is not significantly different from the Uniform Act.

Editor's Note. — Chapter 83, referred to in this section, was rewritten by Session Laws 1979, c. 871, s. 1 and has been recodified as Chapter 83A.

Chapter 48.

Adoptions.

§ 48-1. Legislative intent; construction of Chapter.

CASE NOTES

Applied in *In re Terry*, 76 N.C. App. 529, 333 S.E.2d 526 (1985).

§ 48-7. When consent of parents or guardian necessary.

CASE NOTES

The language of subsection (d) of this section, that adoption by a stepparent does not affect the parent-child relationship with the natural parent, is a measure to protect that parent-child relationship from the otherwise sweeping effects of § 48-23(1), which otherwise might be construed to terminate the natural parent-child relationship. In *re Estate of Edwards*, 77 N.C. App. 302, 335 S.E.2d 39 (1985).

Adopted Children as Lineal Descendants under § 30-3(b). — Natural children of one spouse born during a previous marriage, if adopted by second spouse with consent of their surviving natural parent, are considered lineal descendants by the second marriage for purposes of § 30-3(b), which determines a dissenting spouse's share. In *re Estate of Edwards*, 77 N.C. App. 302, 335 S.E.2d 39 (1985).

§ 48-9. When consent may be given by persons other than parents.

CASE NOTES

Cited in *In re Clark*, 76 N.C. App. 83, 332 S.E.2d 196 (1985).

§ 48-11. Consent not revocable.

CASE NOTES

Reduction of Revocation Period Furthers Purpose of Section. — The amendment to this section which reduced the time allowed for revocation from six months to three months holds true to the purpose stated in this section. It helps to create security in newly adoptive homes. The Legislature believed the six-month term did not achieve this goal. In *re Terry*, 76 N.C. App. 529, 333 S.E.2d 526 (1985), cert. granted, 315 N.C. 390, 338 S.E.2d 886 (1986).
Three-Month Period in Section Overrides Six-Month Period in Outdated Form. —

The language of this section, which provided for a three-month period of revocation at the time consent was given, overrode the conflicting language of the outdated consent form, which provided for a six-month period of revocation. The fact that this section had been amended so as to reduce the period from six months to three months could have been discovered with reasonable diligence. In *re Terry*, 76 N.C. App. 529, 333 S.E.2d 526 (1985), cert. granted, 315 N.C. 390, 338 S.E.2d 886 (1986).

§ 48-15. Petition for adoption.

CASE NOTES

Collateral Attack on Adoption by Party Thereto. — The provisions of § 48-28 would prevent a collateral attack by husband on adoption of wife's child, where he was a party to the proceeding. *Andrews v. Andrews*, — N.C. App. —, 338 S.E.2d 809 (1986).

§ 48-23. Legal effect of final order.

CASE NOTES

I. IN GENERAL.

Adoption by Stepparent. — The language of § 48-7(d), that adoption by a stepparent does not affect the parent-child relationship with the natural parent, is a measure to protect that parent-child relationship from the otherwise sweeping effects of subsection (1) of this section, which otherwise might be construed to terminate the natural parent-child relationship. *In re Estate of Edwards*, 77 N.C. App. 302, 335 S.E.2d 39 (1985).

Adopted Children as Lineal Descendants under § 30-3(b). — Natural children of one

spouse born during a previous marriage, if adopted by second spouse with consent of their surviving natural parent, are considered lineal descendants by the second marriage for purposes of § 30-3(b), which determines a dissenting spouse's share. *In re Estate of Edwards*, 77 N.C. App. 302, 335 S.E.2d 39 (1985).

Collateral Attack on Adoption by Party Thereto. — The provisions of § 48-28 would prevent a collateral attack by husband on adoption of wife's child, where he was a party to the proceeding. *Andrews v. Andrews*, — N.C. App. —, 338 S.E.2d 809 (1986).

§ 48-28. Questioning validity of adoption proceeding.

CASE NOTES

Collateral Attack on Adoption by Party Is Prohibited. — The provisions of this section would prevent a collateral attack by husband on adoption of wife's child, where he was a party to the proceeding. *Andrews v. Andrews*, — N.C. App. —, 338 S.E.2d 809 (1986).

Chapter 48A.**Minors.****§ 48A-2. Age of minors.****CASE NOTES**

Procedure for Changing Support When Child Reaches Age 18. — A husband had no authority to unilaterally attempt his own modification of child support payments upon one of his children reaching the age of 18, and being no longer a "minor" under this section, even though the support order directed the husband

to pay support for "his two minor children. . . ." The proper procedure for the husband to follow would have been to apply to the trial court for relief pursuant to § 50-13.7. *Brower v. Brower*, 75 N.C. App. 425, 331 S.E.2d 170 (1985).

Chapter 49.

Bastardy.

ARTICLE 1.

Support of Illegitimate Children.

§ 49-1. Title.

Legal Periodicals. — legitimate Children in North Carolina," see 63
For 1984 survey, "Intestate Succession of Il- N.C.L. Rev. 1274 (1985).

§ 49-4. When prosecution may be commenced.

CASE NOTES

There is no statute of limitations as such affecting a father's duty to support his illegitimate children. That duty continues throughout the child's minority. *Bertie-Hertford Child Support Enforcement Agency v. Barnes*, — N.C. App. —, 342 S.E.2d 579 (1986).

§ 49-7. Issues and orders.

Legal Periodicals. — legitimate Children in North Carolina," see 63
For 1984 survey, "Intestate Succession of Il- N.C.L. Rev. 1274 (1985).

ARTICLE 2.

Legitimation of Illegitimate Children.

§ 49-10. Legitimation.

CASE NOTES

Section Read in Conjunction with Statutes Applicable to Special Proceedings. — This section, as a special proceeding, should provide procedural mechanisms for the full and fair resolution of cases. To ensure the parties' right to a trial by jury, this section can and should be read in conjunction with the procedural statutes that apply to all special proceeding. In *re Locklear*, 314 N.C. 412, 334 S.E.2d 46 (1985).

Legitimation Procedure within Jurisdiction of Superior Court Clerk. — The legitimation procedure, which is identified in this section as a special proceeding in the superior court of the county in which the putative father resides, is within the jurisdictional purview of the clerk of superior court. In *re Locklear*, 314 N.C. 412, 334 S.E.2d 46 (1985).

The clerks of superior court have authority,

pursuant to this section, to enter an order legitimating a minor child of a man who alleges that he is the child's natural father, where the child is presumed to be legitimate because he was born to his mother while she was lawfully married to another man, provided that the issue of paternity must be submitted to and decided by a jury after the child and the husband have been properly made parties to the proceeding. In *re Locklear*, 314 N.C. 412, 334 S.E.2d 46 (1985).

Phrase "born out of wedlock" should refer to the status of the parents of the child in relation to each other. In *re Locklear*, 314 N.C. 412, 334 S.E.2d 46 (1985).

A child born to a married woman, but begotten by one other than her husband, is a child "born out of wedlock." In *re Locklear*, 314 N.C. 412, 334 S.E.2d 46 (1985).

Child Is Necessary Party. — Under this section, the child is a necessary party to the proceeding. In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985).

Married Woman's Husband Should Be Summoned. — As a potentially adverse party in a special proceeding under this section brought by natural father of child whose mother was married to another man at the time of his conception and birth, the married woman's husband should be construed as one of the respondents on whom summons must be served. In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985).

Summons Procedure Governed by § 1-393. — The requirement that a summons be served upon the man to whom the child's mother was married when the child was conceived and born would be governed by § 1-393. In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985).

Standard of Proof. — This section, just as § 49-14, requires proof beyond a reasonable doubt to establish paternity in rebuttal of the presumption of legitimacy arising from the lawful marriage of child's mother to man other than its natural father. In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985).

Presumption of Legitimacy Where Child's Mother Is Married. — Because of the strong presumption of legitimacy involved where mother of child is married, the lawful husband of the mother has an obvious interest

in a legitimization proceeding involving a child born to his wife while the two were married. The rebuttal of this presumption should be presented to and resolved by a jury to ensure that the parties' rights are adequately protected. In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985).

Man Living with Mother for Five Years Preceding Child's Birth Was Putative Father. — Petitioner, who had lived openly and notoriously in an adulterous relationship with the mother of child (born in 1965) since 1960, continuing to maintain and care for the child born of that relationship, was the "putative father" of the child, rather than the mother's husband, who discontinued living with the mother in 1960, years before the child was born. In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985).

Transfer to Civil Docket for Jury Determination of Paternity. — Resolution by a jury of the factual issue of paternity, when a presumption of legitimacy is involved, may be accomplished by transferring the case to the civil issue docket for trial at the next ensuing session of the superior court pursuant to § 1-273. Therefore, it is not necessary to require that the putative father first file a paternity action under § 49-14 before proceeding under this section to have child legitimated. In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985).

§ 49-12. Legitimation by subsequent marriage.

CASE NOTES

Applied in Department of Transp. v. Fuller, 76 N.C. App. 138, 332 S.E.2d 87 (1985).

ARTICLE 3.

Civil Actions Regarding Illegitimate Children.

§ 49-14. Civil action to establish paternity.

Legal Periodicals. —

For 1984 survey, "Intestate Succession of Il-

legitimate Children in North Carolina," see 63 N.C.L. Rev. 1274 (1985).

CASE NOTES

Standard of Proof. — Section 49-10, just as this section, requires proof beyond a reasonable doubt to establish paternity in rebuttal of the presumption of legitimacy arising from the lawful marriage of child's mother to man other

than its natural father. In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985).

In a paternity action under this section, plaintiff must prove beyond a reasonable doubt that defendant is the father of the child whose

paternity is in issue. Thus, in a paternity case, in order to affirm a JNOV, the court must conclude as a matter of law that the jury could have had no reasonable doubt that defendant was the biological father of plaintiff's son. *Smith v. Price*, — N.C. —, 340 S.E.2d 408 (1986).

Transfer to Civil Docket for Jury Determination of Paternity. — Resolution by a jury of the factual issue of paternity, when a presumption of legitimacy is involved, may be

accomplished by transferring the case to the civil issue docket for trial at the next ensuing session of the superior court pursuant to § 1-273. Therefore, it is not necessary to require that the putative father first file a paternity action under this section before proceeding under § 49-10 to have child legitimated. *In re Locklear*, 314 N.C. 412, 334 S.E.2d 46 (1985).

Cited in *Belfield v. Weyerhaeuser Co.*, 77 N.C. App. 332, 335 S.E.2d 44 (1985).

§ 49-15. Custody and support of illegitimate children when paternity established.

CASE NOTES

Cited in *In re Locklear*, 314 N.C. 412, 334 S.E.2d 46 (1985).

Chapter 50.

Divorce, Alimony, and Child Support.

Article 1.

Divorce, Alimony, and Child Support, Generally.

Sec.

50-11.4. Certain judgments of divorce validated.

50-13.4. Action for support of minor child.

50-13.9. Procedure to insure payment of child support.

50-22 to 50-29. [Reserved.]

Article 2.

Expedited Process for Child Support Cases.

50-30. Findings; policy; and purpose.

Sec.

50-31. Definitions.

50-32. Disposition of cases within 60 days; extension.

50-33. Waiver of expedited process requirement.

50-34. Establishment of an expedited process.

50-35. Authority and duties of a child support hearing officer.

50-36. Child support procedures in districts with expedited process.

50-37. Enforcement authority of child support hearing officer; contempt.

50-38. Appeal from orders of the child support hearing officer.

50-39. Qualifications of child support hearing officer.

ARTICLE 1.

Divorce, Alimony, and Child Support, Generally.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 993, which added Article 2 of

this chapter, designated the existing provisions of this chapter as Article 1.

§ 50-5. Grounds for absolute divorce in cases of incurable insanity.

Legal Periodicals. —

For 1984 survey, "The Brief Death of Alienation of Affections and Criminal Conversation

in North Carolina," see 63 N.C.L. Rev. 1317 (1985).

§ 50-6. Divorce after separation of one year on application of either party.

Legal Periodicals. —

For domestic relations note, "The Validity of Foreign Divorce Decrees in North Carolina," see 20 Wake Forest L. Rev. 765 (1984).

For 1984 survey, "Estoppel and Foreign Divorce," see 63 N.C.L. Rev. 1189 (1985).

For 1984 survey, "Equitable Distribution

Without Consideration of Marital Fault," see 63 N.C.L. Rev. 1204 (1985).

For 1984 survey, "The Brief Death of Alienation of Affections and Criminal Conversation in North Carolina," 63 N.C.L. Rev. 1317 (1985).

CASE NOTES

I. IN GENERAL.

This section is an indication of this State's policy, as exhibited by legislation, that if the parties have lived separate and apart for one year, the marriage is no longer

viable and is not worth saving. *Bruce v. Bruce*, — N.C. App. —, 339 S.E.2d 855 (1986).

Statute of Limitations Not Applicable to Actions for Absolute Divorce. — Balancing the reasons for having statutes of limitation against this State's public policy of endeavor-

ing to maintain the marital state on the one hand and not denying divorce to parties who have demonstrated a ground for divorce on the other hand, the general, residuary statute of limitations, § 1-56, should not be applied to actions for absolute divorce under this section. *Bruce v. Bruce*, — N.C. App. —, 339 S.E.2d 855 (1986).

Accrual of Cause of Action. — Separation, as a ground for divorce, is a type of continuing offense. It begins on the date the parties physically separate with the requisite intention that the separation remain permanent, and the cause of action under this section accrues at the end of one year. However, the cause of action continues to accrue even after the one year period, so long as the parties remain "separate and apart" within the meaning of the statute. *Bruce v. Bruce*, — N.C. App. —, 339 S.E.2d 855 (1986).

Jurisdictional Requirements. —

To obtain a divorce pursuant to this section, all that is required is proof that the parties have lived separate and apart for one year and that one of the parties has lived in this State for six months next preceding institution of the suit. *Bruce v. Bruce*, — N.C. App. —, 339 S.E.2d 855 (1986).

Estoppel from Challenging Divorce Judgment. — Where husband filed for divorce and performed some of his obligations under separation agreement for several years, remarried in reliance on the divorce judgment, and did not object to the validity of the divorce decree or the agreement until he sought to defend his failure to comply with the judgment on grounds that it was void, he was estopped from questioning its validity and effect. *Amick v. Amick*, — N.C. App. —, 341 S.E.2d 613 (1986).

II. SEPARATION.

Separation Requirement Applies to Year Prior to Institution of Suit. — The require-

ment that parties live separate and apart for one year applies to the year prior to institution of the suit. *Bruce v. Bruce*, — N.C. App. —, 339 S.E.2d 855 (1986).

Mutuality of Intent, etc. —

In accord with original. See *Camp v. Camp*, 75 N.C. App. 498, 331 S.E.2d 163, cert. denied, 314 N.C. 663, 335 S.E.2d 493 (1985).

Separation May Not Be Based on Evidence Showing Cohabitation. — For the purposes of obtaining a divorce under this section, separation may not be predicated upon evidence which shows that during the statutorily prescribed period the parties have cohabited as husband and wife. *Camp v. Camp*, 75 N.C. App. 498, 331 S.E.2d 163, cert. denied, 314 N.C. 663, 335 S.E.2d 493 (1985).

Husband's return to the marital home for a 10-day period, during which time he, inter alia, never had any sexual relations with his wife, was constantly looking for work, and did not otherwise represent himself to have resumed the marital relationship, did not constitute a resumption of marital cohabitation such as to invalidate the parties' separation agreement and bar divorce on the grounds of living separate and apart for one year. *Camp v. Camp*, 75 N.C. App. 498, 331 S.E.2d 163, cert. denied, 314 N.C. 663, 335 S.E.2d 493 (1985).

III. FAULT.

Recrimination does not constitute a bar, etc. —

This section is a "no-fault" statute. Recriminatory defenses are not applicable. *Bruce v. Bruce*, — N.C. App. —, 339 S.E.2d 855 (1986).

IV. DOMICILE OR RESIDENCE.

The six months residency requirement means the six months next preceding commencement of the action. *Bruce v. Bruce*, — N.C. App. —, 339 S.E.2d 855 (1986).

§ 50-7. Grounds for divorce from bed and board.

Legal Periodicals. —

For 1984 survey, "Estoppel and Foreign Divorce," see 63 N.C.L. Rev. 1189 (1985).

CASE NOTES

V. INDIGNITIES.

Plaintiff's Innocence, etc. —

In North Carolina, a party relying on subdivision (4) must not have provoked the "indignities" of which he complains. *Puett v. Puett*, 75 N.C. App. 554, 331 S.E.2d 287 (1985).

Grant of Divorce Reversed Where Hus-

band's Behavior Contributed to Wife's Criticism and Accusations. — In a divorce action under subdivision (4), the judge expressly concluded that the plaintiff-husband was not blameless and the judge's findings compelled the conclusion that the husband's conduct—rescue squad activities despite wife's suspicions of unfaithfulness, public name call-

ing—so contributed to his wife's criticism and accusations and to the parties' repeated arguments that the grant of divorce had to be re-

versed. *Puett v. Puett*, 75 N.C. App. 554, 331 S.E.2d 287 (1985).

§ 50-8. Contents of complaint; verification; venue and service in action by nonresident; certain divorces validated.

Legal Periodicals. —

For 1984 survey, "Estoppel and Foreign Divorce," see 63 N.C.L. Rev. 1189 (1985).

§ 50-11. Effects of absolute divorce.

Legal Periodicals. —

For 1984 survey, "Estoppel and Foreign Divorce," see 63 N.C.L. Rev. 1189 (1985).

§ 50-11.4. Certain judgments of divorce validated.

Any judgment of divorce entered as a result of an action instituted prior to October 1, 1983, upon any grounds abolished by Chapter 613 of the 1983 Session Laws as amended by Section 217(O) of Chapter 923 of the 1983 Session Laws, which is proper in all other respects, is hereby rendered valid and of full force and effect. (1985 (Reg. Sess., 1986), c. 952.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 952, s. 2, makes this section effective July 9, 1986.

§ 50-13.1. Action or proceeding for custody of minor child.

CASE NOTES

Cited in *Appert v. Appert*, — N.C. App. —, 341 S.E.2d 342 (1986).

§ 50-13.2. Who entitled to custody; terms of custody; visitation rights of grandparents; taking child out of State.

CASE NOTES

I. IN GENERAL.

Visitation and child support rights are independent rights accruing primarily to the benefit of the minor child and one is not, and may not be made, contingent upon the other. *Appert v. Appert*, — N.C. App. —, 341 S.E.2d 342 (1986).

IV. VISITATION RIGHTS.

Enforcement of Visitation Orders. — Trial judges in this State have authority to enforce orders providing for visitation by the methods set forth in this section, that is, by contempt proceedings and by injunction. *Appert v. Appert*, — N.C. App. —, 341 S.E.2d 342 (1986).

Receipt of Support May Not Be Conditioned on Visitation. — A trial judge does not have authority to condition a minor child's receipt of support paid by the noncustodial parent on compliance with court-ordered visitation allowed the noncustodial parent by order-

ing that child support paid by defendant be placed in escrow if minor child fails or refuses to abide by the visitation privileges allowed defendant. *Appert v. Appert*, — N.C. App. —, 341 S.E.2d 342 (1986).

§ 50-13.3. Enforcement of order for custody.

CASE NOTES

Visitation and child support rights are independent rights accruing primarily to the benefit of the minor child and one is not, and may not be made, contingent upon the other. *Appert v. Appert*, — N.C. App. —, 341 S.E.2d 342 (1986).

Receipt of Support May Not Be Conditioned on Visitation. — A trial judge does not have authority to condition a minor child's receipt of support paid by the noncustodial parent on compliance with court-ordered visitation allowed the noncustodial parent by order-

ing that child support paid by defendant be placed in escrow if minor child fails or refuses to abide by the visitation privileges allowed defendant. *Appert v. Appert*, — N.C. App. —, 341 S.E.2d 342 (1986).

Enforcement of Visitation Orders. — Trial judges in this State have authority to enforce orders providing for visitation by the methods set forth in this section, that is, by contempt proceedings and by injunction. *Appert v. Appert*, — N.C. App. —, 341 S.E.2d 342 (1986).

§ 50-13.4. Action for support of minor child.

(c1) (Effective October 1, 1987) The Conference of Chief District Judges shall prescribe uniform statewide advisory guidelines for the computation of child support obligations of each parent as provided in Chapter 50 or elsewhere in the General Statutes.

Such advisory guidelines may provide for variation of the amount of support recommended based on one or more of the following:

- (1) The special needs of the child, including physical and emotional health needs, educational needs, day-care costs, or needs related to the child's age.
- (2) Any shared physical custody arrangements or extended or unusual visitation arrangements.
- (3) A party's other support obligations to a current or former household, including the payment of alimony.
- (4) A party's extremely low or extremely high income, such that application of the guidelines produces an amount that is clearly too high in relation to the party's own needs or the child's needs.
- (5) A party's intentional suppression or reduction of income, hidden income, income that should be imputed to a party, or a party's substantial assets.
- (6) Any support that a party is providing or will be providing other than by periodic money payments, such as lump sum payments, possession of a residence, payment of a mortgage, payment of medical expenses, or provision of health insurance coverage.
- (7) A party's own special needs, such as unusual medical or other necessary expenses.
- (8) Any other factor the court finds to be just and proper.

Notwithstanding the foregoing, the court shall hear evidence and from the evidence find the facts relating to the reasonable needs of the child for support and the relative ability of each parent to pay support.

(1967, c. 1153, s. 2; 1969, c. 895, s. 17; 1975, c. 814; 1977, c. 711, s. 26; 1979, c. 386, s. 10; 1981, c. 472; c. 613, ss. 1, 3; 1983, c. 54; c. 530, s. 1; 1985, c. 689, s. 17; 1985 (Reg. Sess., 1986), c. 1016.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective October 1, 1987, added subsection (c1).

CASE NOTES

I. IN GENERAL.

Visitation and child support rights are independent rights accruing primarily to the benefit of the minor child and one is not, and may not be made, contingent upon the other. *Appert v. Appert*, — N.C. App. —, 341 S.E.2d 342 (1986).

Applied in *Appelbe v. Appelbe*, 75 N.C. App. 197, 330 S.E.2d 57 (1985).

III. LIABILITY FOR SUPPORT.

Subsection (b) imposes primary liability, etc. —

Subsection (b) of this section, as amended in 1981, does not diminish a father's responsibilities. Rather, it enlarges a mother's responsibilities by making both parents primarily liable for the support of their children. *Alamance County Hosp. v. Neighbors*, 315 N.C. 362, 338 S.E.2d 87 (1986).

Applicability of Doctrine of "Necessaries". — Although the normal vehicle today for enforcing the obligation of support is undoubtedly the payment of court-ordered support pursuant to statute, the common law provided another vehicle through the so-called doctrine of "necessaries." North Carolina accepts this process for enforcing a parent's obligation to support minor children. *Alamance County Hosp. v. Neighbors*, 315 N.C. 362, 338 S.E.2d 87 (1986).

Right of Third Party to Recover for "Necessaries" Furnished to Child. — Because a child's right to support continues unimpaired despite the divorce of his or her parents, the right of a third party provider of goods or services to claim against the noncustodial parent also continues, unimpaired by contracts or judicial decrees or orders affecting the relations between the parents. *Alamance County Hosp. v. Neighbors*, 315 N.C. 362, 338 S.E.2d 87 (1986).

The payment of court-ordered child support does not bar a third party from seeking reimbursement directly from a noncustodial parent for "necessaries" provided to that parent's minor child. However, because the third party provider's right to recover against the parent is based upon the child's right to support, the third party provider must still show that the

services or goods provided were legal "necessaries" and that the parent against whom relief is sought has failed or refused to provide them. In this context, any payment a noncustodial parent has made for the support of his or her child would be a factor for the trial judge to consider in deciding whether the parent has in fact met the obligation to support that child. *Alamance County Hosp. v. Neighbors*, 315 N.C. 362, 338 S.E.2d 87 (1986).

VII. FINDINGS AND CONCLUSIONS.

Judge Must Make Findings, etc. —

The requirements for findings of fact applicable to orders for alimony are also applicable to the determination of reasonable and adequate child support. *Gebb v. Gebb*, 77 N.C. App. 309, 335 S.E.2d 221 (1985).

And Must Cover Factors, etc. —

In accord with 2nd paragraph in main volume. See *In re Botsford*, 75 N.C. App. 72, 330 S.E.2d 23 (1985).

In accord with 3rd paragraph in 1985 Cumulative Supplement. See *Grimes v. Grimes*, 78 N.C. App. 208, 336 S.E.2d 664 (1985).

Award of Reimbursement for Past Support. — The trial court must make specific factual findings to support not only an award of future support but also to support an award of reimbursement for past support of the child. *Buff v. Carter*, 76 N.C. App. 145, 331 S.E.2d 705 (1985).

Finding as to Income of Supporting Spouse. — Although a proper finding pertaining to the income of the supporting spouse must be based on present, as opposed to past, income, there is no rule that requires a specific finding as to the income of the supporting spouse on the precise date of the hearing. *Patton v. Patton*, 78 N.C. App. 247, 337 S.E.2d 607 (1985).

IX. REMEDIES.

A. In General.

Receipt of Support May Not Be Conditioned on Visitation. — A trial judge does not have authority to condition a minor child's receipt of support paid by the noncustodial parent on compliance with court-ordered visitation allowed the noncustodial parent by order-

ing that child support paid by defendant be placed in escrow if minor child fails or refuses to abide by the visitation privileges allowed defendant. *Appert v. Appert*, — N.C. App. —, 341 S.E.2d 342 (1986).

F. Retroactive Support and Reimbursement.

Reasonable Necessity and Ability to Pay Must Be Considered. — When a trial court is faced with calculating a retroactive child support award, it must consider, among other things, whether what was actually expended was "reasonably necessary" for the child's support and the defendant's ability to pay during the time for which reimbursement is sought. *Buff v. Carter*, 76 N.C. App. 145, 331 S.E.2d 705 (1985).

G. Contempt.

Ability to Pay or to Take Measures to Do

So Required. — Although an order for child support is enforceable by civil contempt proceedings, a supporting party cannot be held in contempt unless the party willfully failed to comply with the support order. A finding of willful failure to comply with the order requires evidence of the present ability to pay or to take reasonable measures to comply. *Brower v. Brower*, 75 N.C. App. 425, 331 S.E.2d 170 (1985).

Effect of Dismissal of Contempt Action without Explanation. — A dismissal of a contempt action, without explanation, at most signified that the supporting party was not in contempt as of that date and did not cancel the accrued child support debt; it merely forced the custodial parent or an authorized party to pursue one of the alternate remedies listed in subsection (f) to enforce the debt. *Brower v. Brower*, 75 N.C. App. 425, 331 S.E.2d 170 (1985).

§ 50-13.5. Procedure in actions for custody or support of minor children.

CASE NOTES

III. JURISDICTION AND VENUE.

A. In General.

Previous Action Pending. — Husband's motion as to child custody and child support was properly dismissed where the wife's previously commenced action with respect to the custody and support of the children was pending at the time the husband filed his motion. *Basinger v. Basinger*, — N.C. App. —, 342 S.E.2d 549 (1986).

VII. VISITATION RIGHTS.

A. In General.

The award of visitation rights is a judicial function which may not be delegated to the custodial parent. *Brewington v. Serrato*, 77 N.C. App. 726, 336 S.E.2d 444 (1985).

Order giving custodial parent exclusive control over visitation will not be sustained. *Brewington v. Serrato*, 77 N.C. App. 726, 336 S.E.2d 444 (1985).

Duty of Court to Include Visitation Provision. — Once the parties failed to agree, it was the duty of the trial judge to safeguard defendant's right to visitation by including a provision in its order specifying visitation periods. *Brewington v. Serrato*, 77 N.C. App. 726, 336 S.E.2d 444 (1985).

Visitation and child support rights are independent rights accruing primarily to the benefit of the minor child and one is not, and

may not be made, contingent upon the other. *Appert v. Appert*, — N.C. App. —, 341 S.E.2d 342 (1986).

Receipt of Support May Not Be Conditioned on Visitation. — A trial judge does not have authority to condition a minor child's receipt of support paid by the noncustodial parent on compliance with court-ordered visitation allowed the noncustodial parent by ordering that child support paid by defendant be placed in escrow if minor child fails or refuses to abide by the visitation privileges allowed defendant. *Appert v. Appert*, — N.C. App. —, 341 S.E.2d 342 (1986).

Enforcement of Visitation Orders. — Trial judges in this State have authority to enforce orders providing for visitation by the methods set forth in § 50-13.3, that is, by contempt proceedings and by injunction. *Appert v. Appert*, — N.C. App. —, 341 S.E.2d 342 (1986).

B. Denial of Parents' Rights.

Findings Held Sufficient. — Finding of trial court that defendant had previously taken minor child to Texas under a false pretense and had subsequently refused to return him to North Carolina was a sufficient and appropriate factual finding to support the court's limitation as to the location of visitation (in North Carolina at plaintiff's home.) *Brewington v. Serrato*, 77 N.C. App. 726, 336 S.E.2d 444 (1985).

§ 50-13.6. Counsel fees in actions for custody and support of minor children.

CASE NOTES

I. IN GENERAL.

The amount awarded, etc. —

In accord with 2nd paragraph in the main volume. See *Patton v. Patton*, 78 N.C. App. 247, 337 S.E.2d 607 (1985).

The amount of the award of attorney's fees is within the discretion of the trial judge and will not be reversed in the absence of an abuse of discretion. *Cobb v. Cobb*, — N.C. App. —, 339 S.E.2d 825 (1986).

Court's discretion in disallowing attorneys' fees is limited only by the abuse of discretion rule. *Puett v. Puett*, 75 N.C. App. 554, 331 S.E.2d 287 (1985).

Reviewable Question of Law, etc. —

In accord with main volume. See *Patton v. Patton*, 78 N.C. App. 247, 337 S.E.2d 607 (1985).

Required Facts Must Be Found, etc. —

An order for attorney's fees pursuant to this section in an action for child custody or support, or both, must be supported by findings, required by the statute, that the party seeking the award is (1) an interested party acting in good faith and (2) has insufficient means to defray the expense of the suit. *Cobb v. Cobb*, — N.C. App. —, 339 S.E.2d 825 (1986).

Order Must Contain Factual Findings. —

In accord with the 1985 Cumulative Supplement. See *Patton v. Patton*, 78 N.C. App. 247, 337 S.E.2d 607 (1985).

Findings of Fact Must Support Reasonableness, etc. —

Because this section allows for an award of reasonable attorney's fees, cases construing the statute have in effect annexed an additional requirement concerning reasonableness onto the express statutory ones. Thus, the record must contain additional findings of fact upon which a determination of the requisite reasonableness can be based, such as findings regarding the nature and scope of the legal services rendered, the skill and time required, the attorney's hourly rate, and its reasonableness in comparison with that of other lawyers. *Cobb v. Cobb*, — N.C. App. —, 339 S.E.2d 825 (1986).

Remand for Lack of Evidence, etc. —

Where trial judge made no finding of good faith by plaintiff and no indication of what portion of attorney fees was attributable to custody and support aspects of case, award of attorney fees would be vacated and the case remanded for further proceedings on that issue. *Smith v. Price*, — N.C. —, 340 S.E.2d 408 (1986).

Multiple awards of counsel fees in the same domestic action are, in the proper circumstances, within the court's discretion to allow. *Patton v. Patton*, 78 N.C. App. 247, 337 S.E.2d 607 (1985).

Legitimate work by counsel in precursory activity is allowable within an attorney fee award in connection with a domestic case. *Cobb v. Cobb*, — N.C. App. —, 339 S.E.2d 825 (1986).

Unreasonable Depletion of Separate Estate Not Intended. — It would be contrary to the intent of the legislature to require one seeking an award of attorney's fees to meet the expenses of litigation through the unreasonable depletion of her separate estate, where her separate estate is smaller than that of the other party. *Cobb v. Cobb*, — N.C. App. —, 339 S.E.2d 825 (1986).

Findings Held Insufficient. — Factual findings on award of attorneys' fees were deficient as to child support where there was no finding that the supporting spouse refused to provide adequate support under the circumstances existing at the time the action was initiated, and as to both alimony and child support, where there were no factual findings upon which a determination of the reasonableness of the award could be based, other than the trial court's statement that the time expended was "reasonably necessary." *Patton v. Patton*, 78 N.C. App. 247, 337 S.E.2d 607 (1985).

Award of Fees Held Error. —

See *Norton v. Norton*, 76 N.C. App. 213, 332 S.E.2d 724 (1985).

Reversal of Fee Award Where Increase in Support Reversed. — Where that part of order increasing child support payments was reversed, the award of attorney's fees also had to be reversed. *Mullen v. Mullen*, — N.C. App. —, 339 S.E.2d 838 (1986).

Distinction between Taxing Fees as Costs and Ordering Payment. — As to the difference between including attorney fees in the costs taxed against a party to a lawsuit and in ordering the payment of attorney fees, see *Smith v. Price*, — N.C. —, 340 S.E.2d 408 (1986).

Cited in *Appert v. Appert*, — N.C. App. —, 341 S.E.2d 342 (1986).

II. ACTIONS FOR SUPPORT ONLY.

Findings Required, etc. —

To award attorney's fees in a child support

action, the trial court must find as fact that: (1) The interested party (a) acted in good faith and (b) has insufficient means to defray the expenses of the action; and (2) the supporting party refused to provide adequate support "under the circumstances existing at the time of the institution of the action or proceeding." Moreover, the required findings of fact must in

turn be supported by competent evidence, such as that of the parties' incomes, estates and debts. *Brower v. Brower*, 75 N.C. App. 425, 331 S.E.2d 170 (1985).

Court estimates of time required and attorney's hourly rate are not sufficient. — *Brower v. Brower*, 75 N.C. App. 425, 331 S.E.2d 170 (1985).

§ 50-13.7. Modification of order for child support or custody.

CASE NOTES

I. IN GENERAL.

Cited in *Graham v. Graham*, 77 N.C. App. 422, 335 S.E.2d 210 (1985).

II. MODIFICATION, GENERALLY.

As May Agreements, etc. —

No agreement or contract between husband and wife will serve to deprive the courts of their inherent as well as their statutory authority to protect the interests and provide for the welfare of infants. The parties may bind themselves by a separation agreement or by a consent judgment, but they cannot thus withdraw the children of the marriage from the protective custody of the court. *Voss v. Summerfield*, 77 N.C. App. 839, 336 S.E.2d 144 (1985).

Deference Due Agreement. — On motion filed by defendant to modify consent order to provide for child support, the defendant, as movant, will have the burden of showing a "substantial change of circumstances affecting the welfare of the child." Deference due the agreement gives rise to the presumption, in the absence of evidence to the contrary, that the amount agreed upon is just and reasonable. *Voss v. Summerfield*, 77 N.C. App. 839, 336 S.E.2d 144 (1985).

As Are Support Provisions Therein. —

While the rule in *Walters v. Walters*, 307 N.C. 381, 298 S.E.2d 338 (1983) did not apply to a divorce judgment entered prior thereto, the language used by the court in absolute divorce judgment, incorporating separation agreement into the judgment, was sufficient under the law as it existed prior to *Walters* to evidence the court's intent to make the parties' separation agreement its own determination of their respective rights and obligations. Thus, when the court adopted the parties' agreement as to child support as its own determination of the amount of child support to be paid by defendant, this order of support became modifiable in the same manner as any other child support order. *Holthusen v. Holthusen*, — N.C. App. —, 339 S.E.2d 823 (1986).

Modification Where Consent Judgment, etc. —

When child support agreement was incorporated into parties divorce judgment it became an order of court that was modifiable only as other judgments involving child custody and support are modifiable. *Tyndall v. Tyndall*, — N.C. App. —, 343 S.E.2d 284 (1986), upholding trial court's refusal to disregard the terms of the judgment and make a new, independent determination where no grounds for modifying the judgment were presented.

The trial court must determine the present reasonable needs of the child before ordering a modification in child support. *Mullen v. Mullen*, — N.C. App. —, 339 S.E.2d 838 (1986).

To properly determine child's present reasonable needs, trial court must hear evidence and make findings of specific fact on the actual past expenditures for the minor child, the present reasonable expenses of the minor child, and the parties' relative abilities to pay. *Mullen v. Mullen*, — N.C. App. —, 339 S.E.2d 838 (1986).

Determination of Relative Ability to Pay. — Evidence of, and findings of fact on, the parties' income, estates, and present reasonable expenses are necessary to determine their relative abilities to pay. *Mullen v. Mullen*, — N.C. App. —, 339 S.E.2d 838 (1986).

III. CHANGE IN CIRCUMSTANCES.

Meaning of "Changed Circumstances". —

In accord with 1st paragraph in main volume. See *Wehlau v. Witek*, — N.C. App. —, 331 S.E.2d 223 (1985).

The moving party has the burden, etc. —

In accord with 1st paragraph in main volume. See *Kelly v. Kelly*, — N.C. App. —, 335 S.E.2d 780 (1985).

Decree Is Res Judicata Only as to Facts Then Existing and Before Court. — To modify a custody order, a court must find a change in circumstances. However, when facts perti-

nent to the custody issue existed at the time of the custody decree but were not disclosed to the court, the prior decree is *res judicata* only to the facts that were before the court, and other pertinent facts may be considered in subsequent custody determinations. *Wehlau v. Witek*, 75 N.C. App. 596, 331 S.E.2d 223 (1985).

Speculation as to Future Detrimental Change Insufficient. — A court cannot modify a custody order based on speculation or conjecture that a detrimental change may take place sometime in the future. *Wehlau v. Witek*, 75 N.C. App. 596, 331 S.E.2d 223 (1985).

Evidence of Husband's Suitability Did Not Negate Suitability of Former Wife. — The former husband's evidence that he was a suitable parent for custody did not negate the former wife's standing as a suitable parent for custody and did not represent a change of circumstances. *Wehlau v. Witek*, 75 N.C. App. 596, 331 S.E.2d 223 (1985).

Proof Required Absent Evidence of Change in Either Party's Fitness. — Where there is no evidence that the fitness or unfitness of either party has changed, the trial court may not modify a prior order unless sufficient change of circumstances adversely affecting the welfare of the child is shown. *Wehlau v. Witek*, 75 N.C. App. 596, 331 S.E.2d 223 (1985).

Voluntary Expenses. —

The trial court did not err in denying the husband credit for the purchase of two automobiles for his children, considering his history of delinquent payments and the lack of the wife's consent to these voluntary expenditures. *Brower v. Brower*, 75 N.C. App. 425, 331 S.E.2d 170 (1985).

Waiver of Credit for Child's Receipt of Earnings. — There was no evidence that the husband ever objected to his unemancipated child's receipt of earnings. His right to credit for those earnings was therefore waived. *Brower v. Brower*, 75 N.C. App. 425, 331 S.E.2d 170 (1985).

Inability to Claim Children as Dependents for Tax Purposes. — The husband was not entitled to credit for his inability to claim his children as dependents for income tax purposes. *Brower v. Brower*, 75 N.C. App. 425, 331 S.E.2d 170 (1985).

Rehabilitation from Alcoholism. — In case in which custody of child was taken from the mother because of the mother's problem with alcohol, the district court's subsequent finding that the mother had made substantial progress in rehabilitation from alcoholism and that her accomplishments constituted a material change of circumstances affecting the welfare of the child were upheld. *Perdue v. Perdue*, 76 N.C. App. 600, 334 S.E.2d 86 (1985).

Remarriage. —

Remarriage without a finding of fact indicating the effect of remarriage on a child is not a sufficient change of circumstances to justify modification of a child custody order. *Kelly v. Kelly*, 77 N.C. App. 632, 335 S.E.2d 780 (1985).

Bearing of an Illegitimate Child. —

Whether the birth of a child out of wedlock constitutes a substantial change of circumstances affecting the welfare of the child sufficient to justify a change in custody is to be determined by examining the facts of each case. *Kelly v. Kelly*, 77 N.C. App. 632, 335 S.E.2d 780 (1985), holding that under the circumstances the trial court found insufficient changes to justify a change in custody.

IV. VISITATION RIGHTS.

Visitation and child support rights are independent rights accruing primarily to the benefit of the minor child and one is not, and may not be made, contingent upon the other. *Appert v. Appert*, — N.C. App. —, 341 S.E.2d 342 (1986).

Receipt of Support May Not Be Conditioned on Visitation. — A trial judge does not have authority to condition a minor child's receipt of support paid by the noncustodial parent on compliance with court-ordered visitation allowed the noncustodial parent by ordering that child support paid by defendant be placed in escrow if minor child fails or refuses to abide by the visitation privileges allowed defendant. *Appert v. Appert*, — N.C. App. —, 341 S.E.2d 342 (1986).

V. FINDINGS AND DISCRETION OF TRIAL COURT.

To properly determine a child's present reasonable needs, the trial court must hear evidence and make findings of specific fact on the actual past expenditures for the minor child, the present reasonable expenses of the minor child, and the parties' relative abilities to pay. *Norton v. Norton*, 76 N.C. App. 213, 332 S.E.2d 724 (1985).

And His Decision Will Not Be Upset Absent Abuse. —

What represents the welfare of the child is frequently a difficult determination and the trial court is in the best position to observe the parties and evaluate the evidence. Therefore, the judgment of the trial court will not be disturbed on appeal if the evidence supports the findings of fact and those findings form a valid basis for the conclusions of law and order. *Wehlau v. Witek*, 75 N.C. App. 596, 331 S.E.2d 223 (1985).

Error to Reduce Arrearage Absent Findings or Evidence. — Without the requisite, specific findings or evidence in the record on the child's needs and expenses, or on the rela-

tive abilities of the parties to provide support, the trial court erred in reducing the child support arrearage. *Brower v. Brower*, 75 N.C. App. 425, 331 S.E.2d 170 (1985).

VII. PROCEDURE.

A child support order may be modified or vacated only after an equitable distribution. *Dorton v. Dorton*, 77 N.C. App. 667, 336 S.E.2d 415 (1985).

Modification of child support would be vacated and remanded where it was part of an equitable distribution judgment and thus appeared to have been decided and entered at the same time as the equitable distribution, rather than after the equitable distribution as re-

quired by subsection (f) of § 50-20. *Dorton v. Dorton*, 77 N.C. App. 667, 336 S.E.2d 415 (1985).

Procedure for Modifying Support When Child Reaches Age 18. — A husband had no authority to unilaterally attempt his own modification of child support payments upon one of his children reaching the age of 18, and being no longer a "minor" under § 48A-2, even though the support order directed the husband to pay support for "his two minor children. . . ." The proper procedure for the husband to follow would have been to apply to the trial court for relief pursuant to this section. *Brower v. Brower*, 75 N.C. App. 425, 331 S.E.2d 170 (1985).

§ 50-13.8. Support of persons incapable of self-support upon reaching majority.

CASE NOTES

Action for Support for College Education Failed to State Claim for Relief. — A daughter, over 18 years of age, who graduated from high school and who brought an action against her father to obtain support for her college education, failed to state a claim for relief,

since North Carolina courts do not have authority to order child support for children who have reached their majority. *Appelbe v. Appelbe*, 75 N.C. App. 197, 330 S.E.2d 57, cert. denied, 314 N.C. 662, 336 S.E.2d 399 (1985).

§ 50-13.9. Procedure to insure payment of child support.

(b) After entry of such an order by the court, the clerk of court shall maintain records listing the amount of payments, the date payments are required to be made, and the names and addresses of the parties affected by the order.

In IV-D cases, when required by federal or state law or regulations or by court order, the clerk of superior court shall transmit child support payments that are made to the clerk to the Department of Human Resources for appropriate distribution. In all other cases, whether IV-D or non-IV-D, the clerk shall transmit the payments to the custodial parent or other party entitled to receive them, unless a court order requires otherwise.

(d) In a non-IV-D case, when an obligor fails to make a required payment of child support and is in arrears, the clerk of superior court shall mail by regular mail to the last known address of the obligor a notice of delinquency. The notice shall set out the amount of child support currently due and shall demand immediate payment of said amount. The notice shall also state that failure to make immediate payment will result in the issuance by the court of an enforcement order requiring the obligor to appear before a district court judge and show cause why the support obligation should not be enforced by income withholding, contempt of court, or other appropriate means. Failure to receive the delinquency notice shall not be a defense in any subsequent proceeding. If income withholding has been implemented against the obligor or the obligor has been previously found in contempt for nonpayment under the same child support order, sending the notice of delinquency shall be in the discretion of the clerk.

If the arrearage is not paid in full within 21 days after the mailing of the delinquency notice, or is not paid within 30 days after the obligor becomes

delinquent if the clerk has elected not to send a delinquency notice, the clerk shall cause an enforcement order to be issued and shall issue a notice of hearing before a district court judge. The enforcement order shall order the obligor to appear and show cause why he should not be subjected to income withholding or adjudged in contempt of court, or both, and shall order the obligor to bring to the hearing records and information relating to his employment and the amount and sources of his disposable income. The enforcement order shall state:

- (1) That the obligor is under a court order to provide child support, the name of each child for whose benefit support is due, and information sufficient to identify the order;
- (2) That the obligor is delinquent and the amount of overdue support;
- (3) That the court may order income withholding if the obligor is delinquent in an amount equal to the support due for one month;
- (4) That income withholding, if implemented, will apply to the obligor's current payors and all subsequent payors and will be continued until terminated pursuant to G.S. 110-136.10;
- (5) That failure to bring to the hearing records and information relating to his employment and the amount and sources of his disposable income will be grounds for contempt;
- (6) That if income withholding is not an available or appropriate remedy, the court may determine whether the obligor is in contempt of whether any other enforcement remedy is appropriate.

The enforcement order may be signed by the clerk or a district court judge, and shall be served on the obligor pursuant to G.S. 1A-1, Rule 4, Rules of Civil Procedure. The clerk shall also notify the party to whom support is owed of the pending hearing. The clerk may withdraw the order to the supporting party upon receipt of the delinquent payment. On motion of the person to whom support is owed, with the approval of the district court judge, if he finds it is in the best interest of the child, no enforcement order shall be issued.

When the matter comes before the court, the court shall proceed as in the case of a motion for income withholding under G.S. 110-136.5. If income withholding is not an available or adequate remedy, the court may proceed with contempt, imposition of a lien, or other available, appropriate enforcement remedies.

This subsection shall apply only to non-IV-D cases, except that the clerk shall issue an enforcement order in a IV-D case when requested to do so by an IV-D obligee.

(f) At least seven days prior to an enforcement hearing as set forth in subsection (d), the clerk must notify the district court judge of all cases to be heard for enforcement at the next term, and the judge shall appoint an attorney from the list described in subsection (e) to represent each party to whom support payments are owed if the judge deems it to be in the best interest of the child for whom support is being paid, unless:

- (1) The attorney of record for the party to whom support payments are owed has notified the clerk of court that he will appear for said party; or
- (2) The party to whom support payments are owed requests the judge not to appoint an attorney; or
- (3) An attorney for the enforcement of child support obligations pursuant to Title IV, Part D, of the Social Security Act as amended is available.

The judge may order payment of reasonable attorney's fees as provided in G.S. 50-13.6.

(g) Nothing in this section shall preclude the independent initiation by a party of proceedings for civil contempt or for income withholding. (1983, c. 677, s. 1; 1985 (Reg. Sess., 1986), c. 949, ss. 3-6.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Section 9 of Session Laws 1985 (Reg. Sess., 1986), c. 949, provides: "Nothing in this act shall be construed as affecting any garnishment proceeding heretofore or hereafter instituted." The act is effective October 1, 1986, pursuant to s. 10 of c. 949.

Effect of Amendments. — The 1985 (Reg.

Sess., 1986) amendment, effective October 1, 1986, added the last paragraph of subsection (b), rewrote subsection (d), rewrote the introductory language of subsection (f), and rewrote subsection (g). In addition, the amendment reenacted the last sentence of subsection (f) without change. At the direction of the Revisor of Statutes, the sentence has been indented as a second paragraph of (f).

CASE NOTES

Applied in *Brower v. Brower*, 75 N.C. App. 425, 331 S.E.2d 170 (1985).

Cited in *Appert v. Appert*, — N.C. App. —, 341 S.E.2d 342 (1986).

§ 50-16.1. Definitions.

Legal Periodicals. —

For 1984 survey, "Equitable Distribution Without Consideration of Marital Fault," see 63 N.C.L. Rev. 1204 (1985).

For note, "The Contingent Fee Contract in Domestic Relations Cases," see 7 Campbell L. Rev. 427 (1985).

CASE NOTES

I. IN GENERAL.

Consent Judgment Awarding Medical Expenses. — With the consent of the parties, the trial court, which has general jurisdiction of all domestic matters, could properly enter consent judgment, providing for payment of wife's medical payments, even though it contained a provision which was outside of the pleadings. *Davis v. Davis*, 78 N.C. App. 464, 337 S.E.2d 190 (1985).

Under consent judgment in which the court found as a fact that there were no claims for support or alimony pending between the parties and ordered plaintiff to pay all necessary and reasonable medical expenses incurred by defendant, parties did not intend for medical expenses to constitute alimony payments; thus, the trial court erred in entering judgment *ex meru motu* declaring portions of consent judgment null and void and unenforceable *ab initio* and in striking them. *Davis v. Davis*, 78 N.C. App. 464, 337 S.E.2d 190 (1985).

Cited in *Michael v. Michael*, 77 N.C. App. 841, 336 S.E.2d 414 (1985).

II. ALIMONY.

Spouse Must Be Dependent as Well as Having Grounds under § 50-16.2. — To be entitled to alimony, a spouse must not only have one of the grounds set forth in § 50-16.2, he or she must also be a "dependent spouse." *Talent v. Talent*, 76 N.C. App. 545, 334 S.E.2d 256 (1985).

IV. DEPENDENT SPOUSE.

When One Is a Dependent Spouse. —

In determining whether one qualifies as a dependent spouse under subdivision (3) of this section, as well as in determining the amount of alimony to be awarded, the courts must consider the factors enumerated in § 50-16.5, the section for determining the amount of alimony. These factors include the estates, earnings, earning capacity, condition, and accustomed standard of living of the parties, and other facts of the particular case. *Beaman v. Beaman*, 77 N.C. App. 717, 336 S.E.2d 129 (1985).

To properly find a spouse dependent the court need only find that the spouse's reasonable monthly expenses exceed her monthly income and that the party has no other means with which to meet those expenses. *Beaman v. Beaman*, 77 N.C. App. 717, 336 S.E.2d 129 (1985).

Whether "Dependent" or "Supporting" Must Be Based on Findings. — The conclusions made by the court as to whether a spouse is "dependent" or "supporting" must be based on findings of fact sufficiently specific to indicate that the court properly considered the factors. In the absence of such findings, appellate courts cannot appropriately determine whether the order of the trial court is adequately supported by competent evidence, and therefore such an order must be vacated and the case remanded for necessary findings. It is not enough that there is evidence in the record from which such findings could have been

made because it is for the trial court, and not the appellate court, to determine what facts are established by the evidence. *Talent v. Talent*, 76 N.C. App. 545, 334 S.E.2d 256 (1985).

Absent Actual Dependence, Issue Is Substantial Need of Maintenance. — If the court determines that one spouse is not actually dependent on the other for such support, the court must then determine if one spouse is "substantially in need of maintenance and support" from the other, i.e., whether one spouse would be unable to maintain his or her accustomed standard of living, established prior to separation, without financial contribution from the other. In doing so, the court must determine and consider the following: (1) The standard of living, socially and economically, to which the parties as a family unit became accustomed during the several years prior to their separation; (2) the present earnings, prospective earning capacity, and any other condition, such as health, of each spouse at the time of the hearing; (3) whether the spouse seeking alimony has a demonstrated need for financial contribution from the other spouse in order to maintain the parties' accustomed standard of living, taking into consideration the spouse's reasonable expenses in light of that standard of living; and (4) the financial worth or "estate" of both spouses. The court must also consider fault and other facts of the particular case such as the length of the marriage and the contribution made by each spouse to the financial status of the family over the years. *Talent v. Talent*, 76 N.C. App. 545, 334 S.E.2d 256 (1985).

For a spouse to be "actually substan-

tially dependent" upon the other spouse, he or she must have actual dependence on the other in order to maintain the standard of living to which he or she became accustomed during the last several years prior to the spouses' separation. To determine whether such actual dependence exists, the trial court must evaluate the parties' incomes and expenses measured by the standard of living of the family as a unit. *Talent v. Talent*, 76 N.C. App. 545, 334 S.E.2d 256 (1985).

Spouse Not Dependent. —

Findings of fact supported by competent evidence of record fully supported the trial judge's conclusion that plaintiff was no longer a "dependent spouse", which conclusion supported his order terminating defendant's spousal support obligations, as only a "dependent spouse" is entitled to alimony. *Marks v. Marks*, — N.C. —, 342 S.E.2d 859 (1986).

Spouse Held Dependent. —

Where the evidence was not such as to require the court to find that defendant was capable of earning far greater income than she currently earned and showed that for the last five years of the parties' marriage defendant had earned insufficient income to meet her reasonable needs, there was sufficient evidence to support the court's conclusion that defendant was a dependent spouse, and the court's findings that plaintiff's net monthly income was \$1,753 and that his reasonable expenses were \$1,242 were sufficient to support the conclusion that plaintiff was a supporting spouse. *Beaman v. Beaman*, 77 N.C. App. 717, 336 S.E.2d 129 (1985).

§ 50-16.2. Grounds for alimony.

Legal Periodicals. —

For 1984 survey, "Estoppel and Foreign Divorce," see 63 N.C.L. Rev. 1189 (1985).

For 1984 survey, "Equitable Distribution Without Consideration of Marital Fault," see 63 N.C.L. Rev. 1204 (1985).

For 1984 survey, "The Brief Death of Alien-

ation of Affections and Criminal Conversation in North Carolina," see 63 N.C.L. Rev. 1317 (1985).

For article, "Divisibility of Advanced Degrees in North Carolina — An Examination and Proposal," see 15 N.C. Cent. L.J. 1 (1984).

CASE NOTES

I. IN GENERAL.

Equitable Distribution Decided before Permanent Alimony. — When both permanent alimony and equitable distribution are requested, the equitable distribution should be decided first. *Talent v. Talent*, 76 N.C. App. 545, 334 S.E.2d 256 (1985).

Only a Dependent Spouse, etc. —

To be entitled to alimony, a spouse must not only have one of the grounds set forth in this

section, he or she must also be a "dependent spouse." *Talent v. Talent*, 76 N.C. App. 545, 334 S.E.2d 256 (1985).

For a spouse to be "actually substantially dependent" upon the other spouse, he or she must have actual dependence on the other in order to maintain the standard of living to which he or she became accustomed during the last several years prior to the spouses' separation. To determine whether such actual dependence exists, the trial court must evalu-

ate the parties' incomes and expenses measured by the standard of living of the family as a unit. *Talent v. Talent*, 76 N.C. App. 545, 334 S.E.2d 256 (1985).

Conclusions as to "Dependent" or "Supporting" Status Must Be Based on Findings. — The conclusions made by the court as to whether a spouse is "dependent" or "supporting" must be based on findings of fact sufficiently specific to indicate that the court properly considered the factors. In the absence of such findings, appellate courts cannot appropriately determine whether the order of the trial court is adequately supported by competent evidence, and therefore such an order must be vacated and the case remanded for necessary findings. It is not enough that there is evidence in the record from which such findings could have been made because it is for the trial court, and not the appellate court, to determine what facts are established by the evidence. *Talent v. Talent*, 76 N.C. App. 545, 334 S.E.2d 256 (1985).

Absent Actual Dependence, Issue Is Substantial Need of Maintenance. — If the court determines that one spouse is not actually dependent on the other for such support, the court must then determine if one spouse is "substantially in need of maintenance and support" from the other, i.e., whether one spouse would be unable to maintain his or her accustomed standard of living, established prior to separation, without financial contribution from the other. In doing so, the court must determine and consider the following: (1) The standard of living, socially and economically, to which the parties as a family unit became accustomed during the several years prior to their separation; (2) the present earnings, prospective earning capacity, and any other condition, such as health, of each spouse at the time of the hearing; (3) whether the spouse seeking alimony has a demonstrated need for financial contribution from the other spouse in order to maintain the parties' accustomed standard of living, taking into consideration the spouse's reasonable expenses in light of that standard of living; and (4) the financial worth or "estate" of both spouses. The court must also consider fault and other facts of the particular case such as the length of the marriage and the contribution made by each spouse to the financial status of the family over the years. *Talent v. Talent*, 76 N.C. App. 545, 334 S.E.2d 256 (1985).

Noneconomic Marital Fault Irrelevant to Equitable Distribution. — While noneconomic marital fault is relevant to alimony, it is irrelevant to the equitable distribution of marital property. This distinction is recognized by § 50-20(f). *Smith v. Smith*, 314 N.C. 80, 331 S.E.2d 682 (1985).

Termination of Spousal Support Obliga-

tion. — Findings of fact supported by competent evidence of record fully supported the trial judge's conclusion that plaintiff was no longer a "dependent spouse", which conclusion supported his order terminating defendant's spousal support obligations, as only a "dependent spouse" is entitled to alimony. *Marks v. Marks*, — N.C. —, 342 S.E.2d 859 (1986).

Quoted in *Gebb v. Gebb*, 77 N.C. App. 309, 335 S.E.2d 221 (1985).

III. ABANDONMENT.

What Is "Abandonment." —

In accord with 1st paragraph in main volume. See *Patton v. Patton*, 78 N.C. App. 247, 337 S.E.2d 607 (1985).

When Spouse Is Justified in Leaving. — Ordinarily the withdrawing spouse is not justified in leaving the other unless the conduct of the latter is such as would likely render it impossible for the withdrawing spouse to continue the marital relation with safety, health, and self-respect. *Patton v. Patton*, 78 N.C. App. 247, 337 S.E.2d 607 (1985).

Abandonment is a legal conclusion which must be based upon factual findings supported by competent evidence. *Patton v. Patton*, 78 N.C. App. 247, 337 S.E.2d 607 (1985).

The burden of proof as to each of the elements of abandonment is on the party seeking alimony. *Patton v. Patton*, 78 N.C. App. 247, 337 S.E.2d 607 (1985).

Consent to Departure Not Shown. — Where the evidence at most disclosed a marital relationship that was sometimes rocky and a sexual relationship which, in the husband's estimation, left something to be desired, and the trial court's findings, based upon competent evidence, were that throughout the marriage the wife was a capable homemaker and good mother, that the couple enjoyed recreational activities with family and mutual friends, and that when problems arose in the relationship, the wife sought counseling for the couple, the wife met her burden of proof for lack of justification for the husband's departure; and the fact that the wife had, in effect, given husband an ultimatum to either faithfully commit to the marriage or to "make a clean break" did not mean that as a legal matter she consented to the termination of their cohabitation. *Patton v. Patton*, 78 N.C. App. 247, 337 S.E.2d 607 (1985).

IV. INDIGNITIES TO THE PERSON.

While husband often neglected his wife while participating in rescue squad activities, and on occasion called her names in public, thus contributing to his wife's suspicions and irritation, his conduct was not such as to cause her condition to become intolerable and

her life burdensome. Furthermore, the husband did not abandon his wife, but left the marital residence for "just cause" (wife's criticism and accusations). Therefore, the wife was

not entitled to alimony as a matter of law. Puett v. Puett, 75 N.C. App. 554, 331 S.E.2d 287 (1985).

§ 50-16.3. Grounds for alimony pendente lite.

Legal Periodicals. —

For 1984 survey, "Estoppel and Foreign Divorce," see 63 N.C.L. Rev. 1189 (1985).

For note, "The Contingent Fee Contract in Domestic Relations Cases," see 7 Campbell L. Rev. 427 (1985).

CASE NOTES

I. IN GENERAL.

Cited in Brower v. Brower, 75 N.C. App. 425, 331 S.E.2d 170 (1985).

II. PREREQUISITES.

Wife was not entitled to alimony, and therefore was not entitled to attorneys' fees for the prosecution of her claim for alimony pendente lite. Puett v. Puett, 75 N.C. App. 554, 331 S.E.2d 287 (1985).

§ 50-16.4. Counsel fees in actions for alimony.

Legal Periodicals. —

For note, "The Contingent Fee Contract in

Domestic Relations Cases," see 7 Campbell L. Rev. 427 (1985).

CASE NOTES

I. IN GENERAL.

Prerequisites to Award, etc. —

In accord with 1st paragraph in main volume. See Patton v. Patton, 78 N.C. App. 247, 337 S.E.2d 607 (1985).

As a prerequisite to an award of attorney's fees, the party seeking the award must be a dependent spouse, must be entitled to the relief sought, and must have insufficient means to defray the necessary expense in prosecuting her claim. Beaman v. Beaman, 77 N.C. App. 717, 336 S.E.2d 129 (1985).

Dependent Spouse Must Have Insufficient Means. —

Lacking sufficient means to defray the expenses of the suit means that the dependent spouse is not able as litigant to meet the supporting spouse as litigant on substantially even terms because the dependent spouse is financially unable to employ adequate counsel. Patton v. Patton, 78 N.C. App. 247, 337 S.E.2d 607 (1985).

Multiple awards of counsel fees in the same domestic action are, in the proper circumstances, within the court's discretion to allow. Patton v. Patton, 78 N.C. App. 247, 337 S.E.2d 607 (1985).

Award Upheld. — Uncontradicted evidence that in 1983 the defendant's net monthly income was \$228 and that for the first six months of 1984 the defendant earned only \$3,490 was

sufficient evidence to support the court's finding that the defendant had insufficient means to sustain the financial burden of alimony. Beaman v. Beaman, 77 N.C. App. 717, 336 S.E.2d 129 (1985), upholding award of \$400.00.

Wife was not entitled to alimony, and therefore was not entitled to attorneys' fees for the prosecution of her claim for alimony pendente lite. Puett v. Puett, 75 N.C. App. 554, 331 S.E.2d 287 (1985).

Denial of Fees to Defend Against Husband's Divorce Action Not Error. — The court did not err in not granting the wife's attorneys' fees to defend against her husband's action for divorce from bed and board, as the judge may award such fees when statute allows, and there is no statute giving the judge authority to award fees in this circumstance. Puett v. Puett, 75 N.C. App. 554, 331 S.E.2d 287 (1985).

Cited in Brower v. Brower, 75 N.C. App. 425, 331 S.E.2d 170 (1985).

III. FINDINGS.

Upon Which Determination of Reasonableness, etc. —

A proper order awarding counsel fees in a child support or alimony action must contain a finding or findings upon which a determination of the reasonableness of the award can be based, such as the nature and scope of the legal

services rendered and the time and skill required. *Patton v. Patton*, 78 N.C. App. 247, 337 S.E.2d 607 (1985).

Award Held Erroneous, etc. —

Factual findings on award of attorneys' fees were deficient as to child support where there was no finding that the supporting spouse refused to provide adequate support under circumstances existing at the time the action was initiated, and as to both alimony and child support, where there were no factual findings upon which a determination of the reasonableness of the award could be based, other than the trial court's statement that the time expended was "reasonably necessary." *Patton v.*

Patton, 78 N.C. App. 247, 337 S.E.2d 607 (1985).

IV. REVIEW ON APPEAL.

Scope of Review. —

When an award of counsel fees is made, whether the statutory requirements have been met is a question of law, reviewable on appeal. *Patton v. Patton*, 78 N.C. App. 247, 337 S.E.2d 607 (1985).

When the statutory requirements have been met, the amount of an award of attorney fees is reviewable only for an abuse of discretion. *Patton v. Patton*, 78 N.C. App. 247, 337 S.E.2d 607 (1985).

§ 50-16.5. Determination of amount of alimony.

Legal Periodicals. —

For 1984 survey, "Equitable Distribution Without Consideration of Marital Fault," see 63 N.C.L. Rev. 1204 (1985).

For 1984 survey, "The Brief Death of Alienation of Affections and Criminal Conversation in North Carolina," see 63 N.C.L. Rev. 1317 (1985).

CASE NOTES

I. IN GENERAL.

Reduction of Alimony. —

In accord with 1st paragraph in the main volume. See *Gebb v. Gebb*, 77 N.C. App. 309, 335 S.E.2d 221 (1985).

Termination of Spousal Support Obligation. — Findings of fact supported by competent evidence of record fully supported the trial judge's conclusion that plaintiff was no longer a "dependent spouse", which conclusion supported his order terminating defendant's spousal support obligations, as only a "dependent spouse" is entitled to alimony. *Marks v. Marks*, — N.C. —, 342 S.E.2d 859 (1986).

Cited in *Andrews v. Andrews*, — N.C. App. —, 338 S.E.2d 809 (1986).

II. BASIS OF AWARD.

Factors in this Section To Be Considered in Determining Dependency. — In determining whether one qualifies as a dependent spouse under § 50-16.1(3) as well as in determining the amount of alimony to be awarded, the courts must consider the factors enumerated in this section for determining the amount of alimony. These factors include the estates, earnings, earning capacity, condition, and accustomed standard of living of the parties, and other facts of the particular case. *Beaman v. Beaman*, 77 N.C. App. 717, 336 S.E.2d 129 (1985).

Findings of Fact. —

In determining the amount of alimony to be awarded, the trial judge must comply with

§ 1A-1, Rule 52, i.e., he must find facts specially, state separately the conclusions of law resulting from the facts so found, and direct entry of appropriate judgment; all the evidentiary facts need not be recited, but Rule 52 requires specific findings of ultimate facts established by the evidence which determine the issues involved and are essential to support the conclusions of law. *Gebb v. Gebb*, 75 N.C. App. 309, 335 S.E.2d 221 (1985).

The primary purpose for considering the parties' estates is to assist the court in determining the parties' earnings and earning capacities. Ordinarily, the parties will not be required to deplete their estates to pay alimony or to meet personal expenses. *Beaman v. Beaman*, 77 N.C. App. 717, 336 S.E.2d 129 (1985).

Finding on Earning Capacities Not Required Where Evidence Is Insufficient. — Although the spouses' earning capacities is a factor for the court to consider under this section, there is no requirement that the court make a specific finding of fact where there is not sufficient evidence of the parties' earning capacities. *Beaman v. Beaman*, 77 N.C. App. 717, 336 S.E.2d 129 (1985).

Finding on Income of Supporting Spouse. — Although a proper finding pertaining to the income of the supporting spouse must be based on present, as opposed to past, income, there is no rule that requires a specific finding as to the income of the supporting spouse on the precise date of the hearing. *Patton v. Patton*, 78 N.C. App. 247, 337 S.E.2d 607 (1985).

Finding on Contributions to Marriage. — Where although the court did not make a specific finding of fact concerning what each party had contributed to the financial status of the marital unit, it was clear from its findings of fact that the court considered this evidence, the lack of a specific finding on this matter did not constitute reversible error. *Beaman v. Beaman*, 77 N.C. App. 717, 336 S.E.2d 129 (1985).

Failure to Separate Out Business Expenses. — "Alimony" means payment for the support and maintenance of a spouse; it does not mean payment for the support and maintenance of a spouse's business ventures. There-

fore, the court erred in failing to determine and to consider the extent to which defendant's business expenses as an artist duplicated her personal expenses. *Beaman v. Beaman*, 77 N.C. App. 717, 336 S.E.2d 129 (1985).

III. DISCRETION OF TRIAL COURT.

The amount of the allowance, etc. —

The amount of alimony to be awarded is a reasonable subsistence, which must be determined by the trial judge from the evidence before him. *Gebb v. Gebb*, 75 N.C. App. 309, 335 S.E.2d 221 (1985).

§ 50-16.6. When alimony not payable.

Legal Periodicals. —

For 1984 survey, "The Brief Death of Alienation of Affections and Criminal Conversation

in North Carolina," see 63 N.C.L. Rev. 1317 (1985).

CASE NOTES

I. IN GENERAL.

Consent Judgment Awarding Medical Expenses. — Under consent judgment in which the court found as a fact that there were no claims for support or alimony pending between the parties and ordered plaintiff to pay all necessary and reasonable medical expenses

incurred by defendant, the parties did not intend for medical expenses to constitute alimony payments; thus, the trial court erred in entering judgment ex meru motu declaring portions of consent judgment null and void and unenforceable ab initio and in striking them. *Davis v. Davis*, 78 N.C. App. 464, 337 S.E.2d 190 (1985).

§ 50-16.7. How alimony and alimony pendente lite paid; enforcement of decree.

CASE NOTES

I. IN GENERAL.

Estoppel to Challenge Divorce Judgment. — Where husband filed for divorce and performed some of his obligations under separation agreement for several years, remarried in reliance on the divorce judgment, and did

not object to the validity of the divorce decree or the agreement until he sought to defend his failure to comply with the judgment on grounds that it was void, he was estopped from questioning its validity and effect. *Amick v. Amick*, — N.C. App. —, 341 S.E.2d 613 (1986).

§ 50-16.9. Modification of order.

CASE NOTES

I. IN GENERAL.

Jurisdiction under Long-Arm Statute. — This section provides only that an alimony order entered by a court of another jurisdiction may be modified by a court of this State "upon gaining jurisdiction over the person of both

parties"; therefore, statutory jurisdiction arises, if at all, under § 1-75.4, the North Carolina "long-arm" statute. *Schofield v. Schofield*, 78 N.C. App. 657, 338 S.E.2d 132 (1986).

Money payments are "things of value" within the meaning of § 1-75.4(5)d, the long-

arm statute; thus, in an action brought by resident husband against nonresident wife to have alimony obligation reduced or terminated, statutory jurisdiction existed. However, under the circumstances, defendant did not have sufficient minimum contacts with North Carolina and her motion to dismiss for lack of personal jurisdiction was improperly denied. *Schofield v. Schofield*, 78 N.C. App. 657, 338 S.E.2d 132 (1986).

Cited in *Graham v. Graham*, 77 N.C. App. 422, 335 S.E.2d 210 (1985).

III. SEPARATION AGREEMENTS, CONSENT JUDGMENTS, ETC.

Settlement Provisions Labeled as "Permanent Alimony" Were Not Modifiable. — Where the alimony provisions contained in a consent judgment were not alimony at all, despite their denomination as "permanent alimony," but were actually a part of the overall property settlement by the parties and were not separable from the other provisions of the deed of separation incorporated into the judgment, modification of the alimony provisions would have destroyed the agreement and the court erred in determining that the consent judgment was modifiable. *Marks v. Marks*, 75 N.C. App. 522, 331 S.E.2d 283 (1985).

Where Court Adopts Parties' Agreement, etc. —

Where the court incorporates by reference a separation agreement into a consent judgment, making the agreement a part of the judgment and ordering compliance with its terms, the agreement merges into the consent judgment and is superseded by the court's decree, any language to the contrary notwithstanding. *Marks v. Marks*, — N.C. —, 342 S.E.2d 859 (1986), decided under the law as it existed prior to *Walters v. Walters*, 307 N.C. 381, 298 S.E.2d 338, reh'g denied, 307 N.C. 703, 301 S.E.2d 397 (1983).

Separable Provisions in Consent Judgment. —

Where plaintiff failed to present any evidence to the district court which would tend to rebut the presumption of separability of provisions, the deed of separation incorporated into a 1974 consent judgment between the parties would not be deemed an integrated property settlement which could not be modified by the trial court. *Marks v. Marks*, — N.C. —, 342 S.E.2d 859 (1986), decided under the law as it existed prior to *Walters v. Walters*, 307 N.C. 381, 298 S.E.2d 338, reh'g denied, 307 N.C. 703, 301 S.E.2d 397 (1983).

§ 50-20. Distribution by court of marital property upon divorce.

Legal Periodicals. —

For note, "The Validity of Foreign Divorce Decrees in North Carolina," see 20 Wake Forest L. Rev. 765 (1984).

For 1984 survey, "Property Settlement or Separation Agreement: Perpetuating the Confusion," see 63 N.C.L. Rev. 1166 (1985).

For 1984 survey, "Equitable Distribution Without Consideration of Marital Fault," see 63 N.C.L. Rev. 1204 (1985).

For 1984 survey, "The Brief Death of Alienation of Affections and Criminal Conversation in North Carolina," see 63 N.C.L. Rev. 1317 (1985).

For article, "Divisibility of Advanced De-

grees in North Carolina — An Examination and Proposal," see 15 N.C. Cent. L.J. 1 (1984).

For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

For note, "The Contingent Fee Contract in Domestic Relations Cases," see 7 Campbell L. Rev. 427 (1985).

For comment, "The Wedding Veil or the Corporate Veil?: Appreciation of Close Corporation Stock Under North Carolina's Equitable Distribution Law," see 15 N.C. Cent. L.J., 213 (1985).

CASE NOTES

Applicable Only to Divorce Actions Filed on or after October 1, 1981. — The Equitable Distribution Act was enacted in 1981 and made applicable only when the action for an absolute divorce is filed on or after October 1, 1981. *Talent v. Talent*, 76 N.C. App. 545, 334 S.E.2d 256 (1985).

Equitable Distribution Decided Before Permanent Alimony. — When both perma-

nent alimony and equitable distribution are requested, the equitable distribution should be decided first. *Talent v. Talent*, 76 N.C. App. 545, 334 S.E.2d 256 (1985).

Distribution Factors Are Not Applicable at the Classification Stage. — Before the distribution factor argued by defendant can be considered, the property must be properly classified and its net value properly determined.

Cable v. Cable, 76 N.C. App. 134, 331 S.E.2d 765, cert. denied, 315 N.C. 182, 337 S.E.2d 856 (1985).

Separate Property Considered in Determining Division of Marital Property. — In determining an equitable division of the marital property, the court must consider the separate property owned by each party at the time the property division is to become effective. Talent v. Talent, 76 N.C. App. 545, 334 S.E.2d 256 (1985).

The term "net value," etc. —

In accord with main volume. See Poore v. Poore, 75 N.C. App., 414, 331 S.E.2d 266 (1985); Nix v. Nix, — N.C. App. —, 341 S.E.2d 116 (1986).

Distribution of Articles Having No Net Value Not Required. — The Equitable Distribution Act requires the distribution of marital assets according to their "net value." It does not require the distribution of articles that have no net value. McManus v. McManus, 76 N.C. App. 588, 334 S.E.2d 270 (1985).

Procedure Generally. —

In applying the Equitable Distribution Statute, the trial judge must follow a three step procedure, i.e., (i) classification, (ii) evaluation and (iii) distribution. Cable v. Cable, 76 N.C. App. 134, 331 S.E.2d 765, cert. denied, 315 N.C. 182, 337 S.E.2d 856 (1985).

Procedure Under Subsection (c). —

In accord with main volume. See Lawrence v. Lawrence, 75 N.C. App. 592, 331 S.E.2d 186 (1985).

Failure to Address Every Factor in Subsection (c). — In light of the lack of universal relevancy, the applicable burden of proof and the standard of review, an order is not reversibly erroneous simply because it fails to expressly address every factor listed in subsection (c) of this section. Andrews v. Andrews, — N.C. App. —, 338 S.E.2d 809 (1986).

Factors in Subsection (c) Need Not Be Addressed Where Distribution Is Equal. — In its findings, the court need not address the factors listed in subsection (c) of this section if it makes an equal distribution. Andrews v. Andrews, — N.C. App. —, 338 S.E.2d 809 (1986).

Property can have a dual nature, and can be classified as part separate and part marital. This approach takes into account the active appreciation of separate property which often results from contributions made by one or both spouses. Nix v. Nix, — N.C. App. —, 341 S.E.2d 116 (1986).

Marital Property to Be Valued at Net Value. —

The division of the marital property is to be accomplished by using the net value of the property, i.e., its market value, if any, less the amount of any encumbrance serving to offset or reduce market value. Talent v. Talent, 76 N.C. App. 545, 334 S.E.2d 256 (1985).

Presumption That Property Acquired during Marriage Is Marital Property. — There is a presumption, rebuttable by clear, cogent and convincing evidence, that all property acquired by the parties during the marriage is marital property. Nix v. Nix, — N.C. App. —, 341 S.E.2d 116 (1986).

Presumption May Be Overcome, etc. —

Where the property was acquired during the marriage, this section creates the presumption that all property so acquired is marital property, and requires the party claiming otherwise to prove his claim by "clear, cogent and convincing" evidence. McManus v. McManus, 76 N.C. App. 588, 334 S.E.2d 270 (1985).

Subsection (b)(2) refers only to passive appreciation of separate property, such as that due to inflation, and not to active appreciation resulting from the contributions, monetary or otherwise, by one or both spouses. The increase in the value of separate property due to active appreciation, which otherwise would have augmented the marital estate, is marital property. Lawrence v. Lawrence, 75 N.C. App. 592, 331 S.E.2d 186 (1985).

"Source of Funds" Rule Applicable Even When Property Converted after Separation. — North Carolina has adopted the "source of funds" rule to determine whether and to what extent an asset is part of the marital estate. Even when property is converted after the date of separation, this rule continues to apply, and the dispositive question in determining if an asset is a marital asset remains whether the source of funds therefor were marital funds. Mauser v. Mauser, 75 N.C. App. 115, 330 S.E.2d 63 (1985).

Decrease in Separate Property Through Depreciation. — Where the marital estate was increased due to activities which decreased the value of wife's separate property, this decrease in separate property through depreciation related to the economy of the marriage; thus, the court properly considered this depreciation under subdivision (c)(12) when dividing the marital property. Johnson v. Johnson, 78 N.C. App. 787, 338 S.E.2d 567 (1986).

Property Held Separate. — As to annuity and bank account acquired in exchange for separate property of husband, there was no error in the trial court's conclusion that the property remained the separate property of husband, where although husband added wife's name to the bank account and annuity, the record disclosed no evidence of any intention that the funds would not remain his separate property. Manes v. Harrison-Manes, — N.C. App. —, 338 S.E.2d 815 (1986).

Presumption of Gift to Spouse. — Provision of subdivision (b)(2) of this section that "property acquired by gift from the other spouse during the course of the marriage shall

be considered separate property only if such an intention is stated in the conveyance" has been interpreted as creating a presumption that gifts between spouses are marital property. *Dewey v. Dewey*, 77 N.C. App. 787, 336 S.E.2d 451 (1985).

Equity in Home Held Marital Property. — Where wife's contribution to marital residence was a gift, and there was no statement of her intent that it be separate property, the proportion of the home equity derived from her contribution was marital property. *Dewey v. Dewey*, 77 N.C. App. 787, 336 S.E.2d 451 (1985).

Additions, etc., to Real Property during Marriage Held Marital Property. — That part of the real property (i.e., house and waterfront area) consisting of the unimproved property owned by the wife prior to marriage should have been characterized as separate, and that part of the property consisting of the additions, alterations and repairs provided during marriage should have been considered marital in nature and the marital estate was entitled to a proportionate return of its investment. *Lawrence v. Lawrence*, 75 N.C. App. 592, 331 S.E.2d 186 (1985).

House Built with Marital Funds on Property Acquired Prior to Marriage. — By treating a house and lot as separate property solely because the house built with marital funds was built on land acquired by defendant prior to the marriage, the court erred in classifying the property. Classification must be according to the statutory definitions of separate property and marital property. *Cable v. Cable*, 76 N.C. App. 134, 331 S.E.2d 765, cert. denied, 315 N.C. 182, 337 S.E.2d 856 (1985).

Exchange of Entireties Property for Separate Property and Vice Versa. — When property titled by the entireties is acquired in exchange for separate property, the conveyance itself indicates the "contrary intention" to preserving separate property required by the statute. Furthermore, when separate property is used as consideration to acquire entireties property, a gift of separate property to the marital estate is presumed, which is rebuttable by clear, cogent, and convincing evidence. *Manes v. Harrison-Manes*, — N.C. App. —, 338 S.E.2d 815 (1986).

Use of Marital Property to Acquire Separate Property after Separation. — The fact that marital property was used to acquire other property after the date of the parties' separation did not cause it to lose its marital character. The characterization of property as separate or marital depends not on whether it was acquired after the date of separation but on whether the source of funds for its purchase was marital property or separate property. *Talent v. Talent*, 76 N.C. App. 545, 334 S.E.2d 256 (1985).

Refusal to Consider Evidence of Husband's Conversion of Property after Separation Was Error. — The trial court erred in refusing to consider evidence concerning the husband's conversion of property (i.e., shares of stock) after the parties' separation. The ruling was error regardless of whether the property was originally obtained with marital or separate funds. *Mauser v. Mauser*, 75 N.C. App. 155, 330 S.E.2d 63 (1985).

License to Practice Dentistry. — It was error for the trial court to fail to find that a spouse's license to practice dentistry was separate property. *Poore v. Poore*, 75 N.C. App. 414, 331 S.E.2d 266 (1985).

In an equitable distribution action, dental license of practicing dentist was separate property which the trial court had to consider as one of the factors affecting equitable distribution. *Dorton v. Dorton*, 77 N.C. App. 667, 336 S.E.2d 415 (1985).

Valuation of Professional Practice and Goodwill. — In ordering an equitable distribution of marital property, a court should make specific findings regarding the value of a spouse's professional practice and the existence and value of its goodwill, and should clearly indicate the evidence on which its valuations are based, preferably noting the valuation method or methods on which it relied. The court may appoint an additional expert witness under § 8C-1, Rule 706, if needed. On appeal, if it appears that the trial court reasonably approximated the net value of the practice and its goodwill, if any, based on competent evidence and on a sound valuation method or methods, the valuation will not be disturbed. *Poore v. Poore*, 75 N.C. App. 414, 331 S.E.2d 266 (1985).

The trial court's valuation of a spouse's professional association, based on "available evidence including the tangible assets and net income" of the practice, did not appear to be based on a sound method of valuation, nor was it supported by the evidence, and for this reason the equitable distribution order was vacated and remanded for a new hearing. *Poore v. Poore*, 75 N.C. App. 414, 331 S.E.2d 266 (1985).

Any legitimate method of valuation that measures the present value of goodwill by taking into account past results, and not the post-marital efforts of the professional spouse, is a proper method of valuing the goodwill of a professional practice. *Poore v. Poore*, 75 N.C. App. 414, 331 S.E.2d 266 (1985).

Goodwill is an asset which must be valued and considered in determining the value of a professional practice for purposes of equitable distribution. *Poore v. Poore*, 75 N.C. App. 414, 331 S.E.2d 266 (1985).

It is generally agreed that in valuing a professional practice, or an interest therein, for an

equitable distribution, it should not make any significant difference whether the practice is conducted as a corporation or a professional association, a partnership, or a sole proprietorship. *Poore v. Poore*, 75 N.C. App. 414, 331 S.E.2d 266 (1985).

In an equitable distribution action, the trial court erred in not identifying and treating plaintiff's dental practice including its goodwill component as marital property. *Dorton v. Dorton*, 77 N.C. App. 667, 336 S.E.2d 415 (1985).

Appointment of Expert to Appraise Dental Practice. — In an equitable distribution action, the trial court has the authority under § 8C-1, Rule 706 to appoint an expert witness to appraise the goodwill and other value of plaintiff's dental practice. *Dorton v. Dorton*, 77 N.C. App. 667, 336 S.E.2d 415 (1985).

Applicability of Amendment as to Vested Pension Rights. — A 1983 amendment to this section reclassified vested pension and retirement rights as marital property and is applicable only to actions for absolute divorce filed on or after August 1, 1983. *Morton v. Morton*, 76 N.C. App. 295, 332 S.E.2d 736, cert. denied and appeal dismissed, 314 N.C. 667, 337 S.E.2d 582 (1985); *Dewey v. Dewey*, 77 N.C. App. 787, 336 S.E.2d 451 (1985).

Amendment of this section to include military pensions as marital property, made effective August 1, 1983, is presumed to apply prospectively only. *Morris v. Morris*, — N.C. App. —, 339 S.E.2d 424 (1986).

Separation agreement entered into on August 2, 1982, which contained no reference to defendant-husband's military pension, but specifically provided that each party was forever barred from any or all rights or claims not therein reserved which arose out of the marital relation and that each released and relinquished all claims or interest in and to all property of the other, whether then owned or subsequently acquired, barred an award to plaintiff wife under the Equitable Distribution Act of a share in defendant-husband's military pension; the subsequent amendment of the act effective August 1, 1983, to include military pensions as marital property did not permit plaintiff-wife to avoid the release provisions of the agreement. *Morris v. Morris*, — N.C. App. —, 339 S.E.2d 424 (1986).

Wife's Contributions as Homemaker to Husband's Vested Interest in Pension Plan. — In light of the subsequent recognition that vested pension and retirement rights should be considered marital property in the 1983 amendment to subsection (b)(1), fairness required that the wife's contributions as a homemaker to the acquisition of at least the husband's vested interests in the pension and profit sharing plans of his professional associa-

tion should have been considered by the court under subsection (c)(12) in determining an equitable division of the marital property. *Poore v. Poore*, 75 N.C. App. 414, 331 S.E.2d 266 (1985) (decided under facts existing prior to 1983 amendment).

Effect of Reconciliation on Obligations.

— A single act of sexual intercourse between a husband and wife constitutes a reconciliation and terminates alimony obligations. However, property settlements may be executed before, during or after marriage and are not necessarily terminated by reconciliation. *Love v. Mewborn*, — N.C. App. —, 339 S.E.2d 487 (1986).

Separation Agreement as Bar to Equitable Distribution. — A separation agreement which contained no specific references to any real property, but only to personal property, held to have nevertheless fully disposed of the parties' property rights arising out of the marriage and thus to act as a bar to equitable distribution. *Hartman v. Hartman*, — N.C. App. —, 343 S.E.2d 11 (1986).

Separation agreement is terminated insofar as it remains executory on resumption of marital relation. — This rule has not been superseded by subsection (d). *Camp v. Camp*, 75 N.C. App. 498, 331 S.E.2d 163, cert. denied, 314 N.C. 663, 335 S.E.2d 493 (1985).

Obligation to Make Money Payments Held Not Terminated on Renewal of Sexual Relations. — The trial court's finding of fact that property settlement and alimony payments were mutually dependent supported its conclusion that the husband's obligation to make money payments denominated as "alimony" did not terminate upon renewal of sexual relations. *Love v. Mewborn*, — N.C. App. —, 339 S.E.2d 487 (1986).

Husband's Recovery for Personal Injuries Was Separate Property. — The recovery that a husband obtained for personal injuries that he sustained during the marriage and the property he bought with some of the proceeds were his "separate property," as the same is defined in subdivision (b)(2). The obvious purpose of the Equitable Distribution Act is to require married persons to share their maritally acquired property with each other, not to require either party to contribute his or her bodily health and powers, or the funds received for injuries thereto, to the assets for distribution. *Johnson v. Johnson*, 75 N.C. App. 659, 331 S.E.2d 211 (1985).

Misconduct during marriage which dissipates or reduces value of marital assets for nonmarital purposes may properly be considered under this section, because it is consonant with the essential philosophy of equitable distribution. *Smith v. Smith*, 314 N.C. 80, 331 S.E.2d 682 (1985).

Although an award of alimony to a dependent spouse may be justified because of noneconomic marital misconduct by the supporting spouse, the only fault or misconduct that is "just and proper" under subdivision (c)(12) is that which dissipates or reduces marital property for nonmarital purposes. *Smith v. Smith*, 314 N.C. 80, 331 S.E.2d 682 (1985).

Subdivision (c)(12) Limited to Considerations Relevant to Marital Economy. — Only items affecting the marital economy are considered under the first eleven factors of subsection (c). Thus, under subdivision (c)(12), the only other considerations which are "just and proper" within the theory of equitable distributions as expressed by subdivisions (c)(1)-(11) are those which are relevant to the marital economy. *Smith v. Smith*, 314 N.C. 80, 331 S.E.2d 682 (1985).

The only factors which may properly be considered under the catchall provision of subdivision (c)(12) of this section are those factors which are relevant to the marital economy. Marital economy relates to the source, availability and use by the wife and husband of economic resources during the course of the marriage. *Johnson v. Johnson*, 78 N.C. App. 787, 338 S.E.2d 567 (1986).

Single Factor May Support Unequal Distribution. — A finding that a single factor supported an unequal distribution, if supported by the evidence, would be within the court's discretion and upheld on appeal. *Andrews v. Andrews*, — N.C. App. —, 338 S.E.2d 809 (1986).

Guide as to Which Party Gets What Specific Property. — Once property has been properly designated marital property and valued, and the court has decided in what proportions its value should be divided, there appears to be no other guide than the discretion and good conscience of the trial judge in determining which party gets what specific property. An exception might arise with regard to the marital home or in cases of property of great sentimental value. *Andrews v. Andrews*, — N.C. App. —, 338 S.E.2d 809 (1986).

Noneconomic Marital Fault Irrelevant to Equitable Distribution. — While noneconomic marital fault is relevant to alimony, it is irrelevant to the equitable distribution of marital property. This distinction is recognized by subsection (f). *Smith v. Smith*, 314 N.C. 80, 331 S.E.2d 682 (1985).

Marital fault or misconduct which does not adversely affect the value of marital assets is not a just and proper factor within the meaning of subdivision (c)(12). *Smith v. Smith*, 314 N.C. 80, 331 S.E.2d 682 (1985); *Dewey v. Dewey*, 77 N.C. App. 787, 336 S.E.2d 451 (1985).

Marital fault or misconduct of the parties

which is not related to the economic condition of the marriage is not germane to a division of marital property under subsection (c) and should not be considered. *Smith v. Smith*, 314 N.C. 80, 331 S.E.2d 682 (1985); *Dusenberry v. Dusenberry*, 314 N.C. 608, 335 S.E.2d 892 (1985).

Meaning of "Income". — The legislature used the word "income" in subdivision (c)(1) of this section to convey its natural and ordinary meaning. *Bradley v. Bradley*, 78 N.C. App. 150, 336 S.E.2d 658 (1985).

Food Stamps Are Not Income. — Based on 7 U.S.C. § 2017(b), which provides that the value of the food stamp allotment provided an eligible household shall not be considered income or resources for any purpose under any federal, state or local laws, the value of food stamps received by a party may not be considered as income under subdivision (c)(1) of this section. *Bradley v. Bradley*, 78 N.C. App. 150, 336 S.E.2d 658 (1985).

Child Support and AFDC Are Not Income. — Since the amounts received by spouse in the form of child support and Aid to Families with Dependent Children (AFDC) are for the benefit and support of the parties' children, they are not income within the meaning of subdivision (c)(1) of this section. *Bradley v. Bradley*, 78 N.C. App. 150, 336 S.E.2d 658 (1985).

Subdivision (c)(1) and subsection (f) of this section, interpreted together, demonstrate the legislature's intent that amounts received by a party for the benefit and support of the parties' children should not be considered as income under subdivision (c)(1) of this section. *Bradley v. Bradley*, 78 N.C. App. 150, 336 S.E.2d 658 (1985).

Working Outside Home and Participating in Child-Rearing and Homekeeping. — Under subdivision (c)(12) of this section, it is within the trial court's equitable powers to consider that one spouse worked outside the home and participated in child-rearing and homekeeping, while the other spouse only participated in child-rearing and homekeeping. *Dorton v. Dorton*, 77 N.C. App. 667, 336 S.E.2d 415 (1985).

Presumption of Equal Division. —

An equal division of marital property is mandatory unless the court determines from the evidence presented on one or more of the factors enumerated in subsection (c) of this section that an equal division would not be equitable. *Bradley v. Bradley*, 78 N.C. App. 150, 336 S.E.2d 658 (1985).

Burden in Seeking Unequal Division. — A party desiring an unequal division of marital property bears the burden of producing evidence concerning one or more of the 12 factors in the statute and the burden of proving by a preponderance of the evidence that an equal

distribution would not be equitable. *Patton v. Patton*, 78 N.C. App. 247, 337 S.E.2d 607 (1985).

Subsection (c) of this section requires an equal division unless the trial court, in its discretion, determines that an equal division would not be equitable. The party seeking a greater than equal share bears the burden of proving that an unequal division would be equitable with respect to the 12 factors listed under subsection (c). *Dewey v. Dewey*, 77 N.C. App. 787, 336 S.E.2d 451 (1985).

The party desiring an unequal division of marital property assumes the burden of showing one or more of the factors in subsection (c) of this section. *Andrews v. Andrews*, — N.C. App. —, 338 S.E.2d 809 (1986).

Statement of Reasons for Unequal Division. —

When a party has met its burden of proof and the court has concluded that an equal distribution would not be equitable, the court must make written findings, based upon relevant statutory and nonstatutory factors, which support its conclusion that an equal distribution is not equitable. *Patton v. Patton*, 78 N.C. App. 247, 337 S.E.2d 607 (1985).

Unequal Division Upheld. — Where at the time the division of property was to become effective wife had no earnings and was receiving no monies other than those in the form of child support, food stamps, and Aid to Families with Dependent Children (AFDC), whereas husband had earnings of at least five to six thousand dollars a year, this evidence supported the court's finding that there was a disparity in the parties' income within the meaning of subdivision (c)(1) of this section and tended to show that an equal division of the marital property would not be equitable, and the Court of Appeals could not say that the trial court abused its discretion in ordering an unequal division in favor of wife, particularly in light of wife's poor health. *Bradley v. Bradley*, 78 N.C. App. 150, 336 S.E.2d 658 (1985).

Findings of the court that an equal distribution would not be equitable, relying on child custody, household services, and difficulty of evaluation factors, supported the court's discretionary decision to make an unequal distribution. *Andrews v. Andrews*, — N.C. App. —, 338 S.E.2d 809 (1986).

Division Upheld. — Although none of the equitable distribution cases suggest that a spouse should take out of the marriage exactly that which was brought into it, plus at least one half of the marital estate, defendant who was awarded just that had no reason to complain. *Nix v. Nix*, — N.C. App. —, 341 S.E.2d 116 (1986).

Modification of child support must be vacated and remanded where it is part of the eq-

uitable distribution judgment and thus appears to have been decided and entered at the same time as equitable distribution, rather than after equitable distribution as required by subsection (f) of this section. *Dorton v. Dorton*, 77 N.C. App. 667, 336 S.E.2d 415 (1985).

A child support order may be modified or vacated only after an equitable distribution. *Dorton v. Dorton*, 77 N.C. App. 667, 336 S.E.2d 415 (1985).

Trial court did not err in forbidding either party from receiving a commission or broker's fee on the sale of the marital home, (the order being directed primarily at defendant, a licensed real estate broker), since if the parties could sell the home by themselves, without paying a real estate commission, then the net proceeds of sale would be greater and there would be more marital property for equitable distribution. This was an equitable factor that the trial court could consider. *Dorton v. Dorton*, 77 N.C. App. 667, 336 S.E.2d 415 (1985).

Disregarding Family Corporation Held Error. — Action of the trial court in equitable distribution action in disregarding the corporate entity of a family corporation on the grounds that the corporation was a "sham," and in distributing the assets of the corporation as marital property, but holding defendant personally liable for \$23,000 worth of notes and deeds of trust which she had executed, apparently in the name of the corporation, after the parties separated, constituted reversible error, where several of the reasons cited by the trial court for disregarding the corporate entity were unsupported by the evidence or were irrelevant. *Dorton v. Dorton*, 77 N.C. App. 667, 336 S.E.2d 415 (1985).

The trial court did not abuse its discretion in denying defendant's motion for a compulsory reference in an equitable distribution proceeding. *Vick v. Vick*, — N.C. App. —, 343 S.E.2d 245 (1986).

Scope of Review. — Appellate review of equitable distribution awards is limited to a determination of whether there has been a clear abuse of discretion. *Patton v. Patton*, 78 N.C. App. 247, 337 S.E.2d 607 (1985).

Judgment Not Disturbed, etc. —

When evidence concerning one or more of the factors in subsection (c) of this section tending to show that an equal division of the marital property would not be equitable is admitted, the court must balance that evidence with the other evidence presented, keeping in mind the legislative policy strongly favoring an equal division, and must determine what constitutes an equitable division in that particular case. The balance struck by the court in weighing such evidence will not be disturbed absent a

clear showing of abuse of discretion. *Bradley v. Bradley*, 78 N.C. App. 150, 336 S.E.2d 658 (1985).

In accord with main volume. See *Johnson v. Johnson*, 78 N.C. App. 787, 338 S.E.2d 567 (1986).

Only when the evidence fails to show any rational basis for the distribution ordered by the court will its determination be upset on

appeal. *Nix v. Nix*, — N.C. App. —, 341 S.E.2d 116 (1986).

Applied in *Appelbe v. Appelbe*, 76 N.C. App. 391, 333 S.E.2d 312 (1985).

Cited in *Gebb v. Gebb*, 77 N.C. App. 309, 335 S.E.2d 221 (1985); *Bruce v. Bruce*, — N.C. App. —, 339 S.E.2d 855 (1986); *Basinger v. Basinger*, — N.C. App. —, 342 S.E.2d 549 (1986).

§ 50-21. Procedures in actions for equitable distribution of property.

CASE NOTES

No Authority to Enter Order of Equitable Distribution Preceding Divorce. — Although the trial court had jurisdiction over the parties and their property, it was without authority to enter an order of equitable distribution of the marital property preceding an absolute divorce, notwithstanding the parties' consent. *McKenzie v. McKenzie*, 75 N.C. App. 188, 330 S.E.2d 270 (1985).

Evidence of Divorce Required. — An order of equitable distribution must be supported by a finding of fact, based on competent evidence, that a judgment of absolute divorce has been entered by a court of competent jurisdiction. *McIver v. McIver*, 77 N.C. App. 232, 334 S.E.2d 454 (1985).

Date of Valuation. — When a divorce is granted on the ground of a year's separation, the trial court is to determine the net market value of the marital assets as of the date of separation in order to effect an equitable distribution of these assets. *Patton v. Patton*, 78 N.C. App. 247, 337 S.E.2d 607 (1985).

Effect of Findings. — The trial court's findings concerning valuation, as are all factual findings in an equitable distribution order, are binding on appellate courts when supported by competent evidence. *Patton v. Patton*, 78 N.C. App. 247, 337 S.E.2d 607 (1985).

Refusal to Consider Evidence of Husband's Conversion of Property after Separation Was Error. — The trial court erred in refusing to consider evidence concerning the husband's conversion of property (i.e., shares of stock) after the parties' separation. The ruling was error regardless of whether the property was originally obtained with marital or separate funds. *Mauser v. Mauser*, 75 N.C. App. 115, 330 S.E.2d 63 (1985).

Stated in *Poore v. Poore*, 75 N.C. App. 414, 331 S.E.2d 266 (1985); *Dewey v. Dewey*, 77 N.C. App. 787, 336 S.E.2d 451 (1985).

Cited in *Camp v. Camp*, 75 N.C. App. 498, 331 S.E.2d 163 (1985); *Gebb v. Gebb*, 77 N.C. App. 309, 335 S.E.2d 221 (1985).

§§ 50-22 to 50-29: Reserved for future codification purposes.

ARTICLE 2.

Expedited Process for Child Support Cases.

§ 50-30. Findings; policy; and purpose.

- (a) Findings. — The General Assembly makes the following findings:
- (1) There is a strong public interest in providing fair, efficient, and swift judicial processes for establishing and enforcing child support obligations. Children are entitled to support from their parents, and court assistance is often required for the establishment and enforcement of parental support obligations. Children who do not receive support from their parents often become financially dependent on the State.
 - (2) The State shall have laws that meet the federal requirements on expedited processes for obtaining and enforcing child support orders

for purposes of federal reimbursement under Title IV-D of the Social Security Act, 42 U.S.C. § 66(a)(2). The Secretary of the Department of Health and Human Services may waive the expedited process requirement with respect to one or more judicial districts on the basis of the effectiveness and timeliness of support order issuance and enforcement within the district.

- (3) The State has a strong financial interest in complying with the expedited process requirement, and other requirements, of Title IV-D of the Social Security Act, but the State would incur substantial expense in creating statewide an expedited child support process as defined by federal law.
- (4) The State's judicial system is largely capable of processing child support cases in a timely and efficient manner and has a strong commitment to an expeditious system.
- (5) The substantial expense the State would incur in creating a new system for obtaining and enforcing child support orders would be reduced and better spent by improving the present system.

(b) **Purpose and Policy.** — It is the policy of this State to ensure, to the maximum extent possible, that child support obligations are established and enforced fairly, efficiently, and swiftly through the judicial system by means that make the best use of the State's resources. It is the purpose of this Article to facilitate this policy. The Administrative Office of the Courts and judicial officials in each judicial district shall make a diligent effort to ensure that child support cases, from the time of filing to the time of disposition, are handled fairly, efficiently, and swiftly. The Administrative Office of the Courts and the Department of Human Resources shall work together to improve procedures for the handling of child support cases in which the State or county has an interest, including all cases that qualify in any respect for federal reimbursement under Title IV-D of the Social Security Act. (1985 (Reg. Sess., 1986), c. 993, s. 1.)

Editor's Note. — Section 4 of Session Laws 1985 (Reg. Sess., 1986), c. 993, makes this Article effective October 1, 1986.

§ 50-31. Definitions.

As used in this Article, unless the context clearly requires otherwise:

- (1) "Child support case" means the part of any civil action or proceeding, whether intrastate or interstate, that involves a claim for the establishment or enforcement of a child support obligation.
- (2) "Dispose" or "disposition" of a child support case means the entry of an order in a child support case that:
 - a. Dismisses the claim for establishment or enforcement of the child support obligation; or
 - b. Establishes a child support obligation, either temporary or permanent, and directs how that obligation is to be satisfied; or
 - c. Orders a particular child support enforcement remedy.
- (3) "Expedited process" means a procedure for having child support orders established and enforced by a magistrate or clerk who has been designated as a child support hearing officer pursuant to this Article.
- (4) "Federal expedited process requirement" means the provision in Title IV, Part D of the Social Security Act, 42 U.S.C. § 666(a)(2), that requires as a condition of the receipt of federal funds that a state

have laws that require the use of federally defined expedited processes for obtaining and enforcing child support orders.

- (5) "Filing" means the date the defendant is served with a pleading that seeks establishment or enforcement of a child support obligation, or the date written notice or a pleading is sent to a party seeking establishment or enforcement of a child support obligation.
- (6) "Hearing officer" or "child support hearing officer" means a clerk or assistant clerk of superior court or a magistrate who has been designated pursuant to this Article to hear and enter orders in child support cases.
- (7) "Initiating party" means the party, the attorney for a party, a child support enforcement agency established pursuant to Title IV, Part D of the Social Security Act, or the clerk of superior court who initiates an action, proceeding, or procedure as allowed or required by law for the establishment or enforcement of a child support obligation. (1985 (Reg. Sess., 1986), c. 993, s. 1.)

§ 50-32. Disposition of cases within 60 days; extension.

Except where paternity is at issue, in all child support cases the district court judge shall dispose of the case from filing to disposition within 60 days, except that this period may be extended for a maximum of 30 days by order of the court if:

- (1) Either party or his attorney cannot be present for the hearing; or
- (2) The parties have consented to an extension. (1985 (Reg. Sess., 1986), c. 993, s. 1.)

§ 50-33. Waiver of expedited process requirement.

(a) DHR to Seek Waiver. — The Department of Human Resources, with the assistance of the Administrative Office of the Courts, shall vigorously pursue application to the Secretary of the Department of Health and Human Services for waivers of the federal expedited process requirement.

(b) Districts That Do Not Qualify. — In any judicial district that does not qualify for a waiver of the federal expedited process requirement, an expedited process shall be established as provided in G.S. 50-34. (1985 (Reg. Sess., 1986), c. 993, s. 1.)

§ 50-34. Establishment of an expedited process.

(a) Districts Required to Have Expedited Process. — In any judicial district that is required by G.S. 50-33(b) to establish an expedited child support process, the Director of the Administrative Office of the Courts shall notify the chief district court judge and the clerk or clerks of superior court in the district in writing of the requirement. The Director of the Administrative Office of the Courts, the chief district court judge, and the clerk or clerks of superior court in the district shall implement an expedited child support process as provided in this section.

(b) Procedure for Establishing Expedited Process. — When a judicial district is required to implement an expedited process, the Director of the Administrative Office of the Courts, the chief district judge, and the clerk of superior court in an affected county shall determine by agreement whether the child support hearing officer or officers for that county shall be one or more clerks or one or more magistrates. If such agreement has not been reached within 15

days after the notice required by subsection (a) when implementation is required, the Director of the Administrative Office of the Courts shall make the decision. If it is decided that the hearing officer or officers for a county shall be magistrates, the chief district judge, the clerk of superior court, and the Director of the Administrative Office of the Courts shall ensure his or their qualification for the position. If it is decided that the hearing officer or officers for a county shall be the clerk or assistant clerks, the clerk of superior court in the county shall designate the person or persons to serve as hearing officer, and the chief district judge, the clerk of superior court, and the Director of the Administrative Office of the Courts shall ensure his or their qualification for the position.

(c) **Public To Be Informed.** — When an expedited process is to be implemented in a county or judicial district, the chief district court judge, the clerk or clerks of superior court in affected counties in the district, and the Administrative Office of the Courts shall take steps to ensure that attorneys, the general public, and parties to pending child support cases in the county or district are informed of the change in procedures and helped to understand and use the new system effectively. (1985 (Reg. Sess., 1986), c. 993, s. 1.)

§ 50-35. Authority and duties of a child support hearing officer.

A child support hearing officer who is properly qualified and designated under this Article has the following authority and responsibilities in all child support cases:

- (1) To conduct hearings and to ensure that the parties' due process rights are protected;
- (2) To take testimony and establish a record;
- (3) To evaluate evidence and make decisions regarding the establishment or enforcement of child support orders;
- (4) To accept and approve voluntary acknowledgements of support liability and stipulated agreements setting the amount of support obligations;
- (5) To accept and approve voluntary acknowledgements and affirmations of paternity;
- (6) Except as otherwise provided in this Article, to enter child support orders that have the same force and effect as orders entered by a district court judge;
- (7) To enter temporary child support orders pending the resolution of unusual or complicated issues by a district court judge;
- (8) To enter default orders; and
- (9) To subpoena witnesses and documents. (1985 (Reg. Sess., 1986), c. 993, s. 1.)

§ 50-36. Child support procedures in districts with expedited process.

(a) **Scheduling of Cases.** — The procedures of this section shall apply to all child support cases in any judicial district or county in which an expedited process has been established. All claims for the establishment or enforcement of a child support obligation, whether the claim is made in a separate action or as part of a divorce or any other action, shall be scheduled for hearing before the child support hearing officer. The initiating party shall send a notice of

the date, time, and place of the hearing to all other parties. Service of process shall be made and notices given as provided by G.S. 1A-1, Rules of Civil Procedure.

(b) Place of Hearing. — The hearing before the child support hearing officer need not take place in a courtroom, but shall be conducted in an appropriate judicial setting.

(c) Hearing Procedures. — The hearing of a case before a child support officer is without a jury. The rules of evidence applicable in the trial of civil actions generally are observed; however, the hearing officer may require the parties to produce and may consider financial affidavits, State and federal tax returns, and other financial or employment records. Except as otherwise provided in this Article, the hearing officer shall determine the parties' child support rights and obligations and enter an appropriate order based on the evidence and the child support laws of the State. All parties shall be provided with a copy of the order.

(d) Record of Proceeding. — The record of a proceeding before a child support hearing officer shall consist of the pleadings filed in the child support case, documentation of proper service or notice or waiver, and a copy of the hearing officer's order. No verbatim recording or transcript shall be required or provided at State expense.

(e) Transfer to District Court Judge. — Upon his own motion or upon motion of any party, the hearing officer shall transfer a case for hearing before a district court judge when the case involves:

- (1) A contested paternity action;
- (2) A custody dispute;
- (3) Contested visitation rights;
- (4) The ownership, possession, or transfer of an interest in property to satisfy a child support obligation; or
- (5) Other complex issues.

Upon ordering such a transfer, except in cases of contested paternity, the hearing officer shall also enter a temporary order that provides for the payment of a money amount or otherwise addresses the child's need for support pending the resolution of the case by the district court judge. The chief district court judge shall establish a procedure for such transferred cases to be given priority for hearing before a district court judge. (1985 (Reg. Sess., 1986), c. 993, s. 1.)

§ 50-37. Enforcement authority of child support hearing officer; contempt.

When a child support case is before a child support hearing officer for enforcement of a child support order, the hearing officer has the same authority that a district court judge would have, except in cases of contempt. Orders that commit a party to jail for civil or criminal contempt for the nonpayment of child support, or for otherwise failing to comply with a child support order, may be entered only by a district court judge. When it appears to a hearing officer that there is probable cause for finding such contempt in a case before the child support hearing officer and that no other enforcement remedy would be effective or sufficient, the hearing officer shall enter an order finding probable cause and referring the case for hearing before a district court judge. The order may indicate the amount of payment the responsible parent may make, or other action he may take, or both, to comply with the child support order. If proof of compliance is made to the hearing officer within a time specified in the order, the hearing officer may cancel the referral of the contempt case to

district court. Except as specifically limited by this section, a clerk or magistrate acting as a child support hearing officer retains all of the contempt powers he or she otherwise has by virtue of being a clerk or magistrate. (1985 (Reg. Sess., 1986), c. 993, s. 1.)

§ 50-38. Appeal from orders of the child support hearing officer.

(a) Appeal; Hearing De Novo. — Any party may appeal an order of a child support hearing officer for a hearing de novo before a district court judge by giving notice of appeal at the hearing or in writing within 10 days after entry of judgment. Upon appeal noted, the clerk of superior court shall place the case on the civil issue docket of the district court. The chief district court judge shall establish a procedure for such transferred cases to be given priority for hearing before a district court judge. Unless appealed from, the order of the hearing officer is final.

(b) Order Not Stayed Pending Appeal. — Appeal from an order of a child support hearing officer does not stay the execution or enforcement of the order unless, on application of the appellant, a district court judge orders such a stay. (1985 (Reg. Sess., 1986), c. 993, s. 1.)

§ 50-39. Qualifications of child support hearing officer.

(a) Qualifications. — A clerk or assistant clerk of superior court or a magistrate, to be designated and serve as a child support hearing officer, shall satisfy each of the following qualifications:

- (1) Be at least 21 years of age and not older than 70 years of age, and have a high school degree or its equivalent.
- (2) Be qualified by training and temperament to be effective in relating to parties in child support cases and in conducting hearings fairly and efficiently.
- (3) Be certified by the Administrative Office of the Courts as having completed the training required by subsection (b).
- (4) Establish that he has one of the following qualifications;
 - a. Election or appointment as the clerk of superior court; or
 - b. Three years experience as an assistant clerk of superior court working in child support or related matters; or
 - c. Six years experience as an assistant clerk of superior court; or
 - d. Four years experience as a magistrate whose duties have included, in substantial part, the disposition of civil matters; or
 - e. Pursuant to G.S. 7A-171.1, five to seven years eligibility for pay as a magistrate; or
 - f. Three years experience working in the field of child support enforcement or a related field.

(b) Training Required. — Before a clerk or assistant clerk or a magistrate may conduct hearings as a child support hearing officer he must satisfactorily complete a course of instruction in the conduct of such hearings established by the Administrative Office of the Courts. The Administrative Office of the Courts shall establish a course in the conduct of such hearings. The Administrative Office of the Courts may contract with qualified educational organizations to conduct the course of instruction and must reimburse the clerks or magistrates attending for travel and subsistence incurred in taking such training. (1985 (Reg. Sess., 1986), c. 993, s. 1.)

Chapter 50A.

Uniform Child Custody Jurisdiction Act.

§ 50A-2. Definitions.

CASE NOTES

Home State. — Findings held to sufficiently establish that North Carolina was the home state of child and to establish that child and at

least one parent had a significant connection with North Carolina. *Brewington v. Serrato*, 77 N.C. App. 726, 336 S.E.2d 444 (1985).

§ 50A-3. Jurisdiction.

CASE NOTES

Exercise of Jurisdiction Where Foreign Order Is Pending or Has Been Entered. — When a North Carolina court is considering jurisdiction in a custody proceeding, and a prior order is pending or has been entered by a court of another state, the North Carolina court may exercise jurisdiction if it determines (1) that the court of the other state no longer has jurisdiction and North Carolina has jurisdiction under one of the four alternatives listed in this section, or (2) the court of the other state did not exercise jurisdiction in substantial conformity with the UCCJA and North Carolina has jurisdiction pursuant to this section. *Brewington v. Serrato*, 77 N.C. App. 726, 336 S.E.2d 444 (1985).

Findings held to sufficiently establish that North Carolina was the home state of child and to establish that the child and at least one parent had a significant connection with North Carolina. *Brewington v. Serrato*, 77 N.C. App. 726, 336 S.E.2d 444 (1985).

Parental Rights Proceedings. — While a determination of jurisdiction over child custody matters will precede a determination of jurisdiction over parental rights, it does not supplant the parental rights proceedings; the language of § 7A-289.22(4) is that it shall not be "used to circumvent" Chapter 50A, not that it shall "be in conformity with" Chapter 50A. In *re Leonard*, 77 N.C. App. 439, 335 S.E.2d 73 (1985).

§ 50A-4. Notice and opportunity to be heard.

CASE NOTES

Cited in *Brewington v. Serrato*, 77 N.C. App. 726, 336 S.E.2d 444 (1985).

§ 50A-5. Service of notice.

CASE NOTES

Cited in *Brewington v. Serrato*, 77 N.C. App. 726, 336 S.E.2d 444 (1985).

§ 50A-7. Inconvenient forum.

CASE NOTES

Without a showing that the best interests of the child would be served if another state assumed jurisdiction, North Carolina courts should not defer jurisdiction pursuant to this section. *Kelly v. Kelly*, 77 N.C. App. 632, 335 S.E.2d 780 (1985).

Discretion of Trial Court. — Deferring jurisdiction on inconvenient forum grounds rests in the sound discretion of the trial court. *Kelly v. Kelly*, 77 N.C. App. 632, 335 S.E.2d 780 (1985).

§ 50A-9. Information under oath to be submitted to the court.

CASE NOTES

Purpose of Oath Requirement. — An obvious purpose of the requirement of this section that certain information be presented under oath is to enable the court to determine whether it should properly exercise jurisdiction, under the UCCJA, of a child custody dispute. *Brewington v. Serrato*, 77 N.C. App. 726, 336 S.E.2d 444 (1985).

Affidavit Not Prerequisite to Jurisdiction Obtained under § 7A-523. — Where the court obtained jurisdiction over a juvenile matter pursuant to § 7A-523, and not this Chapter, the affidavit referred to in this section was not a prerequisite to its jurisdiction. In re

Botsford, 75 N.C. App. 72, 330 S.E.2d 23 (1985).

Where Texas decree made no findings of fact to support its exercise of jurisdiction in determining custody of child, the North Carolina trial court correctly found and concluded that the Texas court had not assumed jurisdiction over the custody determination in substantial conformity with the UCCJA or upon a finding of factual circumstances meeting the jurisdictional requirements of this chapter. *Brewington v. Serrato*, 77 N.C. App. 726, 336 S.E.2d 444 (1985).

§ 50A-13. Recognition of out-of-state custody decrees.

CASE NOTES

Where the court of another state has not properly assumed jurisdiction, the courts of this state are not bound to recognize and en-

force the out-of-state judgment. *Brewington v. Serrato*, 77 N.C. App. 726, 336 S.E.2d 444 (1985).

§ 50A-15. Filing and enforcement of custody decree of another state.

CASE NOTES

Failure to Award Fees and Expenses Upheld. — Where the court determined that plaintiff had not violated Texas custody decree and that defendant was not entitled to its enforcement in North Carolina, there was no

abuse of discretion in the court's failure to award attorney's fees and travel expenses to plaintiff. *Brewington v. Serrato*, 77 N.C. App. 726, 336 S.E.2d 444 (1985).

Chapter 52.

Powers and Liabilities of Married Persons.

§ 52-4. Earnings and damages.

CASE NOTES

Recovery that a husband obtained for personal injuries that he sustained during the marriage and the property he bought with some of the proceeds were his "separate property," as the same is defined in § 50-20(b)(2). The obvious purpose of the Equitable Distribution Act is to require married persons to share

their maritally acquired property with each other, not to require either party to contribute his or her bodily health and powers, or the funds received for injuries thereto, to the assets for distribution. *Johnson v. Johnson*, 75 N.C. App. 659, 331 S.E.2d 211 (1985).

§ 52-10. Contracts between husband and wife generally; releases.

Legal Periodicals. —

For 1984 survey, "Property Settlement or Separation Agreement: Perpetuating the Confusion," see 63 N.C.L. Rev. 1166 (1985).

For 1984 survey, "Intestate Succession of Illegitimate Children in North Carolina," see 63 N.C.L. Rev. 1274 (1985).

CASE NOTES

Sections 52-10 and 52-10.1 were enacted without providing women any extra protection not offered to men; therefore, a separation agreement should be viewed today like any other bargained-for exchange between parties who are presumably on equal footing. *Knight v. Knight*, 76 N.C. App. 395, 333 S.E.2d 331 (1985).

Prior Agreement as Bar, etc. —

A separation agreement which contained no specific references to any real property, but only to personal property, held to have nevertheless fully disposed of the parties' property rights arising out of the marriage and thus to act as a bar to equitable distribution. *Hartman v. Hartman*, — N.C. App. —, 343 S.E.2d 11 (1986).

Agreement as Bar to Pension Rights. —

Separation agreement entered into on August 2, 1982, which contained no reference to defendant-husband's military pension, but specifically provided that each party was forever barred from any or all rights or claims not therein reserved which arose out of the marital relation and that each released and relinquished all claims or interest in and to all property of the other, whether then owned or subsequently acquired, barred an award to plaintiff-wife under the Equitable Distribution Act of a share in defendant-husband's military pension; the subsequent amendment of the act effective August 1, 1983, to include military pensions as marital property did not permit plaintiff-wife to avoid the release provisions of the agreement. *Morris v. Morris*, — N.C. App. —, 339 S.E.2d 424 (1986).

§ 52-10.1. Separation agreements.

Legal Periodicals. —

For 1984 survey, "Property Settlement or

Separation Agreement: Perpetuating the Confusion," see 63 N.C.L. Rev. 1166 (1985).

CASE NOTES

Sections 52-10 and 52-10.1 were enacted without providing women any extra protection not offered to men; therefore, a separation agreement should be viewed today like any other bargained-for exchange between parties who are presumably on equal footing. *Knight v. Knight*, 76 N.C. App. 395, 333 S.E.2d 331 (1985).

This section requires that a separation agreement be in writing and be acknowledged by both parties before a certifying officer, not a party to the contract, as defined by statute. *Greene v. Greene*, 77 N.C. App. 821, 336 S.E.2d 430 (1985).

Modification of Separation Agreement Must Be Pursuant to this Section. — In North Carolina, the modification of an original separation agreement must be made pursuant to the formalities and requirements of this section. *Greene v. Greene*, 77 N.C. App. 821, 336 S.E.2d 430 (1985).

An attempt to orally modify a separation agreement would fail to meet the formalities and requirements of this section. Therefore,

the findings of the trial court would not support, much less require, a conclusion that the parties modified their separation agreement when plaintiff told defendant, upon learning of his remarriage, that she was making him a wedding present of the payments under the agreement. *Greene v. Greene*, 77 N.C. App. 821, 336 S.E.2d 430 (1985).

Agreement Not Signed by Wife Was Invalid and Did Not Bar Equitable Distribution. — Having determined that a separation agreement was not valid and enforceable under North Carolina law because only the husband acknowledged the execution of the separation agreement before the certifying officer and further, that the parties intended North Carolina law to govern, although the agreement was executed in Maryland, the Court of Appeals of North Carolina held that the agreement was invalid and did not bar the wife's claim for equitable distribution under § 50-21. *Morton v. Morton*, 76 N.C. App. 295, 332 S.E.2d 736, cert. denied and appeal dismissed, 314 N.C. 667, 337 S.E.2d 582 (1985).

Chapter 52A.
Uniform Reciprocal Enforcement of Support
Act.

Sec.
52A-30.1. Income withholding.

§ 52A-10.1. Official to represent obligee; responding.

CASE NOTES

Service of Brief. — While under this section the Attorney General is the attorney of record for the petitioner obligee for purposes of appeal, the better practice would be for the ap-

pellant's brief to be served upon both the district attorney and the Attorney General. *Grimes v. Grimes*, 78 N.C. App. 208, 336 S.E.2d 664 (1985).

§ 52A-19. Rules of evidence.

CASE NOTES

Remand for Findings and Conclusions. — While plaintiff's allegations in her verified complaint established prima facie that the reasonable needs of the parties' children were in the amount of \$778.00 per month and that defendant had the relative ability to pay \$650.00

per month support for his children, it remained for the trial court to make the necessary findings of fact and conclusions of law, and the case would be remanded for this purpose. *Grimes v. Grimes*, 78 N.C. App. 208, 336 S.E.2d 664 (1985).

§ 52A-30.1. Income withholding.

Income withholding pursuant to G.S. 110-136.3 through 110-136.10 is available as a remedy to allow withholding from income derived in this State to enforce support orders from other states. (1985 (Reg. Sess., 1986), c. 949, s. 8.)

Editor's Note. — Section 10 of Session Laws 1985 (Reg. Sess., 1986), c. 949, makes this section effective October 1, 1986.
Section 9 of Session Laws 1985 (Reg. Sess.,

1986), c. 949, provides: "Nothing in this act shall be construed as affecting any garnishment proceeding heretofore or hereafter instituted."

Chapter 53.

Banks.

Article 2.

Creation.

Sec.

53-17.1. Supervisory acquisition of State association.

Article 15.

North Carolina Consumer Finance Act.

53-172. (Effective July 31, 1987) Conduct of other business in same office.

Article 17.

North Carolina Regional Reciprocal Banking Act.

Sec.

53-210. Definitions.

ARTICLE 2.

Creation.

§ 53-17.1. Supervisory acquisition of State association.

(a) A commercial bank may be chartered under the supervisory provisions provided in this section and may enter into and consummate the purchase and assumption transaction contemplated by subdivision (1) of this subsection if:

- (1) The commercial bank proposes to purchase all or substantially all of the book assets and to assume all or substantially all of the book liabilities of an eligible State association; and
- (2) The Commissioner of Banks approves such chartering and such purchase and assumption pursuant to subsection (c) of this section.

(b) A State association, as defined in G.S. 54B-4, is an eligible State association if it is insured by a mutual deposit guaranty association, as defined in Article 12, Chapter 54B of the General Statutes, which will provide financial assistance for a transaction authorized by this section, and if the Administrator, as defined in G.S. 54B-4, has found, pursuant to G.S. 54B-44, that such State association is unable to operate in a safe and sound manner.

(c) The Commissioner of Banks shall approve the chartering of a commercial bank, and the purchase and retention by such commercial bank of all or substantially all of the book assets and the assumption by such commercial bank of all or substantially all of the book liabilities, of an eligible State association, pursuant to this section if:

- (1) Such commercial bank satisfies the requirements of G.S. 53-4; and
- (2) The chartering and such purchase and assumption will promote the public interest.

(d) Notwithstanding any regulatory or statutory requirement or provision to the contrary, chartering of a commercial bank, the acquisition by such bank of the assets and assumption of the liabilities of an eligible State association and actions taken by the Commissioner of Banks pursuant to this section, are not subject to any notice or public hearing requirements, nor to the provisions of Chapter 150B of the General Statutes or any other administrative procedure requirements under Chapter 53 or Chapter 54B of the General Statutes, or otherwise, other than as stated in this section.

(e) Notwithstanding any other provision of the General Statutes of this

State, any bank holding company, as defined in G.S. 53-210(4), may acquire a commercial bank chartered pursuant to this section, and a bank holding company which has acquired, directly or indirectly, such a commercial bank may acquire a North Carolina bank or a North Carolina bank holding company, each as defined in G.S. 53-210, on the same terms and conditions, and subject to the same regulatory requirements, as a North Carolina bank or North Carolina bank holding company could acquire a North Carolina bank holding company or a North Carolina bank. A purpose of this section is to remove the limitation imposed by Section 3(d) of the Bank Holding Company Act of 1956, as amended (12 U.S.C. § 1842(d)) on bank holding company acquisitions only to the extent of the limited supervisory circumstances provided for herein.

(f) A bank holding company which acquires a commercial bank chartered pursuant to this section, and such commercial bank, shall be deemed to be a North Carolina bank holding company and a North Carolina bank, respectively, as defined in, and for all purposes of G.S. 53-210.

(g) Notwithstanding any regulatory or statutory requirement or provision to the contrary, a commercial bank chartered pursuant to this section shall, except as provided in this section, be a "bank" for all purposes of Chapter 53 of the General Statutes.

(h) A commercial bank that is chartered pursuant to this section shall not receive any deposits, or conduct any other transactions with the public, until it has purchased the assets and assumed the liabilities of an eligible State association as contemplated by this section, and has received the certificate of authority provided for in G.S. 53-8.

(i) No commercial bank may be chartered under this section, and no purchase and assumption may be consummated in reliance upon the authority provided in this section, after September 30, 1986. (1985 (Reg. Sess., 1986), c. 948, s. 1.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 948, s. 3 makes this section effective upon ratification. The act was ratified July 8, 1986.

ARTICLE 5.

Stockholders.

§ 53-42.1. Change in bank control or management.

CASE NOTES

Applied in *Citicorp v. Currie*, 75 N.C. App. 312, 330 S.E.2d 635 (1985).

ARTICLE 15.

*North Carolina Consumer Finance Act.***§ 53-172. (Effective July 31, 1987) Conduct of other business in same office.**

No licensee shall conduct the business of making loans under this Article within any office, suite, room, or place of business in which any other business is solicited or engaged in unless, in the opinion of the Commissioner, such other business would not be contrary to the best interests of the borrowing public and is authorized by the Commissioner in writing. The making of home loans as defined in G.S. 24-1.1A(e) shall not be authorized by the Commissioner.

If the conduct of any other business authorized by the Commissioner should, in the opinion of the Commissioner, prove contrary to the best interests of the borrowing public, the authority granted to conduct such business shall be withdrawn in writing by the Commissioner.

Installment paper dealers as defined in G.S. 105-83, and the collection by a licensee of loans legally made in North Carolina, or another state by another government regulated lender or lending agency, shall not be considered as being any other business within the meaning of this section. This section shall not be construed as authorizing the collection of any loans or charges in violation of the prohibitions contained in G.S. 53-190. The books, records, and accounts relating to loans shall be kept in such manner as the Commissioner of Banks prescribes as to delineate clearly the loan business from any other business authorized by the Commissioner.

Each affiliate operating in the same office or subsidiary operating in the same office of a licensee making home loans as defined in G.S. 24-1.1A(e), shall report to the Attorney General of North Carolina each quarter information concerning home loans as follows: number, rate of interest charged, principal amounts, terms, number of consumer loans refinanced by loans secured by real estate, and number of foreclosures.

The North Carolina Commissioner of Banks will approve the forms for reporting. If an affiliate operating in the same office or a subsidiary operating in the same office of a licensee fails to file the report within 30 days after the due date as required by the Attorney General, the Attorney General shall advise the North Carolina Commissioner of Banks who may revoke under G.S. 53-172 that affiliate's or subsidiary's authority to do business in the same office as the licensee. The Attorney General shall submit a report to the General Assembly no later than December 31, 1986, concerning the loans made pursuant to the authority granted under this Article. The report shall contain the information listed above, plus any recommendations of the Attorney General, if he has any recommendations. (1961, c. 1053, s. 1; 1967, c. 769, s. 1; 1971, c. 1212; 1981, c. 464, s. 2; 1985, c. 154, ss. 7-9.)

For this section as in effect until July 31, 1987, see the 1985 Cumulative Supplement.

Editor's Note. — Section 53-172, as amended effective July 31, 1987, is set out

above to correct an error in the first paragraph of the section as set out in the 1985 Cumulative Supplement.

ARTICLE 17.

North Carolina Regional Reciprocal Banking Act.

§ 53-210. Definitions.

Notwithstanding any other section of this Chapter, for the purposes of this Article:

- (13) "Regional bank holding company" means a bank holding company:
- That has its principal place of business in a state within the region other than North Carolina;
 - The regional bank and North Carolina bank subsidiaries of which hold more than eighty percent (80%) of the total deposits held by all of its bank subsidiaries, other than bank subsidiaries controlled by it in accordance with G.S 53-212 of this Article; and
 - That is not controlled by a bank holding company other than a regional bank holding company.
 - Repealed by Session Laws 1985 (Reg. Sess., 1986), c. 862, s. 3. (1983 (Reg. Sess., 1984), c. 1113, s. 1; 1985 (Reg. Sess., 1986), c. 862.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 1, 1986, added "and" at the end of paragraph (13)b, de-

leted "and" at the end of paragraph (13)c, and deleted paragraph (13)d, which read "That neither is controlled by nor is a foreign bank as defined in the International Banking Act of 1978 (12 U.S.C. 3101(7))."

ARTICLE 18.

Bank Holding Company Act of 1984.

§ 53-225. Title and scope.

CASE NOTES

Cited in Citicorp v. Currie, 75 N.C. App. 312, 330 S.E.2d 635 (1985).

§ 53-229. Acquisition and control of certain nonbank banking institutions.

CASE NOTES

Constitutionality. —

In accord with 1st paragraph in 1985 Cum. Supp. See Citicorp v. Currie, 75 N.C. App. 312, 330 S.E.2d 635, cert. denied and appeal dismissed, 314 N.C. 537, 538, 335 S.E.2d 15, 16 (1985).

In accord with 2nd paragraph in 1985 Cum. Supp. See Citicorp v. Currie, 75 N.C. App. 312, 330 S.E.2d 635, cert. denied and appeal dismissed, 314 N.C. 537, 538, 335 S.E.2d 15, 16 (1985).

This section is not an unconstitutional bill of pains and penalties, although it does not let the stockholders of an industrial bank do what they wanted to do. Citicorp v. Currie, 75 N.C. App. 312, 330 S.E.2d 635, cert. denied and appeal dismissed, 314 N.C. 537, 538, 335 S.E.2d 15, 16 (1985).

This section, as applied to the stockholders of a particular industrial bank, which contracted with a corporation for its acquisition, did not

violate the contract clause of the U.S. Constitution. It is not a violation of the contract clause for a state legislature to adopt a law in a field in which the legislature is authorized to legislate, although the law incidentally impairs the obligation of a pre-existing contract. *Citicorp v. Currie*, 75 N.C. App. 312, 330 S.E.2d 635, cert. denied and appeal dismissed, 314 N.C. 537, 538, 335 S.E.2d 15, 16 (1985).

This section is a law of general application. *Citicorp v. Currie*, 75 N.C. App. 312, 330 S.E.2d 635, cert. denied and appeal dismissed, 314 N.C. 537, 538, 335 S.E.2d 15, 16 (1985).

No Vested Right to Change Control of Industrial Bank. — The commissioner did not err in applying this section to an industrial bank acquisition, despite the fact that the contract and application for approval predated the effective date of this section. The parties involved could not have acquired a substantive or vested right to change the control of an industrial bank until they had received the commissioner's approval. *Citicorp v. Currie*, 75 N.C. App. 312, 330 S.E.2d 635, cert. denied and appeal dismissed, 314 N.C. 537, 538, 335 S.E.2d 15, 16 (1985).

§ 53-231. Appeal of commissioner's decision.

CASE NOTES

Cited in *Citicorp v. Currie*, 75 N.C. App. 312, 330 S.E.2d 635 (1985).

Chapter 53B.

Financial Privacy Act.

Sec.

- 53B-1. Short title.
- 53B-2. Definitions.
- 53B-3. Public policy.
- 53B-4. Access to financial records.
- 53B-5. Service on customer certification.
- 53B-6. Delayed notice.

Sec.

- 53B-7. Customer challenge.
- 53B-8. Disclosure of financial records.
- 53B-9. Duty of financial institutions; fee; limitation of liability.
- 53B-10. Penalty.

§ 53B-1. Short title.

This act may be cited as the North Carolina Financial Privacy Act. (1985 (Reg. Sess., 1986), c. 1002, s. 1.)

Editor's Note. — Section 2 of Session Laws 1985 (Reg. Sess., 1986), c. 1002, makes this Chapter effective October 1, 1986.

§ 53B-2. Definitions.

As used in this Chapter, unless the context otherwise requires, the term:

- (1) "Customer" means a person who has transacted business with a financial institution or has used the services offered by a financial institution.
- (2) "Financial institution" means a banking corporation, trust company, savings and loan association, credit union, or other entity principally engaged in the business of lending money or receiving or soliciting money on deposit.
- (3) "Financial record" means an original of, a copy of, or information derived from, a record held by a financial institution pertaining to a customer's relationship with the financial institution and identified with or identifiable with the customer.
- (4) "Government authority" means an agency or department of the State or of any of its political subdivisions, including any officer, employee, or agent thereof.
- (5) "Government inquiry" means a lawful investigation by a government agency or official proceeding inquiring into a violation of, or failure to comply with, any criminal or civil statute, law, or rule.
- (6) "Supervisory agency" means a State agency or department having the statutory authority to examine the financial condition or business operation of a financial institution. (1985 (Reg. Sess., 1986), c. 1002, s. 1.)

§ 53B-3. Public policy.

It is the policy of this State that financial records should be treated as confidential and that no financial institution may provide to any government authority and no government authority may have access to any financial records except in accordance with the provisions of this Chapter. (1985 (Reg. Sess., 1986), c. 1002, s. 1.)

§ 53B-4. Access to financial records.

Notwithstanding any other provision of law, no government authority may have access to a customer's financial record held by a financial institution unless the financial record is described with reasonable specificity and access is sought pursuant to:

- (1) Customer authorization that meets the requirements of the Right to Financial Privacy Act § 1104, 12 U.S.C. § 3404, provided, however, a customer authorization received by a State agency or a county department of social services for the purpose of determining eligibility for the programs of public assistance under Chapter 108A of the General Statutes, or for purposes of a government inquiry concerning these same programs of public assistance, cannot be revoked and shall remain valid for 12 months unless a shorter period is specified in the authorization, or a customer authorization that is given by a licensed attorney with respect to an account in which the attorney holds funds as a fiduciary;
- (2) Authorization under G.S. 105-251, 105-251.1, or 105-258;
- (3) Search warrant as provided in Article 11 of Chapter 15A of the General Statutes;
- (4) Statutory authority of a supervisory agency to examine or have access to financial records in the exercise of its supervisory, regulatory, or monetary functions with respect to a financial institution;
- (5) The authority granted under G.S. 116B-39;
- (6) Examination and review by the State Auditor or his authorized representative under G.S. 147-64.6(c)(9) or 147-64.7(a);
- (7) Request by a government authority authorized to buy and sell student loan notes under Article 23 of Chapter 116 of the General Statutes for financial records relating to insured student loans;
- (8) Pending litigation to which the government authority and the customer are parties;
- (9) Subpoena or court order in connection with a grand jury proceeding;
- (10) A writ of execution under Article 28 of Chapter 1 of the General Statutes; or
- (11) Other court order or administrative or judicial subpoena authorized by law if the requirements of G.S. 53B-5 are met.

As used in this section, the term "reasonable specificity" means that degree of specificity reasonable under all the circumstances, and may include designation by general type or class as authorized in G.S. 116B-39. (1985 (Reg. Sess., 1986), c. 1002, s. 1.)

§ 53B-5. Service on customer certification.

A government authority may have access to a customer's financial record pursuant to G.S. 53B-4(11) only if:

- (1) The court order or subpoena describes with reasonable specificity the financial record to which access is sought;
- (2) A copy of the court order or subpoena has been served on the customer pursuant to G.S. 1A-1, Rule 4 (J) of the N.C. Rules of Civil Procedure and the court order or subpoena states the name of the government authority seeking access to the financial record and the purpose for which access is sought;
- (3) The following notice has been served on the customer pursuant to G.S. 1A-1, Rule 4 (J) of the N.C. Rules of Civil Procedure together with the court order or subpoena:

"Records or information held by the financial institution named in the attached process are being sought by government authority in accordance with the North Carolina Financial Privacy Act. You may have rights under the act to challenge access to the records or information. You must, however, act within 10 days from the date this notice was served on you to make a challenge in court or the records or information will be made available. You may wish to employ an attorney to represent you and protect your rights.";

- (4) The customer has not challenged the court order or subpoena within 10 days after service;
- (5) The government authority has certified in writing to the financial institution that it has complied with the applicable provisions of this Chapter. (1985 (Reg. Sess., 1986), c. 1002, s. 1.)

§ 53B-6. Delayed notice.

Upon application of a government authority, a superior court judge may order that the customer notice required by G.S. 53B-5 be delayed if the court finds there is reason to believe that:

- (1) The financial record to which access is sought is relevant to a legitimate government inquiry; and
- (2) Notice to the customer will:
 - a. Endanger life or physical safety of any person;
 - b. Result in flight from prosecution;
 - c. Lead to intimidation of a witness;
 - d. Result in destruction of or tampering with evidence; or
 - e. Otherwise seriously jeopardize the government inquiry or an official proceeding or investigation.

A court order granting delay of notice to a customer under this section shall set out the specific facts supporting its findings, specify the period of delay, and direct that the government authority shall serve on the customer at the end of that period a copy of the court order or subpoena and a notice that the records have been furnished. (1985 (Reg. Sess., 1986), c. 1002, s. 1.)

§ 53B-7. Customer challenge.

(a) Within 10 days after service of a court order or subpoena under this Chapter a customer may apply to the superior court of the county in which he resides for an order quashing or modifying the court order or subpoena. The customer shall deliver or mail a copy of the application to the government authority and the financial institution named in the court order or subpoena. The superior court shall grant or deny the application within 10 days after it is filed.

(b) Nothing in this Chapter affects the right of a financial institution to challenge a request for financial records by a government authority under existing law. (1985 (Reg. Sess., 1986), c. 1002, s. 1.)

§ 53B-8. Disclosure of financial records.

No financial institution or its officer, employee, or agent may disclose a customer's financial record to a government authority except as provided in this Chapter. This section does not prohibit a financial institution from giving notice of or disclosing a financial record to a government authority, as defined in G.S. 53B-2(4), to the same extent as is authorized with respect to federal government authorities in the Right to Financial Privacy Act § 1103(d), 12 U.S.C. § 3403(d). Nothing in this Chapter shall prohibit a financial institution from notifying a government authority that it has information that may be relevant to a possible violation of law or regulation, or from disclosing to a government authority only the name, address, account number, and type of account of any customer. (1985 (Reg. Sess., 1986), c. 1002, s. 1.)

§ 53B-9. Duty of financial institutions; fee; limitation of liability.

(a) Upon service of a subpoena or court order pursuant to G.S. 53B-4(1), (3), (9), or (11) and receipt of certification pursuant to G.S. 53B-5(5), a financial institution shall locate the financial records requested and prepare to make them available to the government authority seeking access to them. Upon receipt of notice that a customer has challenged the court order or subpoena, the financial institution may suspend its efforts to make the records available until after final disposition of the challenge.

(b) Upon receipt of access to financial records pursuant to G.S. 53B-4(1), (3), (9), or (11), a government authority shall pay the financial institution that provided the financial records a fee for costs directly incurred in assembling and delivering the financial records. The fee shall be at the rate established pursuant to the Right to Financial Privacy Act § 1115(a), 12 U.S.C. § 3415, and 12 C.F.R. 219.

(c) A financial institution that discloses a financial record pursuant to this Chapter in good faith reliance upon certification by a government authority pursuant to G.S. 53B-5(5) is not liable for damages resulting from the disclosure. (1985 (Reg. Sess., 1986), c. 1002, s. 1.)

§ 53B-10. Penalty.

(a) Any financial institution disclosing financial records or information contained therein in violation of this Chapter shall be liable to the customer to whom the records relate in an amount equal to the sum of:

- (1) One thousand dollars (\$1,000);
- (2) Any actual damages sustained by the customer as a result of the disclosure; and
- (3) Such punitive damages as the court may allow, where the violation is found to have been willful or intentional.

(b) Any government authority that participates in or induces or solicits a violation of this Chapter shall be liable to the customer to whom the violation relates in the amount set out in subsection (a) above. It shall be a defense to an action under this subsection that the government authority acted in good faith in obtaining and relying upon process issued pursuant to G.S. 53B-4. (1985 (Reg. Sess., 1986), c. 1002, s. 1.)

Chapter 54.

Cooperative Organizations.

SUBCHAPTER III. CREDIT UNIONS.

ARTICLE 14D.

Membership.

§ 54-109.26. "Membership" defined.

CASE NOTES

Cited in Branch Bank & Trust Co. v. National Credit Union Admin. Bd., 786 F.2d 621 (4th Cir. 1986).

Chapter 54B.

Savings and Loan Associations.

Article 3. Fundamental Changes.

conversions, and combination
mergers and conversions.

Sec.

54B-44. Supervisory mergers, consolidations,

ARTICLE 3.

Fundamental Changes.

§ 54B-44. Supervisory mergers, consolidations, conversions, and combination mergers and conversions.

(a) Notwithstanding any other provision of this Chapter, in order to protect the public, including members, depositors and stockholders of a State association, the Administrator, upon making a finding that a State association is unable to operate in a safe and sound manner, may authorize or require a short form merger, consolidation, conversion, or combination merger and conversion of the State association, or any other transaction, as to which the finding is made.

(1981, c. 670, s. 2; 1981 (Reg. Sess., 1982), c. 1238, s. 11; 1985, c. 659, s. 18; 1985 (Reg. Sess., 1986), c. 948, s. 2.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, ef-

fective July 8, 1986, deleted the last sentence of subsection (a), which read "The resulting association may be a mutual association or a stock association."

ARTICLE 6.

Withdrawable Accounts.

§ 54B-130. Trust accounts.

CASE NOTES

A person who opened a savings account and signed a document indicating that she was the trustee, but who never created the discretionary revocable trust agreement on the reverse side, did not create a trust pursuant to

the terms of this section, although a common-law trust may have been created. *Shatley v. Southwestern Technical College*, 75 N.C. App. 343, 330 S.E.2d 827 (1985).

Chapter 55.

Business Corporation Act.

Article 4.

Powers and Management.

Sec.

55-19. Indemnification of directors, officers, employees or agents; general provisions.

55-20. Indemnification in actions by outsiders.

55-21. Indemnity for litigation expenses in corporate action.

Article 6.

Shareholders.

Sec.

55-61. Meetings of shareholders.

55-67. Voting of shares.

ARTICLE 1.

General Provisions.

§ 55-2. Definitions.

CASE NOTES

Applied in *State ex rel. Utilities Comm'n v. Nantahala Power & Light Co.*, 313 N.C. 614, 332 S.E.2d 397 (1985).

ARTICLE 3.

Formation, Name and Registered Office.

§ 55-18. Defense of ultra vires.

CASE NOTES

Quoted in *Atlas Fire Apparatus, Inc. v. Beaver*, 56 Bankr. 927 (Bankr. E.D.N.C. 1986).

ARTICLE 4.

Powers and Management.

§ 55-19. Indemnification of directors, officers, employees or agents; general provisions.

(a) In addition to the indemnification provided for in G.S. 55-20 and G.S. 55-21, a corporation may in its charter or bylaws or by contract or resolution indemnify or agree to indemnify any one or more of its officers, directors, employees, or agents against liability and litigation expense, including reasonable attorneys' fees, arising out of their status as such or their activities in any of the foregoing capacities; provided, however, that a corporation may not indemnify or agree to indemnify a person against liability or litigation ex-

pense he may incur on account of his activities which were at the time taken known or believed by him to be clearly in conflict with the best interests of the corporation. A corporation may likewise and to the same extent indemnify or agree to indemnify any person who, at the request of the corporation, is or was serving as a director, officer, employee, or agent of another corporation, partnership, joint venture, trust or other enterprise or as a trustee or administrator under an employee benefit plan. Any charter or bylaw provision, contract, or resolution permitted under this section may include provisions for recovery from the corporation of reasonable costs, expenses, and attorneys' fees in connection with the enforcement of rights to indemnification granted therein and may further include provisions establishing reasonable procedures for determining and enforcing the rights granted therein.

(b) The authorization, adoption, approval, or favorable recommendation by the board of directors of a corporation or any charter or bylaw provision or contract or resolution, as permitted in this section, shall not be deemed an act or corporate transaction in which a director has an adverse interest, and no such charter or bylaw provision or contract or resolution shall be void or voidable on such grounds. Except as permitted in G.S. 55-30, no such bylaw, contract, or resolution not adopted, authorized, approved, or ratified by shareholders shall be effective as to claims made or liabilities asserted against any director prior to its adoption, authorization, or approval by the board of directors.

(c) Anything in this section or in G.S. 55-20 or 55-21 to the contrary notwithstanding, a corporation shall have power to purchase and maintain insurance on behalf of any person who is or was a director, officer, employee or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise or as a trustee or administrator under an employee benefit plan against any liability asserted against him and incurred by him in any such capacity, or arising out of his status as such, whether or not the corporation would have the power to indemnify him against such liability.

(d) Expenses incurred by a director, officer, employee or agent in defending a civil or criminal action, suit or proceeding may be paid by the corporation in advance of the final disposition of such action, suit or proceeding as authorized by the board of directors in the specific case or as authorized or required under any charter or bylaw provision or by any applicable resolution or contract upon receipt of an undertaking by or on behalf of the director, officer, employee or agent to repay such amount unless it shall ultimately be determined that he is entitled to be indemnified by the corporation against such expenses. (1955, c. 1371, s. 1; 1969, c. 797, s. 1; 1973, c. 469, s. 5; 1985 (Reg. Sess., 1986), c. 1027, ss. 35-38.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1027, s. 57, contains a severability clause.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 16, 1986, rewrote subsection (a), rewrote subsection (b), inserted "or as a trustee or administra-

tor under an employee benefit plan" in subsection (c), and inserted "or as authorized or required under any charter or bylaw provision or by any applicable resolution or contract" and substituted "against such expenses" for "as authorized in this section or in G.S. 55-20 or 55-21" in subsection (d).

§ 55-20. Indemnification in actions by outsiders.

(a) When by reason of the fact that he is or was serving as director, officer, employee or agent of a corporation, or in any such capacity at the request of the corporation in any other corporation, partnership, joint venture, trust or other enterprise or at the request of the corporation as a trustee or administrator under an employee benefit plan, any person is or was a party or is threatened to be made a party to any threatened, pending or completed action, suit or proceedings, whether civil, criminal, administrative or investigative, not brought by the corporation nor brought by any party seeking derivatively to enforce a liability of such a person to the corporation, such person shall be entitled to indemnification or reimbursement by the corporation for any expenses, including attorneys' fees, or any liabilities which he may have incurred in consequence of such action, suit or proceeding, under the following conditions:

- (1) If such person is wholly successful in his defense, or if the proceeding is an administrative or investigative proceeding which does not result in the indictment, fine or penalty of such person, he shall be entitled to reimbursement from the corporation of all his reasonable expenses of defense or participation, including attorneys' fees.
- (2) Repealed by Session Laws 1985 (Reg. Sess., 1986), c. 1027, s. 39, effective July 16, 1986.
- (3) If such person is not wholly successful or is unsuccessful in his defense, or the proceeding to which he is a party results in his indictment, fine, or penalty, the corporation shall pay such expenses of defense or participation, including attorneys' fees, and the amount of any judgment, money decree, fine, penalty, or settlement for which he may have become liable, if:
 - a. A plan for such payment is approved by a consent in writing signed by the holders of all shares entitled to vote or such plan is sent to the holders of all shares entitled to vote, with notice of a shareholders' meeting, whether annual or special, to be held to take action thereon and if at such meeting a plan is approved by the holders of a majority of such shares, exclusive of the shares held directly or indirectly by any persons to be benefited by the plan if approved, or
 - b. A majority of a quorum consisting of directors who are not parties to such action, suit or proceeding shall determine that such person acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation, and, with respect to any criminal action or proceeding, had no reasonable cause to believe his conduct was unlawful, and the corporation shall, not later than 60 days before any such payment or agreement to pay is made, send to all shareholders of record on a record date not more than 10 days prior to the date of mailing, at their registered addresses, a statement specifying the persons to be paid, the amounts to be paid, and the nature and status of the suit or proceedings at the time of mailing, or
 - c. In a proceeding brought by such person for such determination in the superior court of the district where the corporation has its registered office it shall be determined that such person acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation, and, with respect to any criminal action or proceeding, had no reasonable cause to believe his conduct was unlawful. In such a proceeding, the court in its discretion may order notice thereof to be sent to the share-

holders of the corporation in such manner and in such form as it may deem appropriate, at the expense of the corporation; and it may allow all shareholders so notified to be heard in opposition to the determination requested.

(1955, c. 1371, s. 1; 1969, c. 797, s. 2; 1973, c. 469, s. 6; 1985 (Reg. Sess., 1986), c. 1027, s. 39.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1027, s. 57, contains a severability clause.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 16, 1986, inserted "or at the request of the corporation as a trustee or administrator under an em-

ployee benefit plan" in the introductory language of subsection (a), deleted "on the merits" following "in his defense" in subdivision (a)(1), deleted subdivision (a)(2), relating to payment of expenses of defense or participation where a person is wholly successful in his defense otherwise than solely on the merits, rewrote the introductory sentence of subdivision (a)(3), and added "or" at the end of subdivision (a)(3)b.

§ 55-21. Indemnity for litigation expenses in corporate action.

(c) Whenever indemnification or reimbursement as provided in this section is sought, the court may in its discretion order notice of the claim thereof to be sent to the shareholders in such manner and in such form as it may approve, at the expense of the corporation. All shareholders so notified may be heard in opposition to the relief requested. (1955, c. 1371, s. 1; 1969, c. 797, s. 3; 1985 (Reg. Sess., 1986), c. 1027, s. 40.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1027, s. 57, contains a severability clause.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 16, 1986, substituted "provided" for "permitted" in the first sentence of subsection (c).

CASE NOTES

Cited in *Dorton v. Dorton*, 77 N.C. App. 667, 336 S.E.2d 415 (1985).

§ 55-22. Loans and guaranties.

CASE NOTES

Quoted in *Atlas Fire Apparatus, Inc. v. Beaver*, 56 Bankr. 927 (Bankr. E.D.N.C. 1986).

§ 55-34. Officers.

CASE NOTES

Cited in *Pierce Concrete, Inc. v. Cannon Realty & Constr. Co.*, 77 N.C. App. 411, 335 S.E.2d 30 (1985); *Belfield v. Weyerhaeuser Co.*, 77 N.C. App. 332, 335 S.E.2d 44 (1985); *Dorton v. Dorton*, 77 N.C. App. 667, 336 S.E.2d 415 (1985).

§ 55-35. Duty of directors and officers to corporation.

CASE NOTES

The law will not permit corporate officer to create obligations in name of corporation, knowing acts are without authority and invalid, and then be permitted to use the corporate name as shield against the creditors. *Pierce Concrete, Inc. v. Cannon Realty & Constr. Co.*, 77 N.C. App. 411, 335 S.E.2d 30 (1985).

Officers Not to Incur Ordinary Business When Charter Suspended. — While corpo-

rate officers in North Carolina are not trustees, their fiduciary duty to the corporation is a high one; this includes a duty not to continue to incur ordinary business obligations on behalf of the corporation when they have knowledge that the corporation's charter has been suspended. *Pierce Concrete, Inc. v. Cannon Realty & Constr. Co.*, 77 N.C. App. 411, 335 S.E.2d 30 (1985).

§ 55-36. Execution of corporate instruments; authority and proof.

CASE NOTES

Cited in *Dorton v. Dorton*, 77 N.C. App. 667, 336 S.E.2d 415 (1985).

§ 55-37. Books and records.

CASE NOTES

Lack of accountability to other shareholders. — Generally, a lack of accountability to other shareholders would not, by itself, be sufficient grounds to pierce the corporate veil,

as this section and § 55-38 provide an adequate remedy at law to enforce accountability. *Dorton v. Dorton*, 77 N.C. App. 667, 336 S.E.2d 415 (1985).

§ 55-38. Examination and production of books, records and information.

CASE NOTES

Lack of accountability to other shareholders. — Generally, a lack of accountability to other shareholders would not, by itself, be sufficient grounds to pierce the corporate veil, as § 55-37 and this section provide an ade-

quate remedy at law to enforce accountability. *Dorton v. Dorton*, 77 N.C. App. 667, 336 S.E.2d 415 (1985).

Applied in *Lowder v. All Star Mills, Inc.*, 75 N.C. App. 233, 330 S.E.2d 649 (1985).

ARTICLE 5.

Corporate Finance.

§ 55-43. Subscriptions for shares.

CASE NOTES

Physician Held Not an Equitable Stockholder in Professional Association. — Assuming, arguendo, that professional association and physician entered into a binding post-incorporation subscription agreement, under the facts, where physician neither tendered payment within a reasonable time nor demonstrated circumstances excusing such tender, he was not an equitable stockholder in the professional association. *Buchele v. Pinehurst Surgical Clinic*, — N.C. App. —, 341 S.E.2d 772 (1986).

Section Held Inapplicable. — This section

did not apply in an action by a former husband against his former wife and her incorporated fast food restaurant franchise for a declaration that he was entitled to an ownership interest. This was not an action in which a defendant was trying to enforce a plaintiff's promise to take shares in a corporation, but an action in which the plaintiff attempted to enforce the defendant's promise or contract to issue shares to the plaintiff, the number of shares to represent a certain percentage of ownership within the corporation being formed. *Penley v. Penley*, 314 N.C. 1, 332 S.E.2d 51 (1985).

ARTICLE 6.

Shareholders.

§ 55-54. Liability of shareholders for receiving unlawful payments.

CASE NOTES

Quoted in Atlas Fire Apparatus, Inc. v. Beaver, 56 Bankr. 927 (Bankr. E.D.N.C. 1986).

§ 55-55. Shareholders' derivative actions.

Legal Periodicals. — For note, "The Non-profit Corporation in North Carolina: Recognizing a Right to Member Derivative Suits,"

see 63 N.C.L. Rev. 999 (1985).

CASE NOTES

This section sets forth two distinct standards for awarding attorney's fees to successful litigants and taxing unsuccessful litigants with their opponents' attorney's fees. Under subsection (b), the court may award attorney's fees to a successful litigant who obtains a compromise and settlement or judgment, while under subsection (e), the court may assess attorney's fees against an unsuccessful litigant in certain cases. *Lowder ex rel. Doby v. Doby*, — N.C. App. —, 340 S.E.2d 487 (1986).

Subsection (e) allows the trial court, in

its discretion, to charge plaintiffs with defendants' reasonable expenses, including attorney's fees, incurred in defense of the actions. *Lowder ex rel. Doby v. Doby*, — N.C. App. —, 340 S.E.2d 487 (1986).

Requirements for Award of Attorney's Fees under Subsection (e). — The award of reasonable attorney's fees under subsection (e) of this section is clearly permissive and within the trial judge's discretion, subject, however, to two requirements: (1) entry of final judgment and (2) a finding that the action was brought "without reasonable cause." *Lowder ex rel.*

Doby v. Doby, — N.C. App. —, 340 S.E.2d 487 (1986).

Plaintiffs' actions were brought without reasonable cause within the meaning of subsection (e) of this section where both the federal bankruptcy court and state receivership court had previously, either in Chapter X reorganization proceeding or receivership proceeding, dealt with the merits of the allegations made by plaintiffs in their five complaints, and the record was devoid of evidence to support any reasonable belief that there was a sound chance that plaintiffs' claims in the

litigation might be sustained. *Lowder ex rel. Doby*, — N.C. App. —, 340 S.E.2d 487 (1986).

Calculation of Fees and Expenses. — Where plaintiff filed five lawsuits involving substantially overlapping contentions of law and fact, four of which were virtually identical and were linked together for purposes of appeal, plaintiffs, who created the situation, could not complain that the fees and expenses apportioned by the trial court to each of these nominally separate proceedings were not calculated with precision. *Lowder ex rel. Doby v. Doby*, — N.C. App. —, 340 S.E.2d 487 (1986).

§ 55-61. Meetings of shareholders.

(c) Special meetings of the shareholders may be called by the president or the board of directors or such other officers or persons as may be provided in the charter or the bylaws or, at the written request of the holders of not less than one tenth of all the shares entitled to vote at the meeting, by any shareholder; provided, however, unless otherwise provided in the charter or bylaws, the call of a special meeting by shareholders is not available to the shareholders of a corporation whose shares of any class or series, when the stock transfer books are closed or at the record date fixed to determine the shareholders entitled to receive notice of and to vote at the meeting of shareholders, are listed on a national securities exchange or are held of record by more than 2,000 shareholders. When the meeting is thus called by a shareholder the call shall recite that it is made pursuant to the required request, but failure so to recite shall not invalidate an otherwise valid meeting.

(1901, c. 2, ss. 46, 49, 51; Rev., ss. 1179, 1188, 1190; C.S., ss. 1168, 1169, 1176; G.S., ss. 55-105, 55-106, 55-113; 1955, c. 1371, s. 1; 1959, c. 1316, ss. 21, 22; 1985 (Reg. Sess., 1986), c. 801, s. 44.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 (Reg.

Sess., 1986) amendment, effective October 1, 1986, added the proviso at the end of the first sentence of subsection (c).

§ 55-63. Irregular meetings; action without meetings.

CASE NOTES

Quoted in *Atlas Fire Apparatus, Inc. v. Beaver*, 56 Bankr. 927 (Bankr. E.D.N.C. 1986).

§ 55-67. Voting of shares.

(c) Except where some inconsistent agreement exists for choosing directors, valid under the provisions of G.S. 55-73, directors shall be elected by a plurality of the votes cast and at each election for directors every shareholder entitled to vote at such election shall have the right to vote, in person or by proxy, the number of shares standing of record in his name for as many persons as there are directors to be elected and for whose election he has a right to vote, or to cumulate his votes by giving one candidate as many votes as the number of such directors multiplied by the number of his shares shall equal, or by distributing such votes on the same principle among any number of such

candidates. Unless the charter provides otherwise, this right of cumulative voting shall not be available to shareholders of any corporation if, when the stock transfer books are closed or at the record date fixed to determine the shareholders entitled to receive notice of and to vote at the meeting called for the election of directors, the corporation has shares of any class or series entitled to be voted at such meeting listed on a national securities exchange or held of record by more than 2,000 shareholders. This right of cumulative voting shall not be exercised unless some shareholder or proxy holder announces in open meeting, before the voting for directors starts, his intention so to vote cumulatively; and if such announcement is made, the chair shall declare that all shares entitled to vote have the right to vote cumulatively and shall announce the number of shares present in person and by proxy, and shall thereupon grant a recess of not less than one hour nor more than four hours, as he shall determine, or of such other period of time as is unanimously then agreed upon. Stockholders in any corporation now in existence under a charter which does not grant the right of cumulative voting may not exercise this right of cumulative voting when at the time of the election the stock transfer book of such corporation discloses, or it otherwise appears, that there is no stockholder who owns or controls more than one fifth of the voting stock of such corporation. Shares represented at a meeting by revocable proxy relating to that meeting or adjourned meetings thereof shall not be deemed shares "controlled" within the meaning of this subsection. (Rev., ss. 1183, 1184; 1907, c. 457, s. 1; 1909, c. 827, s. 1; C.S., s. 1173; 1945, c. 635; G.S., s. 55-110; 1951, c. 265, s. 2; 1953, c. 722; 1955, c. 1371, s. 1; 1959, c. 768; c. 1316, s. 23; 1963, c. 1065; 1969, c. 751, ss. 34, 35; 1985, c. 419; 1985 (Reg. Sess., 1986), c. 801, s. 45.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.
Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective October 1, 1986, inserted the present second sentence of subsection (c).

§ 55-73. Shareholders' agreements.

CASE NOTES

I. GENERAL CONSIDERATION.

Cited in Penley v. Penley, 314 N.C. 1, 332 S.E.2d 51 (1985).

ARTICLE 9.

Dissolution and Liquidation.

§ 55-114. Dissolution and its effect.

CASE NOTES

Cited in Pierce Concrete, Inc. v. Cannon Realty & Constr. Co., 77 N.C. App. 411, 335 S.E.2d 30 (1985).

§ 55-125. Power of courts to liquidate and decree involuntary dissolution.

CASE NOTES

Discretion in Grant of Relief. —

The determination of relief, liquidation or otherwise, is within the superior court's equitable discretion. *Lowder v. All Star Mills, Inc.*, 75 N.C. App. 233, 330 S.E.2d 649, cert. denied, 314 N.C. 541, 335 S.E.2d 19 (1985).

For analysis a trial court is to apply, etc. —

The following is the analysis a superior court should employ in determining whether to order dissolution or other relief under subdivision (a)(4) of this section. The complaining shareholder must show that: (1) He had one or more substantial reasonable expectations known or assumed by the other participants; (2) the expectation has been frustrated; (3) the frustration was not the shareholder's fault and was in large part beyond his control; and (4) under all of the circumstances of the case, the shareholder is entitled to some form of equitable relief. *Lowder v. All Star Mills, Inc.*, 75 N.C. App. 233, 330 S.E.2d 649, cert. denied, 314 N.C. 541, 335 S.E.2d 19 (1985).

Order of Liquidation and Dissolution

Upheld. — It was reasonable for the court to conclude that the complaining shareholder, who began working for corporation in 1955 and worked continuously until he was abruptly fired in 1978, had a reasonable expectation that his employment would continue. Since the controlling officer-director misappropriated corporate opportunities, and since the majority of the stockholders aligned themselves with this officer-director, the court did not abuse its discretion in ordering liquidation and dissolution. *Lowder v. All Star Mills, Inc.*, 75 N.C. App. 233, 330 S.E.2d 649, cert. denied, 314 N.C. 541, 335 S.E.2d 19 (1985).

Cited in *John T. Council, Inc. v. Balfour Prods. Group, Inc.*, 74 N.C. App. 668, 330 S.E.2d 6 (1985); *John T. Council, Inc. v. Balfour Prods. Group, Inc.*, — N.C. App. —, 341 S.E.2d 74 (1986).

§ 55-125.1. Discretion of court to grant relief other than dissolution.

CASE NOTES

Discretion in Grant of Relief. —

The determination of relief, liquidation or otherwise, is within the superior court's equitable discretion. *Lowder v. All Star Mills, Inc.*,

75 N.C. App. 233, 330 S.E.2d 649, cert. denied, 314 N.C. 541, 335 S.E.2d 19 (1985).

Cited in *Dorton v. Dorton*, 77 N.C. App. 667, 336 S.E.2d 415 (1985).

§ 55-127. Procedure in liquidation of corporation by court.

CASE NOTES

Cited in *John T. Council, Inc. v. Balfour Prods. Group, Inc.*, 74 N.C. App. 668, 330 S.E.2d 6 (1985); *John T. Council, Inc. v.*

Balfour Prods. Group, Inc., — N.C. App. —, 341 S.E.2d 74 (1986).

ARTICLE 10.

*Foreign Corporations.***§ 55-141. Registered office and registered agent of foreign corporation.**

Legal Periodicals. — For civil procedure note, "North Carolina Adopts the Stream of Commerce Theory of Jurisdiction: A Step in

the Right Direction," see 20 Wake Forest L. Rev. 737 (1984).

§ 55-143. Suits against foreign corporations authorized to transact business in this State.

Legal Periodicals. —

For civil procedure note, "North Carolina Adopts the Stream of Commerce Theory of Ju-

risdiction: A Step in the Right Direction," see 20 Wake Forest L. Rev. 737 (1984).

§ 55-145. Jurisdiction over foreign corporations not transacting business in this State.

CASE NOTES

II. MINIMUM CONTACTS.

Requirements of Due Process. —

Whether the exercise of jurisdiction under subdivision (a)(1) of this section comports with due process hinges on whether the nonresident defendant had certain "minimum contacts" with North Carolina such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. These contacts cannot be the result of the "unilateral activity" of those who claim some relationship with the defendant; rather, it is essential that there be some act by which the defendant purposefully availed itself of the privilege of conducting activities within this State. *Unitrac, S.A. v. Southern Funding Corp.*, 75 N.C. App. 142, 330 S.E.2d 44 (1985).

Essential requirements of "minimum contacts," etc. —

In accord with 1st paragraph in main volume. See *Tom Togs, Inc. v. Ben Elias Indus. Corp.*, 76 N.C. App. 663, 334 S.E.2d 105 (1985), cert. granted, 315 N.C. 397, 338 S.E.2d 887 (1986).

The criteria for determining whether minimum contacts exist include: (1) The quantity of contacts, (2) the nature and quality of contacts, (3) the source and connection of the cause of action with those contacts, (4) the interests of the forum state and convenience, and (5) whether the defendant invoked benefits and protections of law of the forum state. *Hardin v.*

DLF Computer Co., 617 F. Supp. 70 (W.D.N.C. 1985).

Activity Held Not to Establish Minimum Contacts. —

Where the record revealed only that agent of defendant New Jersey corporation visited a showroom in New York, viewed samples, and completed a purchase order for a quantity of merchandise made by plaintiff North Carolina manufacturer based on those samples, defendant's personal labels to be used in the shirts, there were insufficient contacts between defendant and North Carolina to satisfy the constitutional requirements of due process. *Tom Togs, Inc. v. Ben Elias Indus. Corp.*, 76 N.C. App. 663, 334 S.E.2d 105 (1985), cert. granted, 315 N.C. 397, 338 S.E.2d 887 (1986).

III. CONTRACTS MADE OR PERFORMED IN STATE.

Contract Made or to Be Performed, etc. —

In accord with 1st paragraph in the main volume. See *Monroe Hdwe. Co. v. Robinson*, 621 F. Supp. 1166 (W.D.N.C. 1985).

Single Contract is Sufficient. —

In accord with 1st paragraph in the main volume. See *Hardin v. DLF Computer Co.*, 617 F. Supp. 70 (W.D.N.C. 1985); *Monroe Hdwe. Co. v. Robinson*, 621 F. Supp. 1166 (W.D.N.C. 1985).

Where the final act necessary to make

contract binding occurred outside North Carolina, and the contract was performed entirely outside this state, the contract's connection with North Carolina was not so "substantial" as to support the exercise of in perso-

nam jurisdiction by a North Carolina court consistent with subdivision (a)(1) of this section or the due process clause. *Unitrac, S.A. v. Southern Funding Corp.*, 75 N.C. App. 142, 330 S.E.2d 44 (1985).

§ 55-154. Transacting business without certificate of authority.

CASE NOTES

A nonqualifying corporation, against which an action is brought in this State, may bring a compulsory counterclaim in that action. *E & E Indus., Inc. v. Crown Textiles, Inc.*, — N.C. App. —, 342 S.E.2d 397 (1986).

By suing, in a forum of this State, a foreign corporation which has not obtained a certifi-

cate of authority before the commencement of the action, a North Carolina corporation effectively waives any protection this section affords it from compulsory counterclaims asserted by the party sued. *E & E Indus., Inc. v. Crown Textiles, Inc.*, — N.C. App. —, 342 S.E.2d 397 (1986).

Chapter 55A.

Nonprofit Corporation Act.

Article 1.

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Dissolution and Liquidation.

55A-44. Voluntary dissolution.

55A-53. Power of courts to liquidate and decree involuntary dissolution or to grant other relief.

55A-57.1. Voluntary surrender of corporate rights and franchises by incorporators.

ARTICLE 1.

General Provisions.

§ 55A-2. Definitions.

As used in this Chapter, unless the context otherwise requires, the term:

- (8) "Nonprofit corporation" means a corporation intended to have no income or intended to have income none of which is distributable to its members, directors, or officers, except as permitted by G.S. 55A-28, and includes all marketing associations without capital stock formed under Chapter 54 of the General Statutes or under any act or acts replaced thereby. (1955, c. 1230; 1959, c. 1161, s. 4; 1985 (Reg. Sess., 1986), c. 801, s. 1.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective October 1, 1986, inserted "except as permitted by G.S. 55A-28" in subdivision (8).

Legal Periodicals. — For note, "The Non-profit Corporation in North Carolina: Recognizing a Right to Member Derivative Suits," see 63 N.C.L. Rev. 999 (1985).

ARTICLE 2.

Execution and Filing of Certain Corporate Documents.

§ 55A-4. Execution of corporate documents for filing; filing, recording and effectiveness.

(a) Whenever the provisions of this Chapter require any document relating to a corporation to be executed and filed in accordance with this section, unless otherwise specifically stated in this Chapter:

- (1) There shall be an original executed document and also one conformed copy.
- (2) The said original document shall, if required to be executed by the corporation, be signed by the president or a vice-president and also by the secretary or an assistant secretary, with or without the corporate seal. If required to be executed by designated individuals each of them shall sign.
- (3) Except where the provisions of this Chapter specifically require acknowledgment, the said original document shall be verified by each of the individuals signing, whether in a representative capacity or otherwise, by a statement under oath, made before and certified by an official who is authorized under the laws of this State to take acknowledgments, declaring that he signed the said document, that the statements therein are true, and, in the case of an individual who signed in a representative capacity, declaring the capacity in which he signed and that he was authorized so to sign.
- (4) The conformed copy may either extend its conformation with the original document through all the verifications (or acknowledgments, as the case may be) or may in lieu of such extension contain the legend, after the name of the signers, substantially as follows:
"Original duly verified (acknowledged) by all signers."
- (5) The original document so signed and verified (or acknowledged, as the case may be), together with the conformed copy, shall be delivered to the Secretary of State. Unless he finds that it does not conform to law, the Secretary of State shall, when the proper taxes and fees have been tendered, endorse upon the original the word "filed" and the hour, day, month, and year of the filing thereof, and shall file the same in his office. The Secretary of State shall thereupon immediately compare the copy with the original and if he finds that they are identical he shall make upon the conformed copy the same endorsement which appears on the original and shall attach to the copy a certificate stating that attached thereto is a true copy of the document, designated by an appropriate title, filed in his office and showing the date of such filing. He shall thereupon return the copy so certified to the corporation or its representative.
- (6) The copy, certified as aforesaid, shall, within 60 days after the receipt by the corporation or its representative, be delivered to the register of deeds of the county wherein the corporation has its registered office,

and, when the proper fees shall have been tendered, it shall be recorded and properly indexed in a book to be known as the Record of Incorporations. Promptly after recordation, the register of deeds shall note the fact of recordation on the said copy and return it to the corporation or its representative.

(1955, c. 1230; 1967, c. 13, s. 2; c. 823, s. 21; 1985 (Reg. Sess., 1986), c. 801, s. 2.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective October 1,

1986, substituted "within 60 days after the receipt by the corporation or its representative, be delivered" for "be promptly delivered" near the beginning of the first sentence of subdivision (a)(6).

ARTICLE 3.

Formation, Name and Registered Office.

§ 55A-7. Articles of incorporation.

(a) The articles of incorporation shall set forth:

- (1) The name of the corporation.
- (2) The period of duration, which may be perpetual. When the articles fail to state the period of duration, it shall be considered perpetual.
- (3) The purpose or purposes for which the corporation is organized. It shall be sufficient to state, either alone or with other purposes, that the purpose for which the corporation is organized is to engage in any lawful act or activity for which corporations may be organized under this Chapter; and by such statement all lawful acts and activities for corporations organized under this Chapter shall be within the purposes of the corporation, subject to any express limitations.
- (4) If the corporation is to have no members, a statement to that effect.
- (5) If the corporation is to have one or more classes of members, any provision which the incorporators elect to set forth in the articles of incorporation designating the class or classes of members and stating the qualifications and rights of the members of each class.
- (6) If the directors or any of them are not to be elected or appointed by one or more classes of members, a statement of the manner in which such directors shall be elected or appointed, in which case provision may be made for their election by other designated associations, corporations or individuals or by any combination of the votes of such persons. In lieu thereof, the charter may provide that the method of election of directors be left to the bylaws.
- (7) Any provisions, not inconsistent with law, which the incorporators elect to set forth in the charter (including, if desired, provisions with respect to the relative rights or interests of the members as among themselves or in the property of the corporation, the manner of termination of membership in the corporation, the rights, upon such termination, of the corporation, the terminated member and the remaining members, the transferability or nontransferability of memberships, and the distribution of assets on liquidation or for subordinating and subjecting the corporation to the authority of any head or national association, lodge, order, beneficial association, fraternal or beneficial society, foundation, federation or other nonprofit corporation, society, organization or association).

- (8) The address, including county and city or town, and street and number, if any, of its initial registered office, which shall be in this State, and the name of its initial registered agent at such address.
 - (9) The number of persons constituting the initial board of directors, by whatever name called, and the names and addresses, including street and number, if any, of the persons who are to serve as the initial board.
 - (10) The name and address, including street and number, if any, of each incorporator.
- (1955, c. 1230; 1957, c. 979, s. 11; 1959, c. 1161, s. 5; 1985 (Reg. Sess., 1986), c. 801, ss. 3, 4.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

1985 (Reg. Sess., 1986) amendment, effective October 1, 1986, added the second sentence of subdivision (a)(2) and the second sentence of subdivision (a)(3).

Effect of Amendments. — The 1985 (Reg.

(a)(3).

§ 55A-8.1. Exercise of corporate franchises not granted.

The Attorney General may upon his own information or upon complaint of a private party bring an action in the name of the State to restrain any person from exercising corporate franchises not granted. (1985 (Reg. Sess., 1986), c. 801, s. 5.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 801, s. 46 makes this section effective October 1, 1986.

§ 55A-9. Organization meeting of directors.

After the filing of the articles of incorporation in the office of the Secretary of State an organization meeting of the board of directors named in the articles of incorporation shall be held, either within or without this State, at the call of a majority of the directors, for the purpose of adopting bylaws, electing officers and the transaction of such other business as may come before the meeting. The directors calling the meeting shall give at least three days notice thereof by mail to each director so named, which notice shall state the time and place of the meeting, unless notice is waived as hereinafter provided. Any action permitted to be taken at the organizational meeting may be taken without a meeting of the board of directors and shall be deemed board action if it complies with the requirements of G.S. 55A-33.1. (1955, c. 1230; 1969, c. 875, s. 2; 1985 (Reg. Sess., 1986), c. 801, s. 6.)

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective October 1, 1986, substituted a reference to § 55A-33.1 for

a reference to § 55A-86 at the end of the section.

§ 55A-10. Corporate name.

(j) The issuance of a corporate charter to any domestic corporation shall not authorize the use in this State of the corporate name in violation of the rights of any third party under the Federal Trademark Act, the Trademark Act of this State, or the common law; and the issuance of such charter shall not be a defense to an action for violation of any such rights. (1955, c. 1230; 1969, c. 875, s. 3; 1985 (Reg. Sess., 1986), c. 801, s. 7.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective October 1, 1986, added subsection (j).

ARTICLE 4.

Powers and Management.

§ 55A-15. General powers.

(a) Every corporation shall have power:

- (1) To have perpetual succession by its corporate name unless a limited period of duration is stated in its charter.
- (2) To sue and be sued, complain and defend, in its corporate name.
- (3) To have a corporate seal which may be altered at pleasure, and to use the same by causing it, or a facsimile thereof, to be impressed or affixed or in any other manner reproduced.
- (4) To elect or appoint officers and agents of the corporation, and define their duties and fix their compensation.
- (5) To make and alter bylaws, not inconsistent with its charter or with the laws of this State, for the administration and regulation of the affairs of the corporation.
- (6) Repealed by Session Laws 1985 (Reg. Sess., 1986), c. 801, s. 8, effective October 1, 1986.
- (7) To lend money to its employees and otherwise to assist its employees, officers, and directors, subject to the provisions of C.S. 55A-18.
- (8) To provide for indemnification in accordance with the provisions of G.S. 55A-17.1, G.S. 55A-17.2 and G.S. 55A-17.3.
- (9) To cease its corporate activities and surrender its corporate franchise.
- (10) Repealed by Session Laws 1985 (Reg. Sess., 1986), c. 801, s. 11, effective October 1, 1986.
- (11) To pay pensions and establish pension plans, pension trusts, bonus plans and other incentive plans for its officers, directors and employees.

(b) In connection with carrying out the purposes stated in its charter, and subject to any limitation prescribed by this Chapter or in its charter, every corporation shall also have power:

- (1) To purchase, take, receive, lease, take by gift, devise or bequest, or otherwise acquire, own, hold, improve, use and otherwise deal in and with, real or personal property, or any interest therein, wherever situated.
- (2) To sell, convey, mortgage, pledge, lease, exchange, transfer and otherwise dispose of all or any part of its property and assets.
- (3) To acquire, by purchase, subscription, gift, will or otherwise, and to own, hold, vote, use, employ, sell, mortgage, lend, pledge, or otherwise dispose of, and otherwise use and deal in and with, shares or

other interests in, or obligations of, domestic or foreign business corporations, associations, partnerships or individuals, or direct or indirect obligations of the United States or of any government, state, territory, governmental district or municipality or of any instrumentality thereof.

- (4) To make contracts and incur liabilities, borrow money, issue its notes, bonds, and other obligations, and secure any of its obligations by mortgage or pledge of or other form of security upon all or any of its property, franchises and income.
 - (5) To procure for its benefit insurance on the life or physical or mental ability of any employee, including any officer, or, in case of a religious, educational, or charitable corporation, any sponsor, contributor, student or former student, whose death or disability might cause financial loss to the corporation, and to this end the corporation has an insurable interest in the lives of each of such persons.
 - (6) To lend money for its corporate purposes, invest its funds from time to time, and take and hold real and personal property as security for the payment of funds so loaned or invested.
 - (7) To conduct its affairs, carry on its operations, and have offices and exercise the powers granted by this Chapter anywhere in the world.
 - (7a) To enter into any arrangement with others for the sharing of benefits or union of interests with respect to any transaction, operation or venture which the corporation has power to conduct by itself, even if such arrangement involves sharing or delegation of control of such transaction, operation or venture with or to others.
 - (8) To have and exercise all powers necessary or convenient to effect any or all of the purposes for which the corporation is organized.
 - (9) To make contributions or gifts to corporations (foreign or domestic), trusts, community chests, funds, foundations, or associations organized and operated exclusively for religious, charitable, literary, scientific, or educational, cultural or artistic purposes, or for public welfare, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any member or individual, when such contributions or gifts are authorized or approved by its boards of directors.
 - (10) To enter into contracts of guaranty or suretyship or to make other financial arrangements for the benefit of any person, firm or corporation.
 - (11) To enter into any arrangement with others for the sharing of benefits or union of interests with respect to any transaction, operation or venture which the corporation has power to conduct by itself, even if such arrangement involves sharing or delegation of control of such transaction, operation or venture with or to others.
- (1955, c. 1230; 1957, c. 783, s. 7; 1969, c. 875, s. 4; 1971, c. 1136, s. 1; 1977, c. 236, s. 1; c. 663; 1979, c. 1027; 1985, c. 505; 1985 (Reg. Sess., 1986), c. 801, ss. 8-14.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective October 1, 1986, in subsection (a) deleted subdivision (6), relating to making donations, rewrote subdivisions (7) and (8), deleted

subdivision (10), relating to the purchase of liability insurance incident to the operation of a public hospital, and added subdivision (11); and in subsection (b) inserted "or other form of security upon" preceding "all or any of its property" in subdivision (4) and added subdivisions (9) through (11).

§ 55A-17.1. Indemnification of directors, officers, employees or agents; general provisions.

(a) Subject to any restrictions in its charter, a corporation may provide, by bylaw, agreement, vote of board of directors or members, or otherwise, for indemnification of any director or officer or former director or officer of the corporation or any person who may have served at its request as a director or officer of another corporation, partnership, joint venture, trust or other enterprise against liabilities and reasonable litigation expenses, including attorneys' fees, incurred by him in connection with any action, suit or proceeding in which he is made or threatened to be made a party by reason of being or having been such director or officer, except in relation to matters as to which he shall be adjudged in such action, suit or proceeding to have acted in bad faith or to have been liable or guilty by reason of willful misconduct in the performance of duty. The indemnification authorized by this statute shall be in addition to that permitted by G.S. 55A-17.2 and 55A-17.3.

(d) Expenses incurred by a director, officer, employee or agent in defending a civil or criminal action, suit or proceeding may be paid by the corporation in advance of the final disposition of such action, suit or proceeding as authorized by the board of directors in the specific case upon receipt of an undertaking by or on behalf of the director, officer, employee or agent to repay such amount unless it shall be ultimately determined that he is entitled to be indemnified by the corporation as authorized in G.S. 55A-17.2 or 55A-17.3 or as authorized in any bylaw, agreement, vote of board of directors or members, or other arrangement permitted by this section. (1977, c. 236, s. 2; 1985 (Reg. Sess., 1986), c. 801, ss. 15, 16.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective October 1, 1986, rewrote subsection (a) and substituted "G.S. 55A-17.2 or 55A-17.3 or as authorized in any bylaw, agreement, vote of board of directors or members, or other arrangement permit-

ted by this section" for "this section, or in G.S. 55A-17.2 or 55A-17.3, or by any bylaw, agreement, vote of board of directors or members, or otherwise" at the end of subsection (d).

Legal Periodicals. —

For note, "The Nonprofit Corporation in North Carolina: Recognizing a Right to Member Derivative Suits," see 63 N.C.L. Rev. 999 (1985).

§ 55A-17.3. Indemnity for litigation expenses in corporate action.

Legal Periodicals. — For note, "The Nonprofit Corporation in North Carolina: Recogn-

nizing a Right to Member Derivative Suits," see 63 N.C.L. Rev. 999 (1985).

§ 55A-18. Loans and guaranties.

No loan, guaranty or other form of security shall be made or provided by a corporation to or for the benefit of its directors or officers, except that loans, guaranties or other forms of security may be made to full-time employees of the corporation who are also directors or officers by action of its board of directors in accordance with G.S. 55A-24.2(b)(1). (1955, c. 1230; 1985 (Reg. Sess., 1986), c. 801, s. 17.)

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective October 1, 1986, rewrote this section.

§ 55A-19. Board of directors.

(a) Subject to the provisions of the charter, the bylaws or agreements between the members otherwise lawful, the business and affairs of a corporation shall be managed by a board of directors.

(b) No limitation upon the authority which the directors would have in the absence of such limitation, whether contained in the charter or the bylaws or otherwise, shall be effective against other persons without actual knowledge of such limitation.

(c) The directors need not be residents of this State or members of the corporation unless the charter or the bylaws so require. The charter or the bylaws may prescribe other qualifications for directors. (1955, c. 1230; 1985 (Reg. Sess., 1986), c. 801, s. 18.)

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective October 1, 1986, rewrote this section.

§ 55A-20. Number, election and term of directors.

(c) The first board of directors shall consist of those named in the articles of incorporation. Thereafter, directors shall be elected or appointed or designated ex officio in the manner and for the terms provided in the charter or bylaws. Directors to be elected by members shall be elected by the members entitled to vote at the first meeting of the members held for that purpose and at each subsequent annual meeting of the members. Such election may be by mail if the bylaws so provide. Each director shall hold office for the term for which he is elected or appointed and until his successor shall have been elected or appointed and qualified.

(d) Directors may be divided into classes and the terms of office of the several classes need not be uniform.

(e) If any member so demands, election of directors by the members shall be by ballot, unless the charter or the bylaws otherwise provide.

(1955, c. 1230; 1973, c. 192, ss. 1, 2; 1985 (Reg. Sess., 1986), c. 801, ss. 19-21.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective October 1, 1986, rewrote subsection (c), deleted the second sentence of subsection (d), which read "Each director shall hold office for the term for which he is elected or appointed and until his succe-

sor shall have been elected or appointed and qualified", and in subsection (e) inserted "If any member so demands" at the beginning thereof and inserted a comma following "shall be by ballot."

Legal Periodicals. — For note, "The Non-profit Corporation in North Carolina: Recognizing a Right to Member Derivative Suits," see 63 N.C.L. Rev. 999 (1985).

§ 55A-23. Committees.

(a) Unless otherwise provided in the charter or bylaws, the board of directors, by resolution adopted by a majority of the number of directors then in office may designate one or more committees each of which shall consist of two or more directors, which committees, to the extent provided in such resolution, in the charter or in the bylaws of the corporation, shall have and exercise the authority of the board of directors in the management of the corporation, except that no such committee shall have authority as to the following matters:

- (1) The dissolution, merger or consolidation of the corporation; the amendment of the charter of the corporation; or the sale, lease or exchange of all or substantially all of the property of the corporation.
- (2) The designation of any such committee or the filling of vacancies in the board of directors or in any such committee.
- (3) The amendment or repeal of the bylaws, or the adoption of new bylaws.
- (4) The amendment or repeal of any resolution of the board which by its terms shall not be so amendable or repealable.
- (5) The fixing of compensation of the directors for serving on the board or on any such committee.

(c) Any committee, or any member thereof may be discharged or removed by action of a majority of the board of directors pursuant to the provisions of G.S. 55A-22 or 55A-33.1. The designation of any committee and the delegation thereto of authority shall not operate to relieve the board of directors or any member thereof, of any responsibility or liability imposed upon it or him by law; and any resolutions adopted or other action taken by any such committee within the scope of the authority delegated to it by the board of directors shall be deemed for all purposes to be adopted or taken by the board of directors. (1955, c. 1230; 1969, c. 875, s. 5; 1985 (Reg. Sess., 1986), c. 801, ss. 22, 23.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective October 1,

1986, added subdivision (a)(5) and in subsection (c) substituted "55A-33.1" for "55A-86" at the end of the first sentence and added the language beginning "and any resolutions adopted" at the end of the second sentence.

§ 55A-24. Place and notice of directors' meetings.

(c) Regular meetings of the board of directors may be held with or without notice, as prescribed in the bylaws. Special meetings of the board of directors shall be held upon such notice as is provided in the bylaws, or in the absence of any such provision, upon notice sent by any usual means of communication not less than five days before the meeting. Attendance of a director at any meeting shall constitute a waiver of notice of such meeting, except where a director attends a meeting for the express purpose of objecting to the transaction of any business because the meeting is not lawfully called or convened. Neither the business to be transacted at, nor the purpose of, any regular or special meeting of the board of directors need be specified in the notice or waiver of notice of such meeting unless required by the bylaws. Notice of an adjourned meeting need not be given if the time and place are fixed at the meeting adjourning and if the period of adjournment does not exceed 10 days in any one adjournment.

(d) Repealed by Session Laws 1985 (Reg. Sess., 1986), c. 801, s. 25, effective October 1, 1986. (1955, c. 1230; 1985 (Reg. Sess., 1986), c. 801, ss. 24, 25.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective October 1,

1986, rewrote subsection (c) and deleted subsection (d), relating to specifications in the notice or written waiver of notice of a meeting or the purpose thereof.

§ 55A-24.2. Director's adverse interest.

(a) A corporation may, by action of its board of directors or otherwise, compensate its directors for their services as directors, salaried officers or otherwise.

(b) No corporate transaction in which a director has an adverse interest is either void or voidable by virtue of the adverse interest, if:

- (1) With knowledge on the part of the other directors of such adverse interest, the transaction is approved in good faith by a majority, not less than two, of the disinterested directors present even though less than a quorum, irrespective of the participation of the adversely interested director in the approval, or if
- (2) In the case of a corporation with members, after full disclosure of all the material facts to all the members, the transaction is specifically approved by a vote of the majority of the votes entitled to be cast by the members other than votes entitled to be cast by the adversely interested directors or by members controlled by the adversely interested directors, or if
- (3) The adversely interested party proves that the transaction was just and reasonable to the corporation at the time when entered into or approved. In the case of compensation paid or voted for services of a director as director or as officer or employee the standard of what is "just and reasonable" is what would be paid for such services at arm's length under competitive conditions. (1985 (Reg. Sess., 1986), c. 801, s. 26.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 801, s. 46 makes this section effective October 1, 1986.

§ 55A-24.3. Jurisdiction over and service on nonresident director.

(a) Every nonresident of this State who shall become a director of a domestic corporation shall by becoming such director be subjected to the jurisdiction of the courts of this State in all actions or proceedings brought therein by, or on behalf of, or against said corporation in which said director is a necessary or proper party, or in any action or proceeding by members or creditors against said director for violation of his duty as director. Every nonresident who is a director of a domestic corporation as of October 1, 1986 shall be likewise so subject to the jurisdiction of the courts of this State unless he shall, on or before January 1, 1987, resign his office and file in the office of the Secretary of State a notice of such resignation.

(b) Every nonresident by serving as a director of a domestic corporation at any time after January 1, 1987, shall be subject to the jurisdiction of the

courts of this State in any action or proceeding for violation of his duty while in office.

(c) Every resident in this State who shall become a director of a domestic corporation and thereafter removes his residence from this State shall be subject to the jurisdiction of the courts of this State in all actions or proceedings brought therein by, or on behalf of, or against said corporation in which said director is a necessary or proper party, or in any action or proceeding by members or creditors against said director for violation of his duty as a director.

(d) In all actions or proceedings wherein a director or former director is made a party and cannot with due diligence be found within the State, service of process, notice or demand on said director or former director shall be made by mailing or otherwise delivering duplicate copies thereof to the Secretary of State, who shall be deemed to have been constituted the process agent of such director or former director by the act of such director in becoming a director or continuing as director after January 1, 1987. When such copies are to be delivered to the Secretary of State the procedure to be followed shall be, as against such director or former director, substantially the same as that set forth in G.S. 55A-68 relating to service on foreign corporations by serving the Secretary of State, and service made pursuant to such procedure shall have the same legal force and validity as if the service had been made personally in this State. (1985 (Reg. Sess., 1986), c. 801, s. 27.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 801, s. 46 makes this section effective October 1, 1986.

§ 55A-25. Officers.

(a) Every corporation organized under this Chapter shall have such officers with such titles and duties as shall be stated in the bylaws and as may be necessary to enable it to sign instruments and to conduct its business in compliance with this Chapter. Any number of offices may be held by the same person and any one office may be held collectively by one or more persons unless the charter or bylaws otherwise provide, but no officer may act in more than one capacity where action of two or more officers is required. Whenever a specific office is referred to in this Chapter, it shall be deemed to include any person who, individually or collectively with one or more persons, holds or occupies such office.

(b) All officers and agents of the corporation, as between themselves and the corporation, shall have such authority and perform such duties in the management of the corporation as may be provided either specifically or generally in the bylaws, or as may be determined by action of the board of directors not inconsistent with the bylaws.

(c) The chief executive officer has authority to institute or defend legal proceedings when the directors are deadlocked. (1955, c. 1230; 1985 (Reg. Sess., 1986), c. 801, s. 28.)

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective October 1, 1986, rewrote this section.

§ 55A-26.1. Duty of directors and officers to corporation.

Officers and directors shall be deemed to stand in a fiduciary relation to the corporation and to its members, if any, and shall discharge the duties of their respective positions in good faith, and with that diligence and care which ordinarily prudent men would exercise under similar circumstances in like positions. (1985 (Reg. Sess., 1986), c. 801, s. 29.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 801, s. 46 makes this section effective October 1, 1986.

§ 55A-26.2. Execution of corporate instruments; authority and proof.

(a) Notwithstanding anything to the contrary in the charter or bylaws, any deed, mortgage, contract, note, evidence of indebtedness, proxy, or other instrument in writing, or any assignment or endorsement thereof, whether heretofore or hereafter executed, when signed in the ordinary course of business on behalf of a corporation by its president, a vice-president or an assistant vice-president and attested or countersigned by its secretary or an assistant secretary, not acting in dual capacity, shall with respect to the rights of innocent third parties, be as valid as if executed pursuant to authorization from the board of directors, unless the instrument reveals on its face a potential breach of fiduciary obligation. The foregoing shall not apply to parties who had actual knowledge of lack of authority or of a breach of fiduciary obligation or to the execution of corporate securities which are required, by corporate regulations or resolutions formally adopted, to be signed or countersigned by a transfer agent or registrar who has agreed to act in that capacity.

(b) Any instrument purporting to create a security interest in personal property of a corporation, is sufficiently executed on behalf of the corporation if heretofore or hereafter signed in his official capacity by the president, a vice-president, an assistant vice-president, the secretary, an assistant secretary, the treasurer, or an assistant treasurer. Any instrument so executed shall, with respect to the rights of innocent holders, be as valid as if authorized by the board of directors and upon acknowledgment may be ordered to registration as provided by law.

(c) Deeds, mortgages, contracts, notes, evidences of indebtedness and other instruments purporting to be executed, heretofore or hereafter, by a corporation, foreign or domestic, and bearing a seal which purports to be the corporate seal, setting forth the name of the corporation engraved, lithographed, printed, stamped, impressed upon, or otherwise affixed to the instrument, are prima facie evidence that the seal is the duly adopted corporate seal of the corporation, that it has been affixed as such by a person duly authorized so to do, that such instrument was duly executed and signed by persons who were officers or agents of the corporation acting by authority duly given by the board of directors, that any such instrument is the act of the corporation, and shall be admissible in evidence without further proof of execution.

(d) The provisions of the foregoing subsections of this section shall apply to all instruments therein mentioned executed on behalf of foreign corporations when their authorization, admissibility in evidence or legal effect is challenged in any action or other proceeding in this State.

(e) Nothing in this section shall be deemed to exclude the power of any corporate representatives to bind the corporation pursuant to express, implied or apparent authority, ratification, estoppel or otherwise.

(f) Nothing in this section shall relieve corporate officers from liability to the corporation or from any other liability that they may have incurred from any violation of their actual authority. (1985 (Reg. Sess., 1986), c. 801, s. 30.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 801, s. 46 makes this section effective October 1, 1986.

§ 55A-27. Books and records.

Each corporation shall keep correct and complete books and records of account and shall keep minutes of the proceedings of its members, board of directors, and committees having any of the authority of the board of directors. It shall keep at its registered office or principal office in this State a record of the names and addresses of its members entitled to vote and make keep all other books, records, and minutes without this State. All books and records of a corporation may be inspected and copied by any member, or his agent or attorney, for any proper purpose at any reasonable time. (1955, c. 1230; 1985 (Reg. Sess., 1986), c. 801, s. 31.)

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective October 1, 1986, inserted "and copied" in the last sentence.

Legal Periodicals. — For note, "The Non-profit Corporation in North Carolina: Recognizing a Right to Member Derivative Suits," see 63 N.C.L. Rev. 999 (1985).

§ 55A-28. Shares of stock and certain distributions of assets prohibited.

(a) A corporation shall neither authorize nor issue shares of stock.

(b) No distribution of assets of a corporation shall be made to its members, directors or officers except as provided in subsection (c) or (d) of this section.

(c) A corporation may pay reasonable amounts to its members, directors or officers for services rendered or other value received, may confer benefits upon its members in conformity with its purposes, and may make distributions upon dissolution or final liquidation as permitted by this Chapter.

(d) Subject to the provisions of subsection (e), a corporation may make distributions to any organization that: (i) is a corporation organized under this Chapter or (ii) qualifies as an exempt organization (foreign or domestic) under Section 501(c) (3) of the Internal Revenue Code of 1954 or corresponding provisions of any subsequent federal tax laws.

(e) A corporation shall not make distributions to members under subsection (d) of this section if at the time of or as a result of such distribution:

- (1) There is reasonable ground for believing that the corporation would be unable to meet its obligations as they become due in the ordinary course of business, or
- (2) The liabilities of the corporation would exceed the fair present value of its assets. (1955, c. 1230; 1985 (Reg. Sess., 1986), c. 801, s. 32.)

Effect of Amendments. — The 1985 (Reg. Sess., 1986), amendment, effective October 1, 1986, rewrote this section.

§ 55A-28.1. Liability of directors in certain cases.

(a) The liabilities imposed by this section are in addition to any other liabilities imposed by law upon directors of a corporation.

(b) Directors of a corporation who vote for or assent to any distribution of the assets of a corporation contrary to the provisions of this Chapter or contrary to any lawful restrictions contained in the charter or bylaws shall be jointly and severally liable to the corporation for the amount of such distribution.

(c) The liability of directors for violation of subsection (b) of this section shall not exceed the debts, obligations and liabilities existing at the time of the violation which are not thereafter paid and discharged, plus any loss sustained from the violation by members at the time of the violation other than the members receiving the payment in question.

(d) The directors of a corporation who vote for or assent to any distribution of assets of a corporation during the liquidation of the corporation without the payment and discharge of, or making adequate provision for, all known or reasonably ascertainable debts, obligations, and liabilities of the corporation shall be jointly and severally liable to the corporation for the value of such assets which are distributed, to the extent that such debts, obligations and liabilities of the corporation are not thereafter paid and discharged.

(e) The directors of a corporation who vote for or assent to the making of any loan or guaranty or other form of security in violation of G.S. 55A-18 shall be jointly and severally liable to the corporation for the repayment or return of the money or value loaned, with interest thereon at the rate of six percent (6%) a year until paid, or for any liability of the corporation upon the guaranty.

(f) A director of a corporation who is present at a meeting of its board of directors at which action on any corporate matter is taken shall be presumed to have assented to the action taken unless his contrary vote is recorded or his dissent is otherwise entered in the minutes of the meeting or unless he shall file his written dissent to such action with the person acting as the secretary of the meeting before the adjournment thereof or shall forward such dissent by registered mail to the secretary of the corporation immediately after the adjournment of the meeting. Such right to dissent shall not apply to a director who voted in favor of such action. If action taken by an executive committee is not thereafter formally considered by the board, a director may dissent from such action by filing his written objection with the secretary of the corporation with reasonable promptness after learning of such action.

(g) A director shall not be liable under subsection (b) or (d) of this section if he relied and acted in good faith and reasonably upon financial statements of the corporation represented to him to be correct and to be based upon generally accepted principles of sound accounting practice by the president or the officer of such corporation having charge of its books of account, or certified by an independent public accountant or by a certified public accountant or firm of such accountants to fairly reflect the financial condition of such corporation.

(h) Any director who is held liable upon and pays a claim asserted against him under or pursuant to this section for the unlawful distribution of assets shall be entitled to reimbursement or exoneration from the recipients who accepted or received any such distribution, knowing such distribution to have been made in violation of this section, in proportion to the amounts received.

(i) Any director against whom a claim shall be asserted under or pursuant to this section shall be entitled to contribution from the other directors who voted for or assented to the action upon which the claim is asserted and in any action against him shall, on motion, be entitled to have such directors made parties defendant.

(j) Except where the properties of a corporation are being administered in liquidation, or under court supervision for the benefit of creditors, or in the event that the official administering such properties refuses to bring an action for violation of this section, any creditor damaged by a violation of this section may in one action obtain judgment against the corporation and enforce the liability of one or more of the directors to the corporation imposed by this section to the extent necessary to satisfy his claim, or he may in a separate action obtain such judgment and then enforce such liability.

(k) No action shall be brought against the directors for liability under this section after three years from the time when the cause of action was discovered or ought to have been discovered. (1985 (Reg. Sess., 1986), c. 801, s. 33.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 801, s. 46 makes this section effective October 1, 1986.

§ 55A-28.2. Members' and directors' derivative actions.

(a) An action may be brought in this State in the right of any domestic or foreign corporation by a director or member, if any, of such corporation; provided that, in the case of a suit by a member, the plaintiff or plaintiffs must allege, and it must appear, that each plaintiff was a member at the time of the transaction of which he complains.

(b) The complaint shall allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and the reasons for his failure to obtain the action or for not making the effort.

(c) Such action shall not be discontinued, dismissed, compromised or settled without the approval of the court. If the court shall determine that the interests of the members or of the creditors of the corporation, will be substantially affected by such discontinuance, dismissal, compromise or settlement, the court, in its discretion, may direct that notice, by publication or otherwise, shall be given to such members or creditors whose interests it determines will be so affected. If notice is so directed to be given, the court may determine which one or more of the parties to the action shall bear the expense of giving the same, in such amount as the court shall determine and find to be reasonable in the circumstances, and the amount of such expense shall be awarded as costs of the action.

(d) If the action on behalf of the corporation is successful, in whole or part, whether by means of a compromise and settlement or by a judgment, the court may award the plaintiff the reasonable expenses of maintaining the action, including reasonable attorneys' fees, and shall direct the plaintiff to account to the corporation for the remainder of any proceeds of the action.

(e) In any such action the court, upon final judgment and a finding that the action was brought without reasonable cause, may require the plaintiff or plaintiffs to pay to the defendant or defendants the reasonable expenses, including attorneys' fees, incurred by them in the defense of the action. (1985 (Reg. Sess., 1986), c. 801, s. 34.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 801, s. 46 makes this section effective October 1, 1986.

ARTICLE 5.

Members.§ 55A-29. **Members.**

Legal Periodicals. — For note, "The Non-profit Corporation in North Carolina: Recognizing a Right to Member Derivative Suits," see 63 N.C.L. Rev. 999 (1985).

§ 55A-32. **Voting.**

(a) The right of the members, or any class or classes of members, to vote may be limited, enlarged or denied to the extent specified in the charter or in the initial bylaws adopted by the directors or in any bylaws adopted by the members. Unless so limited, enlarged or denied, each member, regardless of class, shall be entitled to one vote on each matter submitted to a vote of members.

(1955, c. 1230; 1985 (Reg. Sess., 1986), c. 801, s. 35.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective October 1, 1986, added "or in the initial bylaws adopted by the directors or in any bylaws adopted by the members" at the end of the first sentence of subsection (a).

ARTICLE 6.

Fundamental Changes.§ 55A-35. **Procedure to amend charter.**

- (a) Amendments to the charter shall be made in the following manner:
- (1) Where there are members having voting rights, the board of directors shall adopt a resolution setting forth the proposed amendment, and, except as otherwise provided in this paragraph, directing that it be submitted to a vote at a meeting of members having voting rights, which may be either an annual or a special meeting. In lieu thereof, a resolution setting forth a proposed amendment and requesting its submission to such a meeting may be approved in writing by the number or proportion of members entitled to call a members' meeting pursuant to G.S. 55A-30(c). Written or printed notice setting forth the proposed amendment or a summary of the changes to be effected thereby shall be given to each member entitled to vote at such meeting within the time and in the manner provided in this Chapter for the giving of notice of meetings of members. The proposed amendment shall be adopted upon receiving at least two thirds of the votes entitled to be cast by members present or represented by proxy at such meeting.
 - (2) Where there are no members, or no members having voting rights, an amendment shall be adopted at a meeting of the board of directors upon receiving the vote of a majority of the directors in office.
 - (3) Before the action required by G.S. 55A-9, amendments to the charter may be made, either by the directors named therein or by the incor-

porators, by preparing and delivering to the Secretary of State articles of amendment complying with the provisions of G.S. 55A-36.

(c) At any time before delivery of the articles of amendment to the Secretary of State the board of directors may, in its discretion, abandon an amendment if so empowered in the resolutions of the members adopting the amendment. (1955, c. 1230; 1981, c. 372; 1985 (Reg. Sess., 1986), c. 801, ss. 36, 37.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective October 1, 1986, added subdivision (a)(3) and subsection (c).

§ 55A-37. Effect of amendment.

(1955, c. 1230; 1985 (Reg. Sess., 1986), c. 801, s. 38.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, only the catchline is set out.

Effect of Amendments. — The 1985 (Reg.

Sess., 1986) amendment, effective October 1, 1986, rewrote the catchline to this section, which formerly read "Effect of certificate of amendment."

§ 55A-42.1. Merger or consolidation of domestic and foreign corporations.

(c) If the surviving or new corporation, as the case may be, is a corporation of any state other than this State, it shall comply with the provisions of this Chapter with respect to foreign corporations if it is to transact business in this State; and if after the merger or consolidation it transacts no business in this State the courts of this State shall have jurisdiction in actions to enforce any obligation of any constituent corporation of this State arising out of the merger or consolidation or out of any act or omission of such constituent corporation prior to or contemporaneous with the merger or consolidation, and process therein may be served as provided in G.S. 55A-68.

(1973, c. 314, s. 4; 1985 (Reg. Sess., 1986), c. 801, s. 39.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective October 1,

1986, inserted "the merger or consolidation or out of" preceding "any act or omission" and inserted "or contemporaneous with" preceding "the merger or consolidation" near the end of subsection (c).

§ 55A-43. Sale, lease, exchange, or mortgage of assets.

(a) A mortgage of or other security interest in all or any part of the property of a corporation may be made by authority of the board of directors without authorization of the members, unless otherwise provided in the charter or the bylaws.

(b) Any other sale, lease, exchange or other disposition of all, or substantially all, the property and assets of a corporation may be made upon such terms and conditions and for such consideration, which may consist in whole or in part of money or property, real or personal, including shares of any corporation for profit, domestic or foreign, as may be authorized in the following manner:

- (1) Where there are members having voting rights, the board of directors shall adopt a resolution recommending such sale, lease, exchange or

other disposition and directing that it be submitted to a vote at a meeting of members having voting rights, which may be either an annual or a special meeting. Written or printed notice stating that the purpose, or one of the purposes, of such meeting is to consider the sale, lease, exchange or other disposition of all, or substantially all, the property and assets of the corporation shall be given to each member entitled to vote at such meeting, within the time and in the manner provided by this Chapter for the giving of notice of meetings of members. At such meeting the members may authorize such sale, lease, exchange or other disposition and may fix, or may authorize the board of directors to fix, any or all of the terms and conditions thereof and the consideration to be received by the corporation therefor. Such authorization shall require the vote of at least two thirds of the votes entitled to be cast by members present or represented by proxy at such meeting. After such authorization by a vote of members, the board of directors, nevertheless, may, if so empowered by such authorization of the members, abandon such sale, lease, exchange or other disposition of assets, subject to the rights of third parties under any contracts relating thereto, without further action or approval by members.

- (2) Where there are no members, or no members having voting rights, a sale, lease, exchange or other disposition of all, or substantially all, the property and assets of a corporation shall be authorized upon receiving the vote of a majority of the directors in office. (1955, c. 1230; 1985 (Reg. Sess., 1986), c. 801, s. 40.)

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective October 1, 1986, designated the original section as subsection (b) and added subsection (a). In subsection (b) the amendment substituted "Any other" for "A" at the beginning of the introductory lan-

guage and substituted "sale, lease, exchange or other disposition" for "sale, lease, exchange, mortgage, pledge or other disposition" throughout the introductory language and subdivisions (1) and (2).

ARTICLE 7.

Dissolution and Liquidation.

§ 55A-44. Voluntary dissolution.

(b) Upon the adoption of such resolution by the members, or by the board of directors where there are no members or no members having voting rights, the corporation shall cease to conduct its affairs except insofar as may be necessary for the winding up thereof, shall immediately cause a notice of the proposed dissolution to be mailed to each known creditor of the corporation, and such notice shall be published once a week for four successive weeks in a newspaper published in the county wherein the corporation has its registered office, and, if there be no newspaper published in such county, then in some newspaper of general circulation in such county. The corporation shall proceed to collect its assets and apply and distribute them as provided in this Chapter. The corporation may follow the same procedure upon the expiration of any period of duration to which it is limited by its charter. (1955, c. 1230; 1973, c. 314, s. 5; 1985 (Reg. Sess., 1986), c. 801, s. 41.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective October 1, 1986, divided the former first sentence of subsection (b) into the present first and second

sentences thereof, added the language beginning "such notice shall be published once a week" at the end of the present first sentence of subsection (b), and added "The corporation" at the beginning of the present second sentence of subsection (b).

§ 55A-45. Distribution of assets.

Legal Periodicals. — For note, "The Non-profit Corporation in North Carolina: Recogn-

nizing a Right to Member Derivative Suits," see 63 N.C.L. Rev. 999 (1985).

CASE NOTES

Quoted in Hornets Nest Girl Scout Council, Inc. v. Cannon Found., Inc., — N.C. App. —, 339 S.E.2d 26 (1986).

§ 55A-50. Involuntary dissolution in action by Attorney General.

Legal Periodicals. — For note, "The Nonprofit Corporation in North Carolina: Recognizing a Right to Mem-

ber Derivative Suits," see 63 N.C.L. Rev. 999 (1985).

§ 55A-51. Duties of Attorney General with respect to actions for involuntary dissolution.

Legal Periodicals. — For note, "The Nonprofit Corporation in North Carolina: Recognizing a Right to Mem-

ber Derivative Suits," see 63 N.C.L. Rev. 999 (1985).

§ 55A-53. Power of courts to liquidate and decree involuntary dissolution or to grant other relief.

(a) The superior court shall have power to liquidate the assets and affairs of a corporation:

- (1) In an action by a member or director when it is made to appear:
 - a. That the directors are deadlocked in the management of the corporate affairs and that irreparable injury to the corporation or the public is being suffered or is threatened by reason thereof, and either that the members are unable to break the deadlock or there are no members having voting rights; or
 - b. That the acts of the directors or those in control of the corporation are illegal, oppressive or fraudulent; or
 - c. That the corporate assets are being misapplied or wasted; or
 - d. That the corporation is unable to carry out its purposes.
- (2) In an action by a creditor:
 - a. When the claim of the creditor has been reduced to judgment and an execution thereon has been returned unsatisfied; or
 - b. When the corporation has admitted in writing that the claim of the creditor is due and it is established that the corporation is unable to pay its debts in the ordinary course of business.

(3) Upon application by a corporation to have its voluntary dissolution continued under the supervision of the court.

(4) In an action brought by the Attorney General under G.S. 55A-51.

(c) Actions under this section shall be brought in the county in which the registered office of the corporation is situated.

(e) Repealed by Session Laws 1985 (Reg. Sess., 1986), c. 801, s. 42, effective October 1, 1986.

(f) In any proceeding under this section, the court may make such order or grant such relief, other than dissolution as in its discretion it deems appropriate, including, without limitation, an order:

(1) Canceling or altering any provision contained in the charter or the bylaws of the corporation; or

(2) Canceling, altering, or enjoining any resolution or other act of the corporation; or

(3) Directing or prohibiting any act of the corporation or of members, directors, officers or other persons party to the action; or

(4) Appointing a provisional director.

Such relief may be granted as an alternative to a decree of dissolution, or may be granted whenever the circumstances of the case are such that relief, but not dissolution, would be appropriate. (1955, c. 1230; 1985 (Reg. Sess., 1986), c. 801, s. 42.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective October 1, 1986, rewrote the catchline of this section, which formerly read "Power of court to liquidate assets and affairs of corporation"; substituted "it is established that the corporation is unable to pay its debts in the ordinary course

of business" for "owing and it is established that the corporation is insolvent" at the end of paragraph (a)(2)b; rewrote subdivision (a)(4); deleted "or the principal office" preceding "of the corporation" in subsection (c); deleted subsection (e), relating to liquidation of the assets and affairs of the corporation in an action brought by the Attorney General; and added subsection (f).

§ 55A-57.1. Voluntary surrender of corporate rights and franchises by incorporators.

The incorporators named in the articles of incorporation may, before the receipt of any assets and before beginning the activities for which the corporation has been incorporated, surrender the existing corporate rights and franchises, by filing a certificate in the Office of the Secretary of State in the manner prescribed by G.S. 55A-4, verified by oath, that no assets have been received and that such activities have not been begun, and surrendering all rights and franchises. Thereupon the corporation becomes nonexistent and is cancelled as if such corporation had never been created. (1985 (Reg. Sess., 1986), c. 801, s. 43.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 801, s. 46 makes this section effective October 1, 1986.

Chapter 55B.

Professional Corporation Act.

§ 55B-3. Business Corporation Act applicable.

CASE NOTES

Cited in *Buchele v. Pinehurst Surgical Clinic*, — N.C. App. —, 341 S.E.2d 772 (1986).

Chapter 57.

Hospital, Medical and Dental Service Corporations.

Article 1.

In General.

Sec.

57-12. Licensing of agents.

ARTICLE 1.

In General.

§ 57-7. Subscribers' contracts; required and prohibited provisions.

CASE NOTES

Cited in *Varnell v. Henry M. Milgrom, Inc.*,
78 N.C. App. 451, 337 S.E.2d 616 (1985).

§ 57-12. Licensing of agents.

Every agent of any hospital service corporation authorized to do business in this State under the provisions of this Chapter shall be required to obtain annually from the Commissioner of Insurance a license under the seal of his office showing that the company for which he is agent is licensed to do business in this State and that he is an agent of such company and duly authorized to do business for it. And every such agent, on demand, shall exhibit his license to any officer or to any person from whom he shall solicit hospital service. For said license, each agent shall annually pay the sum of ten dollars (\$10.00). Before a license is issued to an agent, hereunder, the agent and the company for which he desires to act, shall apply for the license on forms to be prescribed by the Commissioner of Insurance, and before he issues a license to such agent, the Commissioner of Insurance shall satisfy himself by examination, or otherwise, that the person applying for a license as an agent is a person of good moral character, that he intends to hold himself out in good faith as a hospital and/or medical and/or dental service agent and has sufficient knowledge of the business proposed to be done; that he has not willfully violated any of the insurance laws of the State, and that he is a proper person for such position, and that such license, if issued, shall serve the public's interest. For said examination applicant shall pay the sum of ten dollars (\$10.00). All agents operating as such for a corporation subject to the provisions of this Chapter on the date of its ratification are deemed qualified to act as such without the examination herein provided for. Licenses issued hereunder shall be subject to revocation by the Commissioner of Insurance for cause after notice and hearing and if any person shall assume to act as an agent or broker without obtaining the license herein provided for, or makes any false statements or representations concerning the said hospital and/or medical and/or dental service, knowingly or willfully, he shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than one hundred dollars (\$100.00) nor more than five hundred dollars (\$500.00) for each offense. (1941, c. 338, s. 12; 1943, c. 537, s. 7; 1947, c. 1023, s. 1; 1961, c. 1149; 1971, c. 1080, s. 2; 1983, c. 790, s. 5; 1985 (Reg. Sess., 1986), c. 928, s. 4.)

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective September 1, 1986, substituted "ten dollars (\$10.00)" for

"two dollars (\$2.00)" at the end of the third sentence.

Chapter 57B.

Health Maintenance Organization Act.

Sec.

57B-3. Establishment of health maintenance organizations.

Sec.

57B-13. Regulation of agents.

§ 57B-3. Establishment of health maintenance organizations.

(a) Notwithstanding any law of this State to the contrary, any person may apply to the Commissioner for and obtain a certificate of authority to establish and operate a health maintenance organization in compliance with this Chapter. No person shall establish or operate a health maintenance organization in this State, nor sell or offer to sell, or solicit offers to purchase or receive advance or periodic consideration in conjunction with a health maintenance organization without obtaining a certificate of authority under this Chapter. A foreign corporation may qualify under this Chapter, subject to its full compliance with Article 17 of General Statute Chapter 58.

(1977, c. 580, s. 1; 1979, c. 876, s. 1; 1983, c. 386, s. 1; 1985 (Reg. Sess., 1986), c. 1027, s. 49.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1027, s. 57, contains a severability clause.

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective July 16, 1986, substituted "full compliance with Article 17 of General Statutes Chapter 58" for "registration to do business in this State as a foreign corporation under Article 17 of Chapter 58" at the end of the last sentence of subsection (a).

§ 57B-13. Regulation of agents.

The Commissioner may, after notice and hearing, promulgate such reasonable rules and regulations as are necessary to provide for the licensing of agents. Licensing and examination fees shall be those for insurance agents under G.S. 105-228.7. (1977, c. 580, s. 1; 1979, c. 876, s. 1; 1985 (Reg. Sess., 1986), c. 928, s. 5.)

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective September 1, 1986, added the second sentence.

Chapter 58.

Insurance.

SUBCHAPTER I. INSURANCE DEPARTMENT.

Article 2.

Commissioner of Insurance.

Sec.

- 58-16. Examinations to be made.
- 58-16.3. Examination, annual statement, and records of employers self-insuring for workers' compensation.
- 58-18.1. Immunity from liability for reporting insurance fraud.
- 58-21. Annual, semiannual, or quarterly statements to be filed with Commissioner.
- 58-21.3. Insurance Regulatory Information System and similar program test data not public records.
- 58-25.1. Commissioner may require special reports.
- 58-27. Books and papers required to be exhibited.

Article 2B.

Public Officers and Employees Liability Insurance Commission.

- 58-27.22. Powers and duties of Commission.

Article 3.

General Regulations for Insurance.

- 58-40. Agents and others must procure license.
- 58-41.1. Examinations for license.
- 58-44.5. Rebates and charges in excess of premium prohibited.
- 58-44.8. Agents prohibited from representing unauthorized companies.
- 58-51.3. Companies and agents to transact business through licensed agents.

Article 3A.

Unfair Trade Practices.

- 58-54.4. Unfair methods of competition and unfair or deceptive acts or practices defined.

SUBCHAPTER II. INSURANCE COMPANIES.

Article 6.

General Domestic Companies.

- 58-72. Kinds of insurance authorized.
- 58-75.1. Maintenance and removal of records and assets.

Sec.

- 58-75.2. Exceptions to requirements of G.S. 58-75.1.
- 58-77. Amount of capital and/or surplus required; impairment of capital or surplus.

Article 12B.

North Carolina Rate Bureau.

- 58-124.17. North Carolina Rate Bureau created.
- 58-124.18. Membership as a prerequisite for writing insurance; governing committee; rules and regulations; expenses.
- 58-124.20. Filing rates, plans with Commissioner; public inspection of filings.
- 58-124.22. Appeal of Commissioner's order.
- 58-124.28. Limitation.
- 58-124.31. Classifications and Safe Driver Incentive Plan for nonfleet private passenger motor vehicle insurance.
- 58-124.32. Rate filings and hearings for motor vehicle insurance.

Article 13C.

Regulation of Insurance Rates.

- 58-131.37. Rate standards.
- 58-131.38. Rating methods.
- 58-131.39. Filing of rates and supporting data.
- 58-131.42. Disapproval of rates; interim use of rates.
- 58-131.45. Joint underwriting and joint reinsurance organizations.
- 58-131.46. Insurers authorized to act in concert.
- 58-131.48. Agreements to adhere.
- 58-131.53. Request for review of rate, rating plan, rating system or underwriting rule.
- 58-131.56. [Repealed.]
- 58-131.59. [Repealed.]
- 58-131.60. Limitation.
- 58-131.61. Financial disclosure; rate modifications; reporting requirements.
- 58-131.62. Good faith immunity for operation of market assistance programs.
- 58-131.63. CGL extended reporting.

Article 17.

Foreign or Alien Insurance Companies.

- 58-150. Conditions of admission.
- 58-151. Limitation as to kinds of insurance.

SUBCHAPTER III. FIRE INSURANCE.

Article 18A.

Essential Property Insurance for Beach Area Property.

Sec.

- 58-173.2. Definition of terms.
- 58-173.7. Directors to submit plan of operation to Commissioner; review and approval; amendments.
- 58-173.8. Persons eligible to apply to Association for coverage; contents of application.
- 58-173.16A. Premium taxes to be paid through Association to Commissioner.

Article 18B.

Fire Access to Insurance Requirements.

- 58-173.17. Purpose and geographic coverage of Article.
- 58-173.20. Requirements of Plan and authority of Association.
- 58-173.21. Authority of Commissioner.
- 58-173.29. Premium taxes to be paid through Association to Commissioner.

Article 21.

Insuring State Property, Officials and Employees.

- 58-191.4. Transfer from fund for local fire protection.
- 58-194.3. Competitive selection of payroll deduction insurance products paid for by State employees.

SUBCHAPTER V. AUTOMOBILE INSURANCE.

Article 25A.

North Carolina Motor Vehicle Reinsurance Facility.

- 58-248.33. The Facility; functions; administration.
- 58-248.34. Plan of operation.

SUBCHAPTER IX. MISCELLANEOUS PROVISIONS.

Article 36.

Surplus Lines Act.

- 58-422. Definitions.
- 58-423. Placement of surplus lines insurance.
- 58-424. Eligible surplus lines insurers required.
- 58-433. Licensing of surplus lines licensee.
- 58-437. Surplus lines tax.
- 58-438. Collection of tax.
- 58-442 to 58-449. [Reserved.]

Article 37.

Mandatory or Voluntary Risk Sharing Plans.

Sec.

- 58-450. Establishment of plans.
- 58-451. Purposes, contents, and operation of risk sharing plans.
- 58-452. Persons required to participate.
- 58-453. Voluntary participation.
- 58-454. Classification and rates.
- 58-455. Basis for participation.
- 58-456. Duty to provide information.
- 58-457. Provision of marketing facilities.
- 58-458. Voluntary risk sharing plans.
- 58-459. Article not subject to Administrative Procedure Act.
- 58-460. Immunity of Commissioner and plan participants.
- 58-461 to 58-469. [Reserved.]

Article 38.

Insurance Regulatory Reform Act.

- 58-470. Short title.
- 58-471. Legislative findings and intent.
- 58-472. Scope.
- 58-473. Certain policy cancellations prohibited.
- 58-474. Notice of nonrenewal, premium increase, or change in coverage required.
- 58-475. Notice of renewal of policies with premium or coverage changes.
- 58-476. Loss of reinsurance.
- 58-477. Notice of cessation of business through insurance agency.
- 58-478. No liability for statements or communications made in good faith; prior notice to agents or brokers.
- 58-479. Termination of writing kind of insurance.
- 58-480. Policy form and rate filings; punitive damages; data required to support filings.
- 58-481. Penalties; restitution.
- 58-482 to 58-489. [Reserved.]

Article 39.

Local Government Risk Pools.

- 58-490. Short title; definition.
- 58-491. Local government pooling of property, liability and workers' compensation coverages.
- 58-492. Board of trustees.
- 58-493. Contract.
- 58-494. Termination.
- 58-495. Audit.
- 58-496. Insolvency or impairment of pool.
- 58-497. Immunity of administrators and boards of trustees.
- 58-498. Pools not covered by guaranty associations or solvency funds.

Sec.
58-499 to 58-504. [Reserved.]

Article 40.

Product Liability Risk Retention Groups.

58-505. Purpose.
58-506. Definitions.
58-507. Risk retention groups chartered in this State.
58-508. Risk retention groups not chartered in this State.
58-509. Agents.

Sec.
58-510. Other service providers.
58-511. Taxes.
58-512. Restrictions.
58-513. Exemption from compulsory associations.
58-514. Countersignature not required.
58-515. Unfair claims settlement practices.
58-516. Examination for financial impairment.
58-517. Delinquency proceedings.
58-518. Penalties.

SUBCHAPTER I. INSURANCE DEPARTMENT.

ARTICLE 1.

Title and Definitions.

§ 58-1. Title of the Chapter.

CASE NOTES

Cited in *United Va. Bank v. Air-Lift Assocs.*, — N.C. App. —, 339 S.E.2d 90 (1986).

ARTICLE 2.

Commissioner of Insurance.

§ 58-9. Powers and duties of Commissioner.

CASE NOTES

Stated in *State v. Felts*, — N.C. App. —, 339 S.E.2d 99 (1986).

§ 58-9.6. Extent of review under § 58-9.4.

CASE NOTES

"Whole Record" Test Explained. — The "whole record" test requires the reviewing court to consider the record evidence supporting the commissioner's order, to also consider the record evidence contradicting the commissioner's findings, and to determine if the commissioner's decision had a rational basis in the material and substantial evidence offered. *State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau*, 75 N.C. App. 201, 331 S.E.2d 124, cert. denied, 314 N.C. 547, 335 S.E.2d 319 (1985).

Burden of Proof on Rate Bureau. — While the commissioner's order must be based on material and substantial evidence in the record, the ultimate burden of proof to justify a rate adjustment and its amount is on the rate bureau. *State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau*, 75 N.C. App. 201, 331 S.E.2d 124, cert. denied, 314 N.C. 547, 335 S.E.2d 319 (1985).

The weight and credibility of conflicting evidence in a rate making hearing was for the

commissioner to decide. State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 75 N.C. App. 201, 331 S.E.2d 124, cert. denied, 314 N.C. 547, 335 S.E.2d 319 (1985).

§ 58-16. Examinations to be made.

Before granting certificates of authority to an insurance company to issue policies or make contracts of insurance the Commissioner shall be satisfied, by such examination and evidence as he sees fit to make and require, that the company is otherwise duly qualified under the laws of the State to transact business therein. As often as once in three years or, in the Commissioner's discretion, as often as once in five years he shall personally or by his deputy visit each domestic insurance company and thoroughly inspect and examine its affairs, especially as to its financial condition and ability to fulfill its obligations and whether it has complied with the laws. He shall also make an examination of any such company whenever he deems it prudent to do so, or upon the request of five or more of the stockholders, creditors, policyholders, or persons pecuniarily interested therein, who shall make affidavit of their belief, with specifications of their reasons therefor, that the company is in an unsound condition. Whenever the Commissioner deems it prudent for the protection of policyholders in this State he shall in like manner visit and examine, or cause to be visited and examined by some competent person appointed by him for that purpose, any foreign insurance company applying for admission or already admitted to do business in this State. Any domestic or foreign company examined under this section shall pay the proper charges incurred in the examination, including the expenses of the Commissioner or his deputy and the expenses and compensation of his assistants employed therein. The refusal of any insurer to submit to examination, or the refusal or failure of an insurer to pay the expenses of examination upon presentation of a bill therefor by the Commissioner, shall be grounds for the revocation or refusal of a license. The Commissioner is authorized to make public any such revocation or refusal of license as he may determine and to give his reasons therefor. The Commissioner shall promptly institute a civil action to recover the expenses of examination against any insurer which refuses or fails to pay. For these purposes the Commissioner or his deputy or persons making the examination shall have free access to all the books and papers of the insurance company that relate to its business, and to the books and papers kept by any of its agents, or to the books and papers of any affiliated or subsidiary corporations or partnerships that affect the affairs or financial condition of said company and may summon, administer oaths to, and examine as witnesses, the directors, officers, agents, and trustees of any such company, and any other person, affiliate or subsidiary in relation to its affairs, transactions, and condition. (1899, c. 54, s. 13; Rev., s. 4692; C.S., s. 6275; 1945, c. 383; 1985, c. 666, s. 34; 1985 (Reg. Sess., 1986), c. 1013, s. 2.)

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 15, 1986, inserted "or, in the Commissioner's dis-

cretion, as often as once in five years" in the second sentence.

§ 58-16.3. Examination, annual statement, and records of employers self-insuring for workers' compensation.

The provisions of G.S. 58-16, 58-16.2, 58-17, 58-18, 58-21, 58-22, 58-25, 58-25.1, 58-27, and 58-63 apply to employers that furnish proof of financial responsibility to the Commissioner under G.S. 97-93(a)(2) and to persons that administer workers' compensation self-insurance for such employers. (1985, c. 119, s. 5; 1985 (Reg. Sess., 1986), c. 1027, s. 52.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1027, s. 57, contains a severability clause.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 16, 1986, deleted "58-16.1" following "G.S. 58-16."

§ 58-18.1. Immunity from liability for reporting insurance fraud.

(a) For the purpose of this section, a "fraudulent insurance act" is committed by any person who, knowingly and with the intent to defraud: (1) presents, causes to be presented, or prepares with the knowledge or belief that it will be presented to or by an insurer, purported insurer, broker, or any agent or employee thereof, any written statement as part of an insurance policy, or in support of an insurance policy, an application for the issuance of an insurance policy, or the rating of an insurance policy, or a claim for payment or other benefit pursuant to an insurance policy, that he knows to contain materially false information concerning any material fact; or (2) conceals information concerning any material fact.

(b) In the absence of fraud or bad faith, no person is subject to civil liability for defamation for filing reports or furnishing other information, without malice, required by this Chapter or required by the Commissioner under the authority granted in this Chapter; and no cause of action for defamation arises against such person (1) for any information relating to suspected fraudulent insurance acts furnished to or received from the Commissioner, his designee, or law enforcement officials or their agents and employees; (2) for any information relating to suspected fraudulent insurance acts furnished to or received from other persons subject to the provisions of this Chapter; or (3) for any such information furnished in reports to the Insurance Fraud Bureau of The National Association of Insurance Commissioners or any organization established to detect and prevent fraudulent insurance acts, or their agents, employees or designees; nor shall the Commissioner or any employee of the Insurance Frauds Bureau, acting without malice, in the absence of fraud or bad faith, be subject to liability for defamation, and no cause of action for defamation arises against such person for the publication of any confidential report or bulletin related to the official activities of the Insurance Frauds Bureau. Nothing in this section abrogates or modifies any common law or statutory privilege or immunity enjoyed by any person.

(c) During the course of an investigation of a suspected fraudulent insurance act, the Commissioner may personally or through his representative request any insurer to furnish copies of any information relative to that suspected act that is in the insurer's possession. The insurer shall release the information requested and cooperate with the Commissioner or his representative pursuant to this subsection. The information shall include without limitation to:

- (1) Any insurance policy and application therefor relevant to a suspected fraudulent insurance act under investigation;
- (2) Policy premium payment records;
- (3) History of previous loss claims made by the insured;
- (4) Material relating to the investigation by the insurer of the suspected act, including statements of any person, proof of loss, and any other relevant evidence. (1985 (Reg. Sess., 1986), c. 1013, s. 3.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1013, s. 18, makes this section effective September 1, 1986.

§ 58-21. Annual, semiannual, or quarterly statements to be filed with Commissioner.

Every insurance company shall file in the office of the Commissioner of Insurance, on or before the first day of March in each year, in form and detail as the Commissioner of Insurance prescribes, a statement showing the business standing and financial condition of such company, association, or order on the preceding thirty-first day of December, signed and sworn to by the chief managing agent or officer thereof, before the Commissioner of Insurance or some officer authorized by law to administer oaths. The Commissioner of Insurance shall, in December of each year, furnish to each of the insurance companies authorized to do business in the State two or more blanks adapted for their annual statements. Provided, the Commissioner may, for good and sufficient cause shown by an applicant company, extend the filing date of such annual statement for such company, for a reasonable period of time, not to exceed 30 days. Provided further, the Commissioner may, in his discretion, require the statement required by this section to be filed semiannually or quarterly by any insurance company, association, or order.

The Commissioner may require statements under this section, G.S. 58-21.1, G.S. 58-21.2, and G.S. 58-25.1 to be filed in a format that can be read by electronic data processing equipment; and may require such readable statements to be filed on a monthly basis. (1899, c. 54, ss. 72, 73, 83, 90, 97; 1901, c. 706, s. 2; 1903, c. 438, s. 9; Rev., s. 4698; C.S., s. 6280; 1945, c. 383; 1957, c. 407; 1985, c. 666, ss. 50, 51; 1985 (Reg. Sess., 1986), c. 1013, s. 11.)

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 15, 1986, added the second paragraph.

§ 58-21.3. Insurance Regulatory Information System and similar program test data not public records.

Financial test ratios and other data received or generated by the Commissioner pursuant to the NAIC Insurance Regulatory Information System, any successor program, or any similar program developed by the Commissioner, are not public records and are not subject to Chapter 132 of the General Statutes or G.S. 58-11. (1985 (Reg. Sess., 1986), c. 1013, s. 9.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1013, s. 18, makes this section effective July 15, 1986.

§ 58-25.1. Commissioner may require special reports.

The Commissioner may also address to any authorized insurer, rating organization, advisory organization, joint underwriting or joint reinsurance organization, or the North Carolina Rate Bureau or Motor Vehicle Reinsurance Facility, or its officers any inquiry in relation to its transactions or condition or any matter connected therewith. Every corporation or person so addressed shall reply in writing to such inquiry promptly and truthfully, and such reply shall be verified, if required by the Commissioner, by such individual, or by such officer or officers of a corporation, as he shall designate. (1945, c. 383; 1985 (Reg. Sess., 1986), c. 1027, s. 8.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1027, s. 57, contains a severability clause.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 16,

1986, inserted "rating organization, advisory organization, joint underwriting or joint reinsurance organization, or the North Carolina Rate Bureau or Motor Vehicle Reinsurance Facility" in the first sentence.

§ 58-27. Books and papers required to be exhibited.

It is the duty of any person having in his possession or control any books, accounts, or papers of any company licensed under this Chapter, to exhibit the same to the Commissioner of Insurance or to any deputy, actuary, accountant, or persons acting with or for the Commissioner of Insurance. Any person who shall refuse, on demand, to exhibit the books, accounts, or papers, as above provided, or who shall knowingly or willfully make any false statement in regard to the same, shall be subject to suspension or revocation of his license under this Chapter; and shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined or imprisoned, or both, at the discretion of the court. (1899, c. 54, s. 76; Rev., ss. 3494, 4697; 1907, c. 1000, s. 3; C.S., s. 6286; 1945, c. 383; 1985 (Reg. Sess., 1986), c. 1013, s. 6.)

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 15, 1986, inserted "be subject to suspension or re-

vocation of his license under this Chapter; and shall" in the second sentence.

ARTICLE 2B.

Public Officers and Employees Liability Insurance Commission.

§ 58-27.22. Powers and duties of Commission.

The Commission may acquire from an insurance company or insurance companies a group plan of professional liability insurance covering the law-enforcement officers and/or public officers and employees of any political subdivision of the State. The Commission shall have full authority to negotiate with insurance companies submitting bids or proposals and shall award its group plan master contract on the basis of the company or companies found by

it to offer maximum coverage at the most reasonable premium. The Commission is authorized to enter into a master policy contract of such term as it finds to be in the best interests of the law-enforcement officers and/or public officers and employees of the political subdivisions of the State, not to exceed five years. The Commission, in negotiating for such contract, is not authorized to pledge or offer the credit of the State of North Carolina. The insurance premiums shall be paid by the political subdivisions whose employees are covered by the professional liability insurance. Any political subdivision may elect coverage for any or all of its employees on a departmental basis; provided all employees in a department must be covered if coverage is elected for that department. Nothing contained herein shall be construed to require any political subdivision to participate in any group plan of professional liability insurance.

The Commission may, in its discretion, employ professional and clerical staff whose salaries shall be as established by the State Personnel Commission.

Should the Commission determine that reasonable coverage is not available at a reasonable cost, the Commission may undertake such studies and inquiries into the situation and alternatives, including self insurance and State administered funds, as the Commission deems appropriate. The Commission shall then bring before the General Assembly such recommendations as it deems appropriate.

The Commission may acquire information regarding loss ratios, loss factors, loss experience and other such facts and figures from any agency or company issuing professional liability insurance covering public officers, employees or law-enforcement officers in the State of North Carolina. Such information shall not be deemed a public record within the meaning of Chapter 132 of the General Statutes where it names the company divulging such information, but the Commission may make public such information to show aggregate statistics in respect to the experience of the State as a whole. The information shall be provided to the Commission upon its written demand and shall be submitted to the Commission by such company or companies upon sworn affidavit. If any agency or company shall fail or refuse to supply such information to the Commission within a reasonable time following receipt of the demand, the Commission may apply to the Superior Court sitting in Wake County for appropriate orders to enforce the demand.

For purposes of this section, the term "political subdivision" includes any county, city, town, incorporated village, sanitary district, metropolitan water district, county water and sewer district, water and sewer authority, hospital authority, parking authority, local ABC boards, special airport district, airport authority, soil and water conservation district created pursuant to G.S. 139-5, fire district, volunteer or paid fire department, rescue squads, city or county parks and recreation commissions, area mental health boards, area mental health, mental retardation and substance abuse authority as described in G.S. 122C-117, domiciliary home community advisory committees, county and district boards of health, nursing home advisory committees, county boards of social services, local school administrative units, local boards of education, community colleges and technical institutes, and all other persons, bodies, or agencies authorized or regulated by Chapters 108A, 115C, 115D, 118, 122C, 130A, 131A, 131D, 131E, 153A, 160A, and 160B of the General Statutes. (1979, c. 325, s. 1; 1983, c. 543, s. 3; 1985, c. 666, s. 79; 1985 (Reg. Sess., 1986), c. 1027, s. 30.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1027, s. 57, contains a severability clause.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 16,

1986, substituted the terms "political subdivision" and "political subdivisions" for references to counties and municipalities in the first paragraph and added the last paragraph.

ARTICLE 3.

General Regulations for Insurance.

§ 58-40. Agents and others must procure license.

(g) Nothing in G.S. 58-51.1 or in G.S. 58-39.4(p) permits a person to simultaneously hold an agent's license and an adjuster's license. (1899, c. 54, s. 81; 1901, c. 391, s. 7; 1903, c. 438, s. 8; c. 774; Rev., s. 4706; 1915, c. 109, s. 7; c. 166, s. 1; C.S., s. 6298; 1951, c. 105, s. 1; 1953, c. 1043, s. 2; 1971, c. 757, s. 3; 1983, c. 662; 1985, c. 484, ss. 6, 7; 1985 (Reg. Sess., 1986), c. 1013, s. 12.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective September 1, 1986, added subsection (g).

§ 58-41.1. Examinations for license.

(d) The answers of the applicant to any such examination shall be written by the applicant under the Commissioner's supervision. The Commissioner shall give examinations at such times and places within this State as he deems necessary reasonably to serve the convenience of both the Commissioner and applicants: Provided that the Commissioner is authorized to contract directly with persons for the processing of examination application forms and for the administration and grading of the examinations required by this section; the Commissioner is authorized to charge a reasonable fee not to exceed thirty-five dollars (\$35.00), in addition to the registration fee charged under G.S. 105-228.7, to offset the cost of the examination contract authorized by this subsection; and such contracts shall not be subject to Article 3 of General Statutes Chapter 143. The Commissioner shall require a waiting period of at least 30 days' duration before giving a new examination to an applicant who has failed to pass a previous similar examination.

(e) The Commissioner shall collect in advance the examination fee provided in G.S. 105-228.7 and in subsection (d) of this section. The Commissioner shall make or cause to be made available to all applicants, for a reasonable fee to offset the costs of production, materials that he deems necessary for the applicants' proper preparation for such exams. The Commissioner is hereby empowered to contract directly with publishers and other suppliers for the production of such preparatory materials, and contracts so let by the Commissioner shall not be subject to Article 3, Chapter 143 of the General Statutes.

(1947, c. 922; 1949, c. 958, s. 1; 1951, c. 105, s. 1; 1953, c. 1043, s. 6; 1969, c. 1206; 1971, c. 926, s. 2; 1979, 2nd Sess., c. 1320, ss. 1, 2; 1983, c. 802, s. 4; 1985, c. 484, s. 5; c. 733, s. 2; 1985 (Reg. Sess., 1986), c. 928, ss. 2, 3.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 (Reg.

Sess., 1986) amendment, effective July 1, 1986, inserted "the Commissioner is authorized to charge a reasonable fee not to exceed thirty-five dollars (\$35.00), in addition to the regis-

tration fee charged under G.S. 105-228.7, to offset the cost of the examination contract authorized by this subsection" in the proviso in

the second sentence of subsection (d) and inserted "and in subsection (d) of this section" at the end of the first sentence of subsection (e).

§ 58-44.3. Discrimination forbidden.

CASE NOTES

Purpose and Applicability. — The statutory provisions which prohibit an insurer or insurance agent from "discrimination" in setting rates for any person — §§ 58-44.3, 58-44.5, and 58-54.4 — are obviously designed to prohibit an insurance agent or company from charging reduced or excessive insurance

rates contrary to the established rating rules applicable to the risk, and are not applicable to rate making. *State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau*, 75 N.C. App. 201, 331 S.E.2d 124, cert. denied, 314 N.C. 547, 335 S.E.2d 319 (1985).

§ 58-44.5. Rebates and charges in excess of premium prohibited.

(a) No insurer or employee thereof, and no broker or agent shall knowingly charge, demand or receive a premium for any policy of insurance except in accordance with the applicable filing approved by the Commissioner of Insurance. No insurer or employee thereof, and no broker or agent shall pay, allow, or give, or offer to pay, allow, or give, directly or indirectly, as an inducement to insurance, or after insurance has been effected, any rebate, discount, abatement, credit, or reduction of the premium named in a policy of insurance, or any special favor or advantage in the dividends or other benefits to accrue thereon, or any valuable consideration or inducement whatever, not specified in the policy of insurance. No insured named in a policy of insurance, nor any employee of such insured shall knowingly receive or accept, directly or indirectly, any such rebate, discount, abatement or reduction of premium, or any special favor or advantage or valuable consideration or inducement. Nothing herein contained shall be construed as prohibiting the payment of commissions or other compensation to duly licensed agents and brokers, nor as prohibiting any participating insurer from distributing to its policyholders dividends, savings or the unused or unabsorbed portion of premiums and premium deposits. As used in this section the word "insurance" includes suretyship and the word "policy" includes bond.

(b) No broker or agent may knowingly charge, demand, or receive any consideration that exceeds the filed and approved premium for any policy of insurance unless the applicant for insurance consents before any services are rendered. Any fee charged by a broker or agent for the purpose of compensation for the filling out and completion of applications or forms or the rendering of services associated with the issuance or renewal of a policy of insurance is not allowed, absent the applicant's prior consent, if a commission will be paid by an insurer to the agent or broker on the issuance or renewal of the policy. (1943, c. 170; 1951, c. 781, s. 2; 1985 (Reg. Sess., 1986), c. 1013, ss. 13, 14.)

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 15, 1986, inserted "and charges in excess of pre-

mium" in the section catchline, designated the existing language as subsection (a), and added subsection (b).

CASE NOTES

Purpose and Applicability. — The statutory provisions which prohibit an insurer or insurance agent from “discrimination” in setting rates for any person — §§ 58-44.3, 58-44.5, and 58-54.4 — are obviously designed to prohibit an insurance agent or company from charging reduced or excessive insurance

rates contrary to the established rating rules applicable to the risk and are not applicable to rate making. State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 75 N.C. App. 201, 331 S.E.2d 124, cert. denied, 314 N.C. 547, 335 S.E.2d 319 (1985).

§ 58-44.8. Agents prohibited from representing unauthorized companies.

No licensed agent of any insurer shall solicit anywhere in the boundaries of the State of North Carolina, or receive or transmit an application or premium of insurance, for a company not authorized to do business in the State, except as provided in Article 36 of this Chapter. (1957, c. 547; 1985 (Reg. Sess., 1986), c. 1027, s. 44.)

Editor’s Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1027, s. 57, contains a severability clause.

Session Laws 1985 (Reg. Sess., 1986) amendment, effective July 16, 1986, substituted “Article 36 of this Chapter” for “G.S. 58-53.1.”

Effect of Amendments. — The 1985 (Reg.

§ 58-46. Payment of premium to agent valid; obtaining by fraud a crime.

CASE NOTES

Quoted in Hornby v. Pennsylvania Nat’l Mut. Cas. Ins. Co., 77 N.C. App. 475, 335 S.E.2d 335 (1985).

§ 58-51.3. Companies and agents to transact business through licensed agents.

No insurance company, nor any agent of any insurance company, shall on behalf of such company or agent knowingly permit any person not licensed as an insurance agent as provided by law, to solicit insurance, negotiate for, collect or transmit a premium for a new contract of insurance or to act in any way in the negotiation for any contract or policy of insurance; provided, no license shall be required of the following:

- (4) Licensed insurers authorized to write the kinds of insurance described in G.S. 58-72(1) through G.S. 58-72(3) that do business without the involvement of a licensed agent. (1949, c. 1120; 1953, c. 1043, s. 10; 1985 (Reg. Sess., 1986), c. 800.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective June 26, 1986, added subdivision (4).

ARTICLE 3A.

*Unfair Trade Practices.***§ 58-54.1. Declaration of purpose.**

Cited in *Pearce v. American Defender Life Ins. Co.*, 74 N.C. App. 620, 330 S.E.2d 9 (1985); *Winston Realty Co. v. G.H.G., Inc.*, 314 N.C. 90, 331 S.E.2d 677 (1985).

§ 58-54.4. Unfair methods of competition and unfair or deceptive acts or practices defined.

The following are hereby defined as unfair methods of competition and unfair and deceptive acts or practices in the business of insurance:

(7) Unfair Discrimination.

- a. Making or permitting any unfair discrimination between individuals of the same class and equal expectation of life in the rates charged for any contract of life insurance or of life annuity or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of such contract.
 - b. Making or permitting any unfair discrimination between individuals of the same class and of essentially the same hazard in the amount of premium, policy fees, or rates charged for any policy or contract of accident or health insurance or in the benefits payable thereunder, or in any of the terms or conditions of such contract, or in any other manner whatever.
 - c. Making or permitting any unfair discrimination between or among individuals or risks of the same class and of essentially the same hazard by refusing to issue, refusing to renew, cancelling, or limiting the amount of insurance coverage on a property or casualty risk because of the geographic location of the risk, unless:
 1. The refusal or limitation is for the purpose of preserving the solvency of the insurer and is not a mere pretext for unfair discrimination, or
 2. The refusal, cancellation, or limitation is required by law.
 - d. Making or permitting any unfair discrimination between or among individuals or risks of the same class and of essentially the same hazard by refusing to issue, refusing to renew, cancelling, or limiting the amount of insurance coverage on a residential property risk, or the personal property contained therein, because of the age of the residential property, unless:
 1. The refusal or limitation is for the purpose of preserving the solvency of the insurer and is not a mere pretext for unfair discrimination, or
 2. The refusal, cancellation, or limitation is required by law.
- (11) Unfair Claim Settlement Practices. — Committing or performing with such frequency as to indicate a general business practice of any of the following: Provided, however, that no violation of this subsection shall of itself create any cause of action in favor of any person other than the Commissioner:
- a. Misrepresenting pertinent facts or insurance policy provisions relating to coverages at issue;

- b. Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies;
- c. Failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies;
- d. Refusing to pay claims without conducting a reasonable investigation based upon all available information;
- e. Failing to affirm or deny coverage of claims within a reasonable time after proof-of-loss statements have been completed;
- f. Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear;
- g. Compelling [the] insured to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by such insured;
- h. Attempting to settle a claim for less than the amount to which a reasonable man would have believed he was entitled;
- i. Attempting to settle claims on the basis of an application which was altered without notice to, or knowledge or consent of, the insured;
- j. Making claims payments to insureds or beneficiaries not accompanied by [a] statement setting forth the coverage under which the payments are being made;
- k. Making known to insureds or claimants a policy of appealing from arbitration awards in favor of insureds or claimants for the purpose of compelling them to accept settlements or compromises less than the amount awarded in arbitration;
- l. Delaying the investigation or payment of claims by requiring an insured claimant, or the physician, of [or] either, to submit a preliminary claim report and then requiring the subsequent submission of formal proof-of-loss forms, both of which submissions contain substantially the same information;
- m. Failing to promptly settle claims where liability has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage; and
- n. Failing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement.

(1949, c. 1112; 1955, c. 850, s. 3; 1967, c. 935, s. 2; 1975, c. 668; 1983, c. 831; 1985 (Reg. Sess., 1986), c. 1027, ss. 18, 20.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1027, s. 57, contains a severability clause.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective September 1, 1986, added paragraphs (7)(c) and (7)(d), and rewrote the catchline and introductory language of subdivision (11).

CASE NOTES

Purpose and Applicability. — The statutory provisions which prohibit an insurer or insurance agent from "discrimination" in setting rates for any person — §§ 58-44.3,

58-44.5, and 58-54.4 — are obviously designed to prohibit an insurance agent or company from charging reduced or excessive insurance rates contrary to the established rating rules

applicable to the risk and are not applicable to rate making. *State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau*, 75 N.C. App. 201, 331 S.E.2d 124, cert. denied, 314 N.C. 547, 335 S.E.2d 319 (1985).

A violation of this section as a matter of law constitutes an unfair or deceptive trade practice in violation of § 75-1.1. *Pearce v. American Defender Life Ins. Co.*, — N.C. —, 343 S.E.2d 174 (1986).

Arbitrary Requirement of Unnecessary Medical Reports. — Arbitrarily requiring, under a mortgage payment disability policy, costly, difficult to obtain medical reports that are clearly unnecessary and serve no legitimate purpose, as when the insurer already has proof from a doctor, or the circumstances clearly indicate that the insured's disability is not episodic but will extend beyond the current period benefits are applied for, is an unfair trade practice. *Douglas v. Pennamco, Inc.*, 75 N.C. App. 644, 331 S.E.2d 298, cert. denied, 314 N.C. 664, 336 S.E.2d 399 (1985).

Monthly Proof of Disability. — The requirement, under a mortgage payment disability policy, that the insured, whose injury was of uncertain duration and subject to improvement, submit proof of his disability each month benefits were applied for, did not constitute an unfair and deceptive trade practice. *Douglas v.*

Pennamco, Inc., 75 N.C. App. 644, 331 S.E.2d 298, cert. denied, 314 N.C. 664, 336 S.E.2d 399 (1985).

The average consumer would not have understood the below-quoted statement, included in a letter written by an employee of an insurer in response to an inquiry by an agent of the insured as to the extent of the insured's coverage while he was in military service, to mean that the remaining exceptions to coverage, including an "air craft except," set out in the "accidental death rider" would no longer be applied: "However, in addition to the basic policy, this accidental death rider would also be payable should his death occur while in the Armed Forces but not as a result of an act of war." *Pearce v. American Defender Life Ins. Co.*, 74 N.C. App. 620, 330 S.E.2d 9, cert. granted, 314 N.C. 542, 335 S.E.2d 20 (1985).

Dismissal of Claim Upheld. — Where plaintiff failed to allege any facts supporting a violation of subdivision (11) of this section, and failed to plead that alleged violations occurred "with such frequency as to indicate a general business practice," the court did not err in dismissing a claim under this section. *Beasley v. National Sav. Life Ins. Co.*, 75 N.C. App. 104, 330 S.E.2d 207, cert. granted, 314 N.C. 537, 335 S.E.2d 13 (1985).

SUBCHAPTER II. INSURANCE COMPANIES.

ARTICLE 6.

General Domestic Companies.

§ 58-72. Kinds of insurance authorized.

The kinds of insurance which may be authorized in this State, subject to the other provisions of this Chapter, are set forth in the following paragraphs. Except to the extent an insurer participates in a risk sharing plan under Article 37 of this Chapter, nothing herein contained shall require any insurer to insure every kind of risk which it is authorized to insure. The power to do any kind of insurance against loss of or damage to property shall include the power to insure all lawful interests in such property and to insure against loss of use and occupancy, rents and profits resulting therefrom; but no kind of insurance shall be deemed to include life insurance or insurance against legal liability for personal injury or death unless specified herein. In addition to any power to engage in any other kind of business than an insurance business which is specifically conferred by the provisions of this Chapter, any insurer authorized to do business in this State may engage in such other kind or kinds of business to the extent necessarily or properly incidental to the kind or kinds of insurance business which it is authorized to do in this State. Each of the following paragraphs indicates the scope of the kind of insurance business specified therein:

(22) "Miscellaneous insurance," meaning insurance against any other casualty authorized by the charter of the company, not included in subdivisions (1) to (21) inclusive of this section, which is a proper subject of insurance. Except to the extent an insurer participates in a risk sharing plan under Article 37 of this Chapter, no corporation so formed may transact any other business than that specified in its charter and articles of association. (1899, c. 54, ss. 24, 26; 1903, c. 438, s. 1; Rev., s. 4726; 1911, c. 111, s. 1; C.S., s. 6327; 1945, c. 386; 1947, c. 721; 1953, c. 992; 1967, c. 624, s. 1; 1969, c. 616, s. 1; 1979, c. 714, s. 2; 1986, Ex. Sess., c. 7, ss. 2, 3.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1986, Extra Session, c. 7, s. 13 makes the act effective upon ratification and provides that it shall expire on June 30, 1988. Section 13 further provides: "Within 30 days after the effective date of this act the boards of directors of the FAIR Plan and the Beach Plan shall each submit a revised plan of operation for approval by the Commissioner in accordance with G.S. 58-173.21(b) and G.S. 58-173.7, respectively." The act was ratified on February 18, 1986.

Section 12 of Session Laws 1986, Extra Session, c. 7 is a severability clause.

Effect of Amendments. — The 1986 Extra Session amendment, effective February 18, 1986, rewrote the second sentence of the introductory paragraph, which formerly read "Nothing herein contained shall require any insurer to insure every kind of risk which it is authorized to insure," and rewrote the second sentence of subdivision (22), which formerly read "No corporation so formed may transact any other business than that specified in its charter and articles of association."

§ 58-75.1. Maintenance and removal of records and assets.

(a) Every domestic insurer that has its home or principal office in a location outside this State shall nevertheless maintain an office or offices in this State and keep therein for such period as the Commissioner may by regulation require complete records of its assets, transactions, and affairs, specifically including:

- (1) Financial records;
- (2) Corporate records;
- (3) Reinsurance document;
- (4) Access to all accounting transactions and access in this State, upon demand by the Commissioner, to all original accounting documents;
- (5) Claim files; and
- (6) Payment of claims, in accordance with such methods and systems as are customary or suitable as to the kind or kinds of insurance transacted.

(b) Every domestic insurer that has its home or principal office in a location outside this State shall have and maintain its assets in this State, except as to:

- (1) Real property and personal property appurtenant thereto lawfully owned by the insurer and located outside this State; and
- (2) Such property of the insurer as may be customary, necessary, and convenient to enable and facilitate the operation of its branch offices, regional home offices, and operations offices, located outside this State as referred to in G.S. 58-75.2.

(c) The removal from this State of all or a material part of the records or assets of a domestic insurer that has its home or principal office outside this State except pursuant to a plan of merger or consolidation approved by the Commissioner under or for such reasonable purposes and periods of time as may be approved by the Commissioner in writing in advance of such removal, or concealment of such records or assets or material part thereof from the Commissioner is prohibited. Any person who, without the prior approval of

the Commissioner, removes or attempts to remove such records or assets or such material part thereof from the office or offices in which they are required to be kept and maintained under subsection (a) of this section or who conceals or attempts to conceal such records from the Commissioner, in violation of this subsection, shall be guilty of a Class J felony. Upon any removal or attempted removal of such records or assets or upon retention of such records or assets or material part thereof outside this State, beyond the period therefor specified in the consent of the Commissioner under which consent the records were so removed thereat, or upon concealment of or attempt to conceal records or assets in violation of this section, the Commissioner may institute delinquency proceedings against the insurer pursuant to the provisions of Article 17A of this Chapter.

(d) This section is subject to the exceptions provided for in G.S. 58-75.2. (1985 (Reg. Sess., 1986), c. 1013, s. 7.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1013, s. 18, makes this section effective October 1, 1986.

§ 58-75.2. Exceptions to requirements of G.S. 58-75.1.

The provisions of G.S. 58-75.1 shall not be deemed to prohibit or prevent an insurer from:

- (1) Establishing and maintaining branch offices or regional home offices in other states where necessary or convenient to the transaction of its business and keeping therein the detailed records and assets customary and reasonably necessary for the servicing of its insurance in force and affairs in the territory served by such an office, as long as such records and assets are made readily available at such office for examination by the Commissioner at his request.
- (2) Having, depositing, or transmitting funds and assets of the insurer in or to jurisdictions outside this State as required by other jurisdictions as a condition of transacting insurance in such jurisdictions reasonably and customarily required in the regular course of its business.
- (3) Establishing and maintaining its principal operations offices, its usual operations records, and such of its assets as may be necessary or convenient for the purpose, in another state in which the insurer is authorized to transact insurance in order that general administration of its affairs may be combined with that of an affiliated insurer or insurers, but subject to the following conditions:
 - a. That the Commissioner consents in writing to such removal of offices, records, and assets from this State upon evidence satisfactory to him that the same will facilitate and make more economical the operations of the insurer, and will not unreasonably diminish the service or protection thereafter to be given the insurer's policyholders in this State and elsewhere;
 - b. That the insurer will continue in this State its principal corporate office or place of business, and maintain therein available to the inspection of the Commissioner complete records of its corporate proceedings and a copy of each financial statement of the insurer current within the preceding five years, including a copy of each interim financial statement prepared for the information of the insurer's officers or directors;
 - c. That, upon the written request of the Commissioner, the insurer will with reasonable promptness produce at its principal corpo-

rate offices in this State for examination or for subpoena, its records or copies thereof relative to a particular transaction or transactions of the insurer as designated by the Commissioner in his request; and

- d. That if at any time the Commissioner finds that the conditions justifying the maintenance of such offices, records, and assets outside of this State no longer exist, or that the insurer has willfully and knowingly violated any of the conditions stated in sub-subdivisions b. and c., the Commissioner may order the return of such offices, records, and assets to this State within such reasonable time, not less than six months, as may be specified in the order; and that for failure to comply with such order, as thereafter modified or extended, if any, the Commissioner shall suspend or revoke the insurer's certificate of authority.
- (4) Placing its investment assets in one or more custodial accounts inside or outside of this State with banks, trust companies, or other similar institutions pursuant to custodial agreements approved by the Commissioner.
- (5) Permitting policyholder and certificate holder records and claims and other information to be kept and maintained by agents, general agents, third-party administrators, creditors, employers, associations, and others in the ordinary course of business in a manner customary or suitable to the kind or kinds of insurance transacted; provided, however, that the insurer shall, upon reasonable notice, make available to the Commissioner or his designee any records or other information permitted by this subsection to be maintained outside this State. (1985 (Reg. Sess., 1986), c. 1013, s. 7.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1013, s. 18, makes this section effective October 1, 1986.

§ 58-77. Amount of capital and/or surplus required; impairment of capital or surplus.

The amount of capital and/or surplus requisite to the formation and organization of companies under the provisions of this Chapter shall be as follows:

(5) Mutual Fire and Marine Companies.

- a. Limited assessment companies. — A limited assessment mutual company may be organized in the manner prescribed in this Chapter and licensed to do one or more kinds of insurance specified in subdivisions (4), (5), (6), (7), (8), (11), (12), (19), (20), (21) and (22) of G.S. 58-72 only when it has no less than five hundred thousand dollars (\$500,000) of insurance in not fewer than 500 separate risks subscribed with a paid-in initial surplus of at least three hundred thousand dollars (\$300,000), which surplus shall at all times be maintained. The assessment liability of a policyholder of a company organized in accordance with the provisions of this paragraph shall not be limited to less than five annual premiums provided, such limited assessment company may reduce the assessment liability of its policyholders from five annual premiums as set out herein to one additional annual premium when the free surplus of such company amounts to not less than three hundred thousand dollars (\$300,000), which surplus shall at all times be maintained.

- b. Assessable mutual companies. — An assessable mutual company may be organized in the manner prescribed in this Chapter and licensed to do one or more of the kinds of insurance specified in subdivisions (4), (5) and (6) of G.S. 58-72 (fire, miscellaneous property and water damage), with an unlimited assessment liability of its policyholders only when it shall have not less than five hundred thousand dollars (\$500,000) of insurance in not fewer than 500 separate risks subscribed with a paid-in initial surplus equal to twice the amount of the maximum net retained liability under the largest policy of insurance issued by such company; but not less than sixty thousand dollars (\$60,000) which surplus shall at all times be maintained. Provided such company, when its charter so permits, in addition may be licensed to do one or more of the kinds of insurance specified in subdivisions (7), (8), (11), (12), (19), (20), (21) and (22) of G.S. 58-72, with an unlimited assessment liability of its policyholders, when its free surplus amounts to not less than sixty thousand dollars (\$60,000), which surplus shall at all times be maintained.
- c. Nonassessable mutual companies. — A nonassessable mutual company may be organized in the manner prescribed in this Chapter and licensed to do one or more of the kinds of insurance specified in subdivisions (4), (5), (6), (7), (8), (11), (12), (19), (20), (21) and (22) of G.S. 58-72 and may be authorized to issue policies under the terms of which a policyholder is not liable for any assessments in addition to the premium set out in the policy only when it shall have not less than five hundred thousand dollars (\$500,000) of insurance in not fewer than 500 separate risks subscribed with a paid-in initial surplus of not less than eight hundred thousand dollars (\$800,000), which surplus shall at all times be maintained.
- d. Town or county mutual insurance companies. — A town or county mutual insurance company with unlimited assessment liability may be organized in the manner prescribed in this Chapter and licensed to do the kinds of insurance specified in subdivision (4) of G.S. 58-72 (fire) only when it shall have not less than fifty thousand dollars (\$50,000) of insurance in not fewer than 50 separate risks subscribed with a paid-in initial surplus of not less than fifteen thousand dollars (\$15,000), which surplus shall at all times be maintained. A town or county mutual insurance company may, in addition to writing the business specified in subdivision (4) of G.S. 58-72 (fire insurance), cover in the same policy the hazards usually insured against under an extended coverage endorsement when such company has and at all times maintains in addition to the surplus hereinbefore required, an additional surplus of not less than twenty-five thousand dollars (\$25,000) or not less than an amount equivalent to one percent (1%) of the total amount of net retained insurance in force, whichever is the larger sum: Provided, that such company may not operate in more than five counties in this State that are adjacent to the county in which its home office is located.

(1899, c. 54, s. 26; 1903, c. 438, s. 4; Rev., s. 4729; 1907, c. 1000, s. 5; 1913, c. 140, s. 2; C.S., s. 6332; 1929, c. 284, s. 1; 1945, c. 386; 1947, c. 721; 1963, c. 943; 1965, c. 947; 1967, c. 300; 1971, c. 536; 1973, c. 686; 1979, c. 421, s. 1; 1983, c. 472; 1985, c. 666, s. 75; 1985 (Reg. Sess., 1986), c. 1013, s. 10.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 15,

1986, substituted "five counties in this State that are adjacent to the county in which its home office is located" for "three adjacent counties in this State" at the end of subdivision (5)d.

ARTICLE 12B.

North Carolina Rate Bureau.

§ 58-124.17. North Carolina Rate Bureau created.

There is hereby created a Bureau to be known as the "North Carolina Rate Bureau," with the following objects and functions:

- (6) The Bureau shall maintain and furnish to the Commissioner on an annual basis the statistics on earnings derived by member companies from the investment of unearned premium, loss, and loss expense reserves on nonfleet private passenger motor vehicle insurance policies written in this State. Whenever the Bureau proposes rates under this Article, it shall prepare a separate exhibit for the experience years in question showing the combined earnings realized from the investment of such reserves on policies written in this State. The amount of earnings may in an equitable manner be included in the ratemaking formula to arrive at a fair and equitable rate. The Commissioner may require further information as to such earnings and may require calculations of the Bureau bearing on such earnings.
- (7) Member companies shall furnish, upon request of any person carrying nonfleet private passenger motor vehicle insurance in the State upon whose risk a rate has been promulgated, information as to rating, including the method of calculation. (1977, c. 828, s. 6; 1981, c. 888, ss. 1-3; 1983, c. 416, s. 5; 1985 (Reg. Sess., 1986), c. 1027, s. 5.1.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1027, s. 57, contains a severability clause.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 16, 1986, added subdivisions (6) and (7).

CASE NOTES

Scope of Commissioner's Authority. — The authority of the commissioner to review, approve, modify, or disapprove insurance rates promulgated by the rate bureau is limited to that authority granted by the General Assembly. State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 75 N.C. App. 201, 331 S.E.2d 124, cert. denied, 314 N.C. 547, 335 S.E.2d 319 (1985).

The commissioner did not have the stat-

utory authority to withhold approval of an 11.7% rate increase for farmowner insurance coverages subject to the rate bureau's jurisdiction on the condition that the insurance service office file for a rate decrease for farmowner insurance coverages not subject to the rate bureau's jurisdiction. State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 75 N.C. App. 201, 331 S.E.2d 124, cert. denied, 314 N.C. 547, 335 S.E.2d 319 (1985).

§ 58-124.18. Membership as a prerequisite for writing insurance; governing committee; rules and regulations; expenses.

(b) Each member of the Bureau writing any one or more of the above lines of insurance in North Carolina shall, as a requisite thereto, be represented in the Bureau and shall be entitled to one representative and one vote in the administration of the affairs of the Bureau. They shall, upon organization, elect a governing committee which governing committee shall be composed of equal representation by stock and nonstock members. The governing committee of the Bureau shall also have as nonvoting members two persons who are not employed by or affiliated with any insurance company or the Department of Insurance and who are appointed by the Governor to serve at his pleasure.

(1977, c. 828, s. 6; 1981, c. 888, s. 4; 1985 (Reg. Sess., 1986), c. 1027, s. 6.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1027, s. 57, contains a severability clause.

Effect of Amendments. — The 1985 (Regular Session, 1986) amendment, effective July 16, 1986, added the last sentence of subsection (b).

§ 58-124.19. Method of rate making; factors considered.

CASE NOTES

Subdivision (1) of this section applies only to insurance coverages subject to the rate bureau's jurisdiction. State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 75 N.C. App. 201, 331 S.E.2d 124, cert. denied, 314 N.C. 547, 335 S.E.2d 319 (1985).

"Inadequate" and "Excessive" Rates. —

In accord with main volume. See State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 75 N.C. App. 201, 331 S.E.2d 124, cert. denied, 314 N.C. 547, 335 S.E.2d 319 (1985).

Income from Invested Capital, etc. —

The commissioner had to consider evidence tending to show that the insurance department's expert witness based part of his calculations on investment income from capital and surplus, because investment income from these sources may not be considered in insurance rate making. State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 75 N.C. App. 201, 331 S.E.2d 124, cert. denied, 314 N.C. 547, 335 S.E.2d 319 (1985).

The commissioner was not required to approve rates which provided a positive

underwriting profit as a matter of law, but was only required to give "due consideration" to this criteria. Consequently, the commissioner properly ordered a rate level that produced an underwriting loss while providing for an overall adequate profit. State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 75 N.C. App. 201, 331 S.E.2d 124, cert. denied, 314 N.C. 547, 335 S.E.2d 319 (1985).

The commissioner was not required to approve an underwriting profit greater than that requested by the rate bureau. State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 75 N.C. App. 201, 331 S.E.2d 124, cert. denied, 314 N.C. 547, 335 S.E.2d 319 (1985).

The commissioner's order of a five percent "excess multiplier" (i.e., computation providing premium against catastrophic losses) was based on evidence that was not material or substantial, that was fact speculation, and was rejected by the court. State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 75 N.C. App. 201, 331 S.E.2d 124, cert. denied, 314 N.C. 547, 335 S.E.2d 319 (1985).

§ 58-124.20. Filing rates, plans with Commissioner; public inspection of filings.

(d) With respect to the filing of rates for nonfleet private passenger motor vehicle insurance, the Bureau shall, on or before July 1 of each year, or later with the approval of the Commissioner, file with the Commissioner the experience, data, statistics, and information referred to in subsection (c) of this section and any proposed adjustments in the rates for all member companies of the Bureau. The filing shall include, where deemed by the Commissioner to be necessary for proper review, the data specified in subsections (c), (e), (g) and (h) of this section. Any filing that does not contain the data required by this subsection may be returned to the Bureau and not be deemed a proper filing. Provided, however, that if the Commissioner concludes that a filing does not constitute a proper filing he shall promptly notify the Bureau in writing to that effect, which notification shall state in reasonable detail the basis of the Commissioner's conclusion. The Bureau shall then have a reasonable time to remedy the defects so specified. An otherwise defective filing thus remedied shall be deemed to be a proper and timely filing, except that all periods of time specified in this Article will run from the date the Commissioner receives additional or amended documents necessary to remedy all material defects in the original filing.

(g) The following information must be included in policy form, rule, and rate filings under this Article and under Article 25A of this Chapter:

- (1) A detailed list of the rates, rules, and policy forms filed, accompanied by a list of those superseded; and
- (2) A detailed description, properly referenced, of all changes in policy forms, rules, and rates, including the effect of each change.

(h) Except for filings made under G.S. 58-124.23, all policy form, rule, and rate filings under this Article and Article 25A of this Chapter that are based on statistical data must be accompanied by the following properly identified information:

- (1) North Carolina earned premiums at the actual and current rate level; losses and loss adjustment expenses, each on paid and incurred bases without trending or other modification for the experience period, including the loss ratio anticipated at the time the rates were promulgated for the experience period;
- (2) Credibility factor development and application;
- (3) Loss development factor derivation and application on both paid and incurred bases and in both numbers and dollars of claims;
- (4) Trending factor development and application;
- (5) Changes in premium base resulting from rating exposure trends;
- (6) Limiting factor development and application;
- (7) Overhead expense development and application of commission and brokerage, other acquisition expenses, general expenses, taxes, licenses, and fees;
- (8) Percent rate change;
- (9) Final proposed rates;
- (10) Investment earnings, consisting of investment income and realized plus unrealized capital gains, from loss, loss expense, and unearned premium reserves;
- (11) Identification of applicable statistical plans and programs and a certification of compliance with them;
- (12) Investment earnings on capital and surplus;
- (13) Level of capital and surplus needed to support premium writings without endangering the solvency of member companies; and

- (14) Such other information that may be required by any rule adopted by the Commissioner.

Provided, however, that no filing may be returned or disapproved on the grounds that such information has not been furnished if insurers have not been required to collect such information pursuant to statistical plans or programs or to report such information to the Bureau or to statistical agents, except where the Commissioner has given reasonable prior notice to the insurers to begin collecting and reporting such information, or except when the information is readily available to the insurers.

(i) The Bureau shall file with and at the time of any rate filing all testimony, exhibits, and other information on which the Bureau will rely at the hearing on the rate filing. The Department shall file all testimony, exhibits, and other information on which the Department will rely at the hearing on the rate filing 20 days in advance of the convening date of the hearing. Upon the issuance of a notice of hearing the Commissioner shall hold a meeting of the parties to provide for the scheduling of any additional testimony, including written testimony, exhibits or other information, in response to the notice of hearing and any potential rebuttal testimony, exhibits, or other information. This subsection also applies to rate filings made by the North Carolina Motor Vehicle Reinsurance Facility under Article 25A of this Chapter. (1977, c. 828, s. 6; 1979, c. 824, s. 2; 1981, c. 521, s. 1; 1985, c. 666, s. 3; 1985 (Reg. Sess., 1986), c. 1027, ss. 2, 3.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985 (Regular Session, 1986), c. 1027, s. 9, provides: "Notwithstanding the provisions of sections 2 through 5 of this act, the Bureau may make its 1986 rate filing for nonfleet private passenger motor vehicle insurance after July 1, 1986."

Session Laws 1985 (Reg. Sess., 1986), c. 1027, s. 57, contains a severability clause.

Effect of Amendments. — The 1985 (Regular Session, 1986) amendment, effective July 16, 1986, rewrote subsection (d) and added subsections (g), (h) and (i).

CASE NOTES

The controlling statutes do not require the rate bureau to provide justification of classification changes in the rate filing itself. *State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau*, 75 N.C. App. 201, 331 S.E.2d 124, cert. denied, 314 N.C. 547, 335 S.E.2d 319 (1985).

Consideration of Effect of Disapproval. — Where the rate bureau's separate filing requesting to write farmowner policies on a one-year rather than a three-year basis did not note that disapproval of the filing would require increases in premium trends in its farmowner filing upon the separate filing being disapproved, the commissioner was not required to consider the effect of this disapproval on farmowner insurance rates. *State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau*, 75 N.C. App. 201, 331 S.E.2d 124, cert. denied, 314 N.C. 547, 335 S.E.2d 319 (1985).

Where the rate bureau's filing specifically requested a rate adjustment for the reclassification of masonry veneer structures,

having failed to give the rate bureau notice of the alleged deficiency in supporting data, the commissioner was precluded from raising the classification change at the hearing and was required to permit a rate adjustment on this basis because of the material and substantial evidence offered by the bureau. *State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau*, 75 N.C. App. 201, 331 S.E.2d 124, cert. denied, 314 N.C. 547, 335 S.E.2d 319 (1985).

Use of Rate Making Data beyond that Provided by ISO. — Although the rate bureau was not required by statute to base a rate filing on data from all insurance companies comprising its membership, instead of only data from the Insurance Service Office (ISO), there was no error in the commissioner relying on rate making data beyond that compiled by the ISO. *State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau*, 75 N.C. App. 201, 331 S.E.2d 124, cert. denied, 314 N.C. 547, 335 S.E.2d 319 (1985).

§ 58-124.21. Disapproval; hearing, order; adjustment of premium, review of filing.

CASE NOTES

Notice of Alleged Deficiency. — Clearly, the commissioner knew, prior to the notice of hearing, that the rate bureau, based on its filing, had used fire and extended coverage data in calculating its "excess multiplier" (i.e., computation providing premium against catastrophic losses). This section and fundamental fairness required the commissioner to give notice of the nature and extent of any alleged deficiency in the use of this data. Having failed to give such notice, the commissioner was prohibited from disapproving the rate bureau's excess multiplier on that basis. *State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau*, 75 N.C. App. 201, 331 S.E.2d 124, cert. denied, 314 N.C. 547, 335 S.E.2d 319 (1985).

Failure to Give Notice of Alleged Deficiency. — Where the rate bureau's filing specifically requested a rate adjustment for the reclassification of masonry veneer structures, having failed to give the rate bureau notice of alleged deficiency in supporting data, the commissioner was precluded from raising the classification change at the hearing and was required to permit a rate adjustment on this basis because of the material and substantial evidence offered by the bureau. *State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau*, 75 N.C. App. 201, 331 S.E.2d 124, cert. denied, 314 N.C. 547, 335 S.E.2d 319 (1985).

Notice Held Adequate. — The commissioner's notice of hearing specifically providing that investment income had not been considered and that the rate bureau had failed to justify the profit and contingency margin requested was adequate notice of the alleged deficiencies in the bureau's profit determination. The commissioner was not required to provide in his notice the manner in which profitability would be determined, there being no evidence to indicate that he knew the precise rating methodology that he would propose at the hearing before the notice of hearing was required. *State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau*, 75 N.C. App. 20, 331 S.E.2d 124, cert. denied, 314 N.C. 547, 335 S.E.2d 319 (1985).

Consideration of Effect of Disapproval. — Where the rate bureau's separate filing requesting to write farmowner policies on a one-year rather than a three-year basis did not note that disapproval of the filing would require increases in premium trends in its farmowner filing upon the separate filing being disapproved, the commissioner was not required to consider the effect of this disapproval on farmowner insurance rates. *State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau*, 75 N.C. App. 201, 331 S.E.2d 124, cert. denied, 314 N.C. 547, 335 S.E.2d 319 (1985).

§ 58-124.22. Appeal of Commissioner's order.

(b) Whenever a Bureau rate is held to be unfairly discriminatory or excessive and no longer effective by order of the Commissioner issued under G.S. 58-124.21, the members of the Bureau, in accordance with rules and regulations established and adopted by the governing committee, shall have the option to continue to use such rate for the interim period pending judicial review of such order, provided each such member shall place in escrow account the purportedly unfairly discriminatory or excessive portion of the premium collected during such interim period. Upon a final determination by the Court, the Commissioner shall order the escrowed funds to be distributed appropriately, except that individual refunds that are five dollars (\$5.00) or less shall not be required. The court may also require that purportedly excess premiums resulting from an adjustment of premiums ordered pursuant to G.S. 58-124.21(b) be placed in such escrow account pending judicial review. If refunds made to policyholders are ordered under this subsection, the amounts refunded shall bear interest at the rate determined under this subsection. That rate shall be the average of the prime rates of the four largest banking institutions domiciled in this State, plus three percent (3%), as of the effective date of the filing, to be computed by the Commissioner. (1977, c. 828, s. 6; 1979, c. 824, s. 4; 1985 (Reg. Sess., 1986), c. 1027, ss. 3.1, 4.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985 (Regular Session, 1986), c. 1027, s. 9, provides: "Notwithstanding the provisions of sections 2 through 5 of this act, the Bureau may make its 1986 rate filing for nonfleet private passenger motor vehicle insurance after July 1, 1986."

Session Laws 1985 (Reg. Sess., 1986), c. 1027, s. 57, contains a severability clause.

Effect of Amendments. — The 1985 (Regu-

lar Session, 1986) amendment, effective July 16, 1986, in subsection (b), divided the former first sentence into the present first and second sentences thereof, deleted "and the court" at the end of the present first sentence, inserted "by the Court, the Commissioner" in the present second sentence, and substituted the present next-to-last and last sentences for the former last sentence, which read "The amounts escrowed hereunder shall bear interest at the prime rate as of the date such rates were put into effect."

CASE NOTES

Applied in *State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau*, 75 N.C. App. 201, 331 S.E.2d 124 (1985).

§ 58-124.28. Limitation.

Nothing in this Article shall apply to any town or county farmers mutual fire insurance association restricting its operations to not more than five counties in this State that are adjacent to the county in which its home office is located, or to domestic insurance companies, associations, orders or fraternal benefit societies now doing business in this State on the assessment plan. (1977, c. 828, s. 6; 1985 (Reg. Sess., 1986), c. 1013, s. 10.1.)

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 15, 1986, substituted "its operations" for "their operations" and substituted "five counties in this

State that are adjacent to the county in which its home office is located" for "three adjacent counties."

§ 58-124.31. Classifications and Safe Driver Incentive Plan for nonfleet private passenger motor vehicle insurance.

(a) The Bureau shall file, subject to review, modification, and promulgation by the Commissioner, such rate classifications, schedules, or rules that the Commissioner deems to be desirable and equitable to classify drivers of nonfleet private passenger motor vehicles for insurance purposes. Subsequently, the Commissioner may require the Bureau to file modifications of the classifications, schedules, or rules. If the Bureau does not file the modifications within a reasonable time, the Commissioner may promulgate the modifications. In promulgating or modifying these classifications, schedules, or rules, the Commissioner may give consideration to the following:

- (1) Uses of vehicles, including without limitation to farm use, pleasure use, driving to and from work, and business use;
- (2) Principal and occasional operation of vehicles;
- (3) Years of driving experience of insureds as licensed drivers;
- (4) The characteristics of vehicles; or
- (5) Any other factors, not in conflict with any law, deemed by the Commissioner to be appropriate.

(b) The Bureau shall file, subject to review, modification, and promulgation by the Commissioner, a Safe Driver Incentive Plan ("Plan") that adequately

and factually distinguishes among various classes of drivers that have safe driving records and various classes of drivers that have a record of chargeable accidents; a record of convictions of major moving traffic violations; a record of convictions of minor moving traffic violations; or a combination thereof; and that provides for premium differentials among those classes of drivers. Subsequently, the Commissioner may require the Bureau to file modifications of the Plan. If the Bureau does not file the modifications within a reasonable time, the Commissioner may promulgate the modifications. The Commissioner is authorized to structure the Plan to provide for surcharges above and discounts below the rate otherwise charged.

(c) The classifications and Plan filed by the Bureau shall be subject to the filing, hearing, modification, approval, disapproval, review, and appeal procedures provided by law. The classifications or Plan filed by the Bureau and promulgated by the Commissioner shall of itself not be designed to bring about any increase or decrease in the overall rate level.

(d) Whenever any policy loses any safe driver discount provided by the Plan or is surcharged due to an accumulation of points under the Plan, the insurer shall, pursuant to rules adopted by the Commissioner, prior to or simultaneously with the billing for additional premium, inform the named insured of the surcharge or loss of discount by mailing to such insured a notice that states the basis for the surcharge or loss of discount, and that advises that upon receipt of a written request from the named insured it will promptly mail to the named insured a statement of the amount of increased premium attributable to the surcharge or loss of discount. The statement of the basis of the surcharge or loss of discount is privileged, and does not constitute grounds for any cause of action for defamation or invasion of privacy against the insurer or its representatives, or against any person who furnishes to the insurer the information upon which the insurer's reasons are based, unless the statement or furnishing of information is made with malice or in bad faith.

(e) Records of convictions for moving traffic violations to be considered under the safe driver plans under G.S. 58-30.4 and this section shall be obtained at least annually from the Division of Motor Vehicles and applied by the Bureau's member companies in accordance with rules to be established by the Bureau.

(f) The Bureau is authorized to establish reasonable rules providing for the exchange of information among its member companies as to chargeable accidents and similar information involving persons to be insured under policies. Neither the Bureau, any employee of the Bureau, nor any company or individual serving on any committee of the Bureau has any liability for defamation or invasion of privacy to any person arising out of the adoption, implementation, or enforcement of any such rule. No insurer or individual requesting, furnishing, or otherwise using any information that such insurer or person reasonably believes to be for purposes authorized by this section has any liability for defamation or invasion of privacy to any person on account of any such requesting, furnishing, or use. The immunity provided by this subsection does not apply to any acts made with malice or in bad faith.

(g) If an applicant for the issuance or renewal of a nonfleet private passenger motor vehicle insurance policy knowingly makes a material misrepresentation of the years of driving experience or the driving record of any named insured or of any other operator who resides in the same household and who customarily operates a motor vehicle to be insured under the policy, the insurer may:

- (1) Cancel or refuse to renew the policy;
- (2) Surcharge the policy in accordance with rules to be adopted by the Bureau and approved by the Commissioner; or

- (3) Recover from the applicant the appropriate amount of premium or surcharge that would have been collected by the insurer had the applicant furnished the correct information. (1985 (Reg. Sess., 1986), c. 1027, s. 1)

Editor's Note. — Session Laws 1985 (Regular Session, 1986), c. 1027, s. 58, makes this section effective July 16, 1986.

Session Laws 1985 (Reg. Sess., 1986), c. 1027, s. 57, contains a severability clause.

§ 58-124.32. Rate filings and hearings for motor vehicle insurance.

(a) With respect to nonfleet private passenger motor vehicle insurance, except as provided in G.S. 58-124.22, a filing made by the Bureau under G.S. 58-124.20(d) is not effective until approved by the Commissioner or unless 60 days have elapsed since the making of a proper filing under that subsection and the Commissioner has not called for a hearing on the filing. If the Commissioner calls for a hearing, he must give written notice to the Bureau, specify in the notice in what respect the filing fails to comply with this Article, and fix a date for the hearing that is not less than 30 days from the date the notice is mailed.

(b) At least 15 days before the date set for the convening of the hearing the respective staffs and consultants of the Bureau and Commissioner shall meet at a prehearing conference to review the filing and discuss any points of disagreement that are likely to be in issue at the hearing. At the prehearing conference, the parties shall list the names of potential witnesses and, where possible, stipulate to their qualifications as expert witnesses, stipulate to the sequence of appearances of witnesses, and stipulate to the relevance of proposed exhibits to be offered by the parties. Minutes of the prehearing conference shall be made and reduced to writing and become part of the hearing record. Any agreements reached as to preliminary matters shall be set forth in writing and consented to by the Bureau and the Commissioner. The purpose of this subsection is to avoid unnecessary delay in the rate hearings.

(c) Once begun, hearings must proceed without undue delay. At the hearing the burden of proving that the proposed rates are not excessive, inadequate, or unfairly discriminatory is on the Bureau. The Commissioner may disregard at the hearing any exhibits, judgments, or conclusions offered as evidence by the Bureau that were developed by or available to or could reasonably have been obtained or developed by the Bureau at or before the time the Bureau made its proper filing and which exhibits, judgments, or conclusions were not included and supported in the filing; unless the evidence is offered in response to inquiries made at the hearing by the Department, the notice of hearing, or as rebuttal to the Department's evidence. If relevant data becomes available after the filing has been properly made, the Commissioner may consider such data as evidence in the hearing. The order of presenting evidence shall be (1) by the Bureau; (2) by the Department; (3) any rebuttal evidence by the Bureau regarding the Department's evidence; and (4) any rebuttal evidence by the Department regarding the Bureau's rebuttal evidence. Neither the Bureau nor the Department shall present repetitious testimony or evidence relating to the same issues. The Bureau shall reimburse the Department for all reasonable costs incurred by the Department in retaining outside actuarial, economic, and legal consultants or counsel, and court reporting services, for the review of rate filings, in conducting hearings, and up to the time the Commissioner issues an order approving or disapproving the filing.

(d) If the Commissioner finds that a filing complies with the provisions of this Article, either after the hearing or at any other time after the filing has been properly made, he may issue an order approving the filing. If the Commissioner after the hearing finds that the filing does not comply with the provisions of this Article, he may issue an order disapproving the filing, determining in what respect the filing is improper, and specifying the appropriate rate level or levels that may be used by the members of the Bureau instead of the rate level or levels proposed by the Bureau filing, unless there has not been data admitted into evidence in the hearing that is sufficiently credible for arriving at the appropriate rate level or levels. Any order issued after a hearing shall be issued within 45 days after the completion of the hearing. If no order is issued within 45 days after the completion of the hearing, the filing shall be deemed to be approved.

(e) No person shall willfully withhold information required by this Article from or knowingly furnish false or misleading information to the Commissioner, any statistical agency designated by the Commissioner, any rating or advisory organization, the Bureau, the North Carolina Motor Vehicle Reinsurance Facility, or any insurer, which information affects the rates, rating plans, classifications, or policy forms subject to this Article or Article 25A of this chapter. (1985 (Reg. Sess., 1986), c. 1027, s. 5.)

Editor's Note. — Session Laws 1985 (Regular Session, 1986), c. 1027, s. 58, makes this section effective July 16, 1986.

Session Laws 1985 (Regular Session, 1986), c. 1027, s. 9, provides: "Notwithstanding the provisions of sections 2 through 5 of this act,

the Bureau may make its 1986 rate filing for nonfleet private passenger motor vehicle insurance after July 1, 1986."

Session Laws 1985 (Reg. Sess., 1986), c. 1027, s. 57, contains a severability clause.

ARTICLE 13C.

Regulation of Insurance Rates.

§ 58-131.34. Purposes.

CASE NOTES

Scope of Commissioner's Authority. — The authority of the commissioner to review, approve, modify, or disapprove insurance rates promulgated by the rate bureau is limited to that authority granted by the General Assem-

bly. *State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau*, 75 N.C. App. 201, 331 S.E.2d 124, cert. denied, 314 N.C. 547, 335 S.E.2d 319 (1985).

§ 58-131.36. Scope of application.

CASE NOTES

The commissioner did not have the statutory authority to withhold approval of an 11.7% rate increase for farmowner insurance coverages subject to the rate bureau's jurisdiction on the condition that the insurance service office file for a rate decrease for farmowner in-

surance coverages not subject to the rate bureau's jurisdiction. *State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau*, 75 N.C. App. 201, 331 S.E.2d 124, cert. denied, 314 N.C. 547, 335 S.E.2d 319 (1985).

§ 58-131.37. Rate standards.

(a) In order to serve the public interest, rates shall not be excessive, inadequate, or unfairly discriminatory.

(b), (c) Repealed by Session Laws 1985 (Reg. Sess., 1986), c. 1027, s. 10, effective September 1, 1986.

(d) No rate is inadequate unless the rate is unreasonably low for the insurance provided and the use or continued use of the rate by the insurer has had or will have the effect of:

(1) Endangering the solvency of the insurer; or

(2) Destroying competition; or

(3) Creating a monopoly; or

(4) Violating actuarial principles, practices, or soundness.

(1977, c. 828, s. 2; 1985 (Reg. Sess., 1986), c. 1027, ss. 9.1, 10, 11.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1027, s. 57, contains a severability clause.

Effect of Amendments. — The 1985 (Regular Session, 1986) amendment, effective September 1, 1986, inserted "In order to serve the public interest" at the beginning of subsection (a), deleted subsections (b) and (c), relating to excessive rates, and rewrote subsection (d).

§ 58-131.38. Rating methods.

In determining whether rates comply with the standards under GS 58-131.37, the following criteria shall be applied:

(1) Due consideration shall be given to past and prospective loss and expense experience within this State, to catastrophe hazards, to a reasonable margin for underwriting profit and contingencies, to trends within this State, to dividends or savings to be allowed or returned by insurers to their policyholders, members, or subscribers, and to all other relevant factors, including judgment factors; Provided, however, that regional or countrywide expense or loss experience and other regional or countrywide data may be considered only when credible North Carolina expense or loss experience or other data is not available.

(1977, c. 828, s. 2; 1985 (Reg. Sess., 1986), c. 1027, s. 16.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1027, s. 57, contains a severability clause.

Effect of Amendments. — The 1985 (Regular Session, 1986) amendment, effective September 1, 1986, rewrote the proviso at the end of subdivision (1).

§ 58-131.39. Filing of rates and supporting data.

(d) This section and G.S. 58-480 shall be construed in pari materia. (1977, c. 828, s. 2; 1985 (Reg. Sess., 1986), c. 1027, s. 17.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1027, s. 57, contains a severability clause.

Effect of Amendments. — The 1985 (Regular Session, 1986) amendment, effective September 1, 1986, added subsection (d).

§ 58-131.42. Disapproval of rates; interim use of rates.

(a) If, after a hearing, the Commissioner disapproves a rate, he must issue an order specifying in what respects the rate fails to meet the requirements of G.S. 58-131.37. If the Commissioner finds a rate to be excessive, he shall order the excess premium, plus interest at a rate determined in the same manner as in G.S. 58-124.22(b) as of the dates such rates were effective for policyholders, to be refunded to those policyholders who have paid the excess premium. If the Commissioner finds a rate to be unfairly discriminatory, he shall order an appropriate adjustment for policyholders who have paid the unfairly discriminatory premium. The order must be issued within 30 business days after the close of the hearing.

(c) No person shall willfully withhold information required by this Article from or knowingly furnish false or misleading information to the Commissioner, any statistical agency designated by the Commissioner, any rating or advisory organization, or any insurer, which information will affect the rates, rating plans, classifications, or policy forms subject to this Article. (1977, c. 828, s. 2; 1985 (Reg. Sess., 1986), c. 1027, ss. 12, 12.1.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1027, s. 57, contains a severability clause.

Effect of Amendments. — The 1985 (Regular Session, 1986) amendment, effective September 1, 1986, rewrote subsection (a) and added subsection (c).

§ 58-131.44. Advisory organizations.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1027, s. 47 provides that "G.S. 58-131.44(a) is amended by substituting the words, 'obtain a license from and' between the words 'shall' and 'file'." The words "shall" and "file" do not occur together in subsection (a).

Therefore, at the direction of the Revisor of Statutes, this amendment has not been effectuated.

Session Laws 1985 (Reg. Sess., 1986), c. 1027, s. 57, contains a severability clause.

§ 58-131.45. Joint underwriting and joint reinsurance organizations.

(a) Every group, association, or other organization of insurers which engages in joint underwriting or joint reinsurance through such group, association, or organization, or by standing agreement among the members thereof, shall [obtain a license from and] file with the Commissioner:

- (1) A copy of its constitution, articles of incorporation, agreement, or association, and bylaws;
 - (2) A list of its members; and
 - (3) The name and address of a resident of this State upon whom notices, process affecting it, or orders of the Commissioner may be served.
- (1977, c. 828, s. 2; 1985 (Reg. Sess., 1986), c. 1027, s. 48.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1027, s. 48 provides that "G.S. 58-131.45(a) is amended by inserting the

words, 'obtain a license from and' between the words 'file' and 'with'." However, the apparent intent of the act was to insert the quoted language between the words "shall" and "file." At the direction of the Revisor of Statutes, the language has been inserted in subsection (a)

above in brackets in the position apparently intended.

Session Laws 1985 (Reg. Sess., 1986), c. 1027, s. 57, contains a severability clause.

Effect of Amendments. — The 1985 (Reg.

Sess., 1986) amendment, effective July 16, 1986, inserted "obtain a license from and" in subsection (a). The language has been inserted in brackets. See the Editor's note above.

§ 58-131.46. Insurers authorized to act in concert.

Subject to and in compliance with the provisions of this Chapter authorizing insurers to be members or subscribers of rating or advisory organizations or to engage in joint underwriting or joint reinsurance, two or more insurers may act in concert with each other and with others with respect to any matters pertaining to the making of rates or rating systems, the preparation or making of insurance policy or bond forms, underwriting rules, surveys, inspections and investigations, the furnishing of loss or expense statistics or other information and data, the creation, administration, or termination of a market assistance program, or carrying on of research. (1977, c. 828, s. 2; 1986, Ex. Sess., c. 7, s. 9.)

Editor's Note. — Session Laws 1986, Extra Session, c. 7, s. 13 makes the act effective upon ratification and provides that it shall expire on June 30, 1988. Section 13 further provides: "Within 30 days after the effective date of this act the boards of directors of the FAIR Plan and the Beach Plan shall each submit a revised plan of operation for approval by the Commissioner in accordance with G.S. 58-173.21(b)

and G.S. 58-173.7, respectively." The act was ratified on February 18, 1986.

Section 12 of Session Laws 1986, Extra Session, c. 7 is a severability clause.

Effect of Amendments. — The 1986 Extra Session amendment, effective February 18, 1986, inserted "the creation, administration, or termination of a market assistance program" near the end of this section.

§ 58-131.48. Agreements to adhere.

No insurer shall assume any obligation to any person, other than a policyholder or other insurers with which it is under common control or management or is a member of a market assistance program or of a joint underwriting or joint reinsurance organization, to use or adhere to certain rates or rules; and no other person shall impose any penalty or other adverse consequence for failure of an insurer to adhere to certain rates or rules. This section does not apply to mandatory or voluntary risk sharing plans established under Article 37 of this Chapter or apportionment agreements among insurers approved by the Commissioner pursuant to G.S. 58-131.52. Provided, however, that members and subscribers of rating or advisory organizations may use the rates, rating systems, underwriting rules, or policy or bond forms of such organizations either consistently or intermittently. The fact that two or more admitted insurers, whether or not members or subscribers of a rating or advisory organization, consistently or intermittently use the rates or rating systems made or adopted by a rating organization, or the underwriting rules or policy or bond forms prepared by a rating or advisory organization, shall not be sufficient in itself to support a finding that an agreement to so adhere exists, and it may be used only for the purpose of supplementing or explaining direct evidence of the existence of any such agreement. (1977, c. 828, s. 2; 1986, Ex. Sess., c. 7, ss. 10, 11.)

Editor's Note. — Session Laws 1986, Extra Session, c. 7, s. 13 makes the act effective upon ratification and provides that it shall expire on June 30, 1988. Section 13 further provides: "Within 30 days after the effective date of this act the boards of directors of the FAIR Plan and the Beach Plan shall each submit a revised plan of operation for approval by the Commissioner in accordance with G.S. 58-173.21(b) and G.S. 58-173.7, respectively." The act was ratified on February 18, 1986.

Section 12 of Session Laws 1986, Extra Session, c. 7 is a severability clause.

Effect of Amendments. — The 1986 Extra Session amendment, effective February 18, 1986, inserted "a market assistance program or of" following "management or is a member of" in the first sentence and substituted "This section does not apply to mandatory or voluntary risk sharing plans established under Article 37 of this Chapter or" for "This section shall not apply to" at the beginning of the second sentence.

§ 58-131.53. Request for review of rate, rating plan, rating system or underwriting rule.

(b) Repealed by Session Laws 1985 (Regular Session, 1986), c. 1027, s. 15, effective September 1, 1986. (1977, c. 828, s. 2; 1985, c. 733, s. 3; 1985 (Reg. Sess., 1986), c. 1027, s. 15.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1027, s. 57, contains a severability clause.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective Sept. 1, 1986, repealed subsection (b) of this section, relating to notice of cancellation of agency contracts.

§ 58-131.56: Repealed by Session Laws 1985 (Reg. Sess., 1986), c. 1027, s. 15, effective September 1, 1986.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1027, s. 57, contains a severability clause.

§ 58-131.59: Repealed by Session Laws 1985 (Reg. Sess., 1986), c. 1027, s. 15, effective September 1, 1986.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1027, s. 57, contains a severability clause.

§ 58-131.60. Limitation.

Nothing in this Article shall apply to any town or county farmers mutual fire insurance association restricting its operations to not more than five counties in this State that are adjacent to the county in which its home office is located, or to domestic insurance companies, associations, orders or fraternal benefit societies now doing business in this State on the assessment plan. (1977, c. 828, s. 2; 1985 (Reg. Sess., 1986), c. 1013, s. 10.1.)

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 15, 1986, substituted "its operations" for "their operations" and substituted "five counties in this

State that are adjacent to the county in which its home office is located" for "three adjacent counties."

§ 58-131.61. Financial disclosure; rate modifications; reporting requirements.

(a) The Commissioner may require each insurer subject to this Article to report, on a form prescribed by the Commissioner, its loss and expense experience, investment income, administrative expenses, and other data that he may require, for kinds of insurance or classes of risks that he designates. These reports are in addition to financial or other statements required by this Chapter.

(b) The Commissioner may designate one or more rating organizations or advisory organizations to gather and compile the experience and data referred to in subsection (a) of this section for their member companies.

(c) Whereas the provisions enacted by the General Assembly in 1986 regarding modifications in North Carolina civil law may have a prospective effect upon the loss experience of insurers subject to this Article, the Commissioner is authorized to review each company's rates by type of insurance that are in effect on and after January 1, 1987, and, when and where appropriate, require modification of such rates.

(d) Each insurer subject to this Article shall record the experience and data referred to in subsection (a) of this section arising from causes of action arising against its insureds on and after January 1, 1987. Such experience and data shall be reported to the Commissioner by March 31, 1988, which report shall be on a form prescribed by the Commissioner reflecting such experience and data for the one-year period beginning on January 1, 1987. Subsequently, such experience and data shall be reported to the Commissioner by March 31 of each year for each one-year period ending on December 31 of the previous year.

(e) On or before July 1, 1988, and annually thereafter, the Commissioner shall report to the General Assembly the effects, if any, of changes in North Carolina civil law statutes on the experience of insurers subject to this section. (1985 (Reg. Sess., 1986), c. 1027, c. 13.)

Editor's Note. — Session Laws 1985 (Regular Session, 1986), c. 1027, s. 58, makes this section effective September 1, 1986.

Session Laws 1985 (Reg. Sess., 1986), c. 1027, s. 57, contains a severability clause.

§ 58-131.62. Good faith immunity for operation of market assistance programs.

There is no liability on the part of and no cause of action of any nature arises against any director, administrator, or employee of a market assistance program, or the Commissioner or his representatives, for any acts or omissions taken by them in creation or operation of a market assistance program. The immunity established by this section does not extend to willful neglect, malfeasance, bad faith, fraud, or malice that would otherwise make an act or omission actionable. (1985 (Reg. Sess., 1986), c. 1027, s. 28.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1027, s. 58, makes this section effective March 10, 1986.

Session Laws 1985 (Reg. Sess., 1986), c. 1027, s. 57, contains a severability clause.

§ 58-131.63. CGL extended reporting.

Any policy for commercial general liability coverage wherein the insurer offers, and the insured elects to purchase, an extended reporting period for claims arising during the expiring policy period must provide:

- (1) That in the event of a cancellation permitted by G.S. 58-473 or nonrenewal effective under G.S. 58-474, there shall be a 30-day period before the effective date of the cancellation or nonrenewal during which the insured may elect to purchase coverage for the extended reporting period;
- (2) That the limit of liability in the policy aggregate for the extended reporting period shall be one hundred percent (100%) of the expiring policy aggregate; and
- (3) Within 45 days after the mailing or delivery of the written request of the insured, the insurer shall mail or deliver the following loss information covering a three-year period:
 - a. Aggregate information on total closed claims, including date and description of occurrence, and any paid losses;
 - b. Aggregate information on total open claims, including date and description of occurrence, and amounts of any payments;
 - c. Information on notice of any occurrence, including date and description of occurrence. (1985 (Reg. Sess., 1986), c. 1013, s. 17; c. 1027, s. 29.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1027, s. 58, makes this section, which was enacted by Session Laws 1985 (Reg. Sess., 1986), c. 1027, s. 29, effective September 1, 1986.

Session Laws 1985 (Reg. Sess., 1986), c. 1027, s. 57, contains a severability clause.

Effect of Amendments. — Session Laws 1985 (Reg. Sess., 1986), c. 1013, s. 17, amends this section, as enacted by Session Laws 1985 (Reg. Sess., 1986), c. 1027, s. 29, by rewriting subdivision (3), effective Sept. 1, 1986.

ARTICLE 14.

Real Estate Title Insurance Companies.

§ 58-132. Purpose of organization; formation.

CASE NOTES

Cited in *Gardner v. North Carolina State Bar*, — N.C. —, 341 S.E.2d 517 (1986).

ARTICLE 17.

Foreign or Alien Insurance Companies.

§ 58-150. Conditions of admission.

A foreign or alien insurance company may be admitted and authorized to do business when it:

- (6) Satisfied the Commissioner that it is in substantial compliance with the provisions of G.S. 58-72.1 through G.S. 58-72.3 and Article 35 of this Chapter. (1899, c. 54, s. 62; 1901, c. 391, s. 5; 1903, c. 438, s. 6; Rev., s. 4747; C.S., s. 6411; 1945, c. 384; 1951, c. 781, s. 3; 1985 (Reg. Sess., 1986), c. 1027, s. 32.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1027, s. 57, contains a severability clause.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 16, 1986, added subdivision (6).

§ 58-151. Limitation as to kinds of insurance.

(a) Any foreign or alien company admitted to do business in this State shall be limited with respect to doing kinds of insurance in this State in the same manner and to the same extent as are domestic companies, provided that any foreign insurance company which has been licensed to do the business of life insurance in this State continuously during a period of 20 years next preceding March 6, 1945, may continue to be licensed, in the discretion of the Commissioner, to do the kind or kinds of insurance business which it was authorized to do immediately prior to March 6, 1945.

(b) Any foreign or alien company admitted to do business in this State shall have as a part of its corporate title one of the following: "insurance company," "insurance association," "insurance society," "life," "casualty," or "indemnity"; and "mutual," if the corporation is organized upon the mutual principle. (1899, c. 44, s. 65; 1901, c. 391, s. 5; 1903, c. 438, s. 6; Rev., s. 4748; 1911, c. 111, s. 2; C.S., s. 6412; 1945, c. 384; 1985 (Reg. Sess., 1986), c. 1027, s. 53.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1027, s. 57, contains a severability clause.

Sess., 1986) amendment, effective July 16, 1986, designated the first paragraph subsection (a) and added subsection (b).

Effect of Amendments. — The 1985 (Reg.

ARTICLE 17A.

Mergers, Rehabilitation and Liquidation of Insurance Companies.

§ 58-155.11. Conduct of delinquency proceedings against insurers domiciled in this State.

CASE NOTES

Cited in *Universal Marine Ins. Co. v. Beacon Ins. Co.*, 768 F.2d 84 (4th Cir. 1985).

§ 58-155.13. Claims of nonresidents against domestic insurers.

CASE NOTES

Cited in *Universal Marine Ins. Co. v. Beacon Ins. Co.*, 768 F.2d 84 (4th Cir. 1985).

§ 58-155.14. Claims against foreign insurers.

CASE NOTES

Cited in *Universal Marine Ins. Co. v. Beacon Ins. Co.*, 768 F.2d 84 (4th Cir. 1985).

SUBCHAPTER III. FIRE INSURANCE.

ARTICLE 18A.

Essential Property Insurance for Beach Area Property.

§ 58-173.2. Definition of terms.

In this Article, unless the context otherwise requires,

- (3a) "Crime insurance" means insurance against losses resulting from robbery, burglary, larceny, and similar crimes, as more specifically defined and limited in the various crime insurance policies approved by the Commissioner and issued by the Association. Such policies shall not be more restrictive than those issued under the Federal Crime Insurance Program authorized by Public Law 91-609.
- (5) "Insurable property" means real property at fixed locations in beach areas of the State as that term is hereinafter defined or the tangible personal property located therein, but shall not include insurance on motor vehicles, farm and manufacturing risks, which property is determined by the Association, after inspection and pursuant to the criteria specified in the plan of operation, to be in an insurable condition: Provided, however, any one and two family dwellings built in substantial accordance with the Federal Manufactured Home Construction and Safety Standards, any predecessor or successor federal or State construction or safety standards, and any further construction or safety standards promulgated by the association and approved by the Commissioner, or the North Carolina Uniform Residential Building Code and any structure or building built in substantial compliance with the North Carolina Building Code, including the design-wind requirements, which is not otherwise rendered uninsurable by reason of use or occupancy, shall be an insurable risk within the meaning of this Article, but neighborhood, area, location, environmental hazards beyond the control of the applicant or owner of the property shall not be considered in determining insurable condition. Provided further, that any structure commenced on or after January 1, 1970, not built in substantial compliance with the Federal Manufactured Home Construction and Safety Standards, any predecessor or successor federal or State construction or safety standards,

and any further construction or safety standards promulgated by the association and approved by the Commissioner, or the North Carolina Uniform Residential Building Code or the North Carolina Building Code, including the design-wind requirements therein, shall not be an insurable risk. The owner or applicant shall furnish with the application proof in the form of a certificate from a local building inspector, contractor, engineer or architect that the structure is built in substantial accordance with the Federal Manufactured Home Construction and Safety Standards, any predecessor or successor federal or State construction or safety standards, and any further construction or safety standards promulgated by the association and approved by the Commissioner, or the North Carolina Uniform Residential Building Code or the North Carolina Building Code; provided, however, such individual certificate shall not be necessary in those cases where the structure is located within a political subdivision which has certified to the Association on an annual basis that it is enforcing the North Carolina Uniform Residential Building Code or the North Carolina Building Code and has no plans to discontinue enforcing these codes during that year.

(1967, c. 1111, s. 1; 1969, c. 249; 1979, c. 601, ss. 2, 3; 1985, c. 516, s. 1; 1985 (Reg. Sess., 1986), c. 1027, ss. 21, 25).

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1027, s. 57, contains a severability clause.

Effect of Amendments. — The 1985 (Regu-

lar Session, 1986) amendment, effective July 16, 1986, added subdivision (3a), and inserted the language beginning "The Federal Manufactured Home" and ending "approved by the Commissioner, or" in three places in subdivision (5).

§ 58-173.7. Directors to submit plan of operation to Commissioner; review and approval; amendments.

Within 90 days after April 17, 1969, the directors of the Association shall submit to the Commissioner for his review and approval, a proposed plan of operation. Such proposed plan shall set forth the number, qualifications, terms of office, and manner of election of the members of the board of directors, and shall grant proper credit annually to each member of the Association for essential property insurance voluntarily written in the beach area and shall provide for the efficient, economical, fair and nondiscriminatory administration of the Association and for the prompt and efficient provision of essential property insurance in the beach areas of North Carolina so as to promote orderly community development in those areas and to provide means for the adequate maintenance and improvement of the property in such areas. Such proposed plan may include a preliminary assessment of all members for initial expenses necessary to the commencement of operation; the establishment of necessary facilities; management of the Association; plan for the assessment of members to defray losses and expenses; underwriting standards; procedures for the acceptance and cession of reinsurance; procedures for determining the amounts of insurance to be provided to specific risks; time limits and procedures for processing applications for insurance and for such other provisions as may be deemed necessary by the Commissioner to carry out the purposes of this Article.

The proposed plan shall be reviewed by the Commissioner and approved by him if he finds that such plan fulfills the purposes provided by G.S. 58-173.1 of

this article. In the review of the proposed plan the Commissioner may, in his discretion, consult with the directors of the Association and may seek any further information which he deems necessary to his decision. If the Commissioner approves the proposed plan, he shall certify such approval to the directors and the plan shall become effective 10 days after such certification. If the Commissioner disapproves all or any part of the proposed plan of operation he shall return the same to the directors with his written statement for the reasons for disapproval and any recommendations he may wish to make. The directors may alter the plan in accordance with the Commissioner's recommendation or may within 30 days from the date of disapproval return a new plan to the Commissioner. Should the directors fail to submit a proposed plan of operation within 90 days of April 17, 1969, or a new plan which is acceptable to the Commissioner, or accept the recommendations of the Commissioner within 30 days after his disapproval of the plan, the Commissioner shall promulgate and place into effect a plan of operation certifying the same to the directors of the Association. Any such plan promulgated by the Commissioner shall take effect 10 days after certification to the directors: Provided, however, that until a plan of operation is in effect, pursuant to the provisions of this Article, any existing temporary placement facility may be continued in effect on a mandatory basis on such terms as the Commissioner may determine.

The directors of the Association may, subject to the approval of the Commissioner, amend the plan of operation at any time. The Commissioner may review the plan of operation at any time he deems expedient or prudent, but not less than once in each calendar year. After review of such plan the Commissioner may amend the plan after consultation with the directors and upon certification to the directors of such amendment.

The Commissioner may designate the kinds of property insurance policies on principal residences to be offered by the association, including insurance policies under Article 12B of this Chapter, and the commission rates to be paid to agents or brokers for these policies, if he finds, after a hearing held in accordance with G.S. 58-9.2, that the public interest requires the designation. The provisions of Chapter 150B do not apply to any procedure under this subsection, except that G.S. 150B-39 and G.S. 150B-41 shall apply to a hearing under this subsection. Within 30 days after the receipt of notification from the Commissioner of a change in designation pursuant to this subsection, the association shall submit a revised plan and articles of association for approval in accordance with this section. (1967, c. 1111, s. 1; 1969, c. 249; 1986, Ex. Sess., c. 7, s. 8.)

Editor's Note. — Session Laws 1986, Extra Session, c. 7, s. 13 makes the act effective upon ratification and provides that it shall expire on June 30, 1988. Section 13 further provides: "Within 30 days after the effective date of this act the boards of directors of the FAIR Plan and the Beach Plan shall each submit a revised plan of operation for approval by the Commis-

sioner in accordance with G.S. 58-173.21(b) and G.S. 58-173.7, respectively." The act was ratified on February 18, 1986.

Section 12 of Session Laws 1986, Extra Session, c. 7 is a severability clause.

Effect of Amendments. — The 1986 Extra Session amendment, effective February 18, 1986, added the last paragraph.

§ 58-173.8. Persons eligible to apply to Association for coverage; contents of application.

(b) If the Association determines that the property is insurable and that there is no unpaid premium due from the applicant for prior insurance on the property, the Association upon receipt of the premium, or such portion thereof, as is prescribed in the plan of operating, shall cause to be issued a policy of essential property insurance and shall offer additional extended coverage and crime insurance for a term of one year. Any policy issued pursuant to the provisions of this section shall be renewed annually, upon application therefor, so long as the property meets the definition of "insurable property" set forth in G.S. 58-173.2(5).

(1967, c. 1111, s. 1; 1969, c. 249; 1985, c. 516, s. 2; 1985 (Reg. Sess., 1986), c. 1027, s. 22.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1027, s. 57, contains a severability clause.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 16, 1986, inserted "and shall offer additional extended coverage and crime insurance" in the first sentence of subsection (b).

§ 58-173.16A. Premium taxes to be paid through Association to Commissioner.

All premium taxes due on insurance written under this Article shall be remitted by each insurer to the Association; and the Association, as collecting agent for its member companies, shall forward all such taxes to the Commissioner as provided in Article 8B of Chapter 105 of the General Statutes. (1985 (Reg. Sess., 1986), c. 928, s. 10.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 928, s. 14 makes this section effective upon ratification. The act was ratified July 8, 1986.

ARTICLE 18B.

Fair Access to Insurance Requirements.

§ 58-173.17. Purpose and geographic coverage of Article.

(a) It is the purpose of this Article to provide a program whereby adequate basic property insurance may be made available to property owners having insurable property in the State. It is further the purpose of this Article to encourage the improvement of properties located in the State and to arrest the decline of properties located in the State.

(b) This Article shall apply to all geographic areas of the State except the "Beach Area" defined in G.S. 58-173.2(2).

(c) As used in this Article, "crime insurance" means insurance against losses resulting from robbery, burglary, larceny, and similar crimes, as more specifically defined and limited in the various crime insurance policies approved by the Commissioner and issued by the Association. Such policies shall not be more restrictive than those issued under the Federal Crime Insurance Program authorized by Public Law 91-609. (1969, c. 1284; 1985, c. 519, s. 1; 1986, Ex. Sess., c. 7, s. 4; 1985 (Reg. Sess., 1986), c. 1027, s. 24.)

Editor's Note. — Session Laws 1986, Extra Session, c. 7, s. 13 makes the act effective upon ratification and provides that it shall expire on June 30, 1988. Section 13 further provides: "Within 30 days after the effective date of this act the boards of directors of the FAIR Plan and the Beach Plan shall each submit a revised plan of operation for approval by the Commissioner in accordance with G.S. 58-173.21(b) and G.S. 58-173.7, respectively." The act was ratified on February 18, 1986.

Session Laws 1986, Extra Session, c. 7, s. 12 and Session Laws 1985 (Reg. Sess., 1986), c. 1027, s. 57 are severability clauses.

Effect of Amendments. — The 1986 Extra Session amendment, effective February 18,

1986, rewrote this section, which formerly read "It is the purpose of this Article to provide a program whereby adequate basic property insurance may be made available to property owners having insurable property in urban areas of the State. It is further the purpose of this Article to encourage the improvement of properties located in urban areas of the State and to arrest the decline of properties located in such areas." The act also rewrote the catchline to this section, which formerly read "Purpose of Article."

The 1985 (Regular Session, 1986) amendment, effective July 16, 1986, added subsection (c).

§ 58-173.20. Requirements of Plan and authority of Association.

The Association formed pursuant to the provisions of this Article shall have authority on behalf of its members to cause to be issued basic property insurance policies, including coverage for farm risks; and shall offer additional extended coverage and crime insurance policies; to reinsure in whole or in part, any such policies; and to cede any such reinsurance. The Plan adopted, pursuant to the provision of this Article, shall provide, among other things, for the perils to be covered, compensation and commissions, assessments of members, the sharing of expenses, income and losses on an equitable basis, cumulative weighted voting for the board of directors of the Association, the administration of the Plan and Association and any other matter necessary or convenient for the purpose of assuring fair access to insurance requirements. (1969, c. 1284; 1985, c. 519, s. 4; 1986, Ex. Sess., c. 7, ss. 5, 6; 1985 (Reg. Sess., 1986), c. 1027, s. 23.)

Editor's Note. — Session Laws 1986, Extra Session, c. 7, s. 13 makes the act effective upon ratification and provides that it shall expire on June 30, 1988. Section 13 further provides: "Within 30 days after the effective date of this act the boards of directors of the FAIR Plan and the Beach Plan shall each submit a revised plan of operation for approval by the Commissioner in accordance with G.S. 58-173.21(b) and G.S. 58-173.7, respectively." The act was ratified on February 18, 1986.

Session Laws 1986, Extra Session, c. 7, s. 12 and Session Laws 1985 (Reg. Sess., 1986), c. 1027, s. 57 are severability clauses.

Effect of Amendments. — The 1986 Extra Session amendment, effective February 18, 1986, inserted ", including property insurance for farm risks" following "basic property insurance" in the first sentence, and deleted "the geographical areas of coverage," preceding "compensation and commissions" near the middle of the second sentence.

The 1985 (Regular Session, 1986) amendment, effective July 16, 1986, rewrote the first sentence.

§ 58-173.21. Authority of Commissioner.

(c) The Commissioner may designate the kinds of property insurance policies on principal residences to be offered by the association, including insurance policies under Article 12B of this Chapter, and the commission rates to be paid to agents or brokers for these policies, if he finds, after a hearing held in accordance with G.S. 58-9.2, that the public interest requires the designation. The provisions of Chapter 150B do not apply to any procedure under this subsection, except that G.S. 150B-39 and G.S. 150B-41 shall apply to a hear-

ing under this subsection. Within 30 days after the receipt of notification from the Commissioner of a change in designation pursuant to this subsection, the association shall submit a revised plan and articles of association for approval in accordance with subsection (b) of this section. (1969, c. 1284; 1986, Ex. Sess., c. 7, s. 7.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1986, Extra Session, c. 7, s. 13 makes the act effective upon ratification and provides that it shall expire on June 30, 1988. Section 13 further provides: "Within 30 days after the effective date of this act the boards of directors of the FAIR Plan and the Beach Plan shall each submit a revised

plan of operation for approval by the Commissioner in accordance with G.S. 58-173.21(b) and G.S. 58-173.7, respectively." The act was ratified on February 18, 1986.

Section 12 of Session Laws 1986, Extra Session, c. 7 is a severability clause.

Effect of Amendments. — The 1986 Extra Session amendment, effective February 18, 1986, added subsection (c).

§ 58-173.29. Premium taxes to be paid through Association to Commissioner.

All premium taxes due on insurance written under this Article shall be remitted by each insurer to the Association; and the Association, as collecting agent for its member companies, shall forward all such taxes to the Commissioner as provided in Article 8B of Chapter 105 of the General Statutes. (1985 (Reg. Sess., 1986), c. 928, s. 10.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 928, s. 14 makes this section

effective upon ratification. The act was ratified July 8, 1986.

ARTICLE 19.

Fire Insurance Policies.

§ 58-176. Fire insurance contract; standard policy provisions.

CASE NOTES

I. IN GENERAL.

Provisions of Standard Form Are Just.

— The provisions of the "Standard Fire Insurance Policy for North Carolina," as provided by this section, including the provision that compliance with its terms is a condition precedent before the insured can establish a claim for relief, have been held by the Supreme Court to be valid and just to the insured and the insurer. *Chavis v. State Farm Fire & Cas. Co.*, — N.C. App. —, 338 S.E.2d 787 (1986).

And Binding on the Parties. —

Both the insured and the insurer are presumed to know the terms, provisions, and conditions of the standard fire insurance policy, and are bound by them. *Chavis v. State Farm*

Fire & Cas. Co., — N.C. App. —, 338 S.E.2d 787 (1986).

Object of provisions requiring insured to submit to examination under oath is to enable insurance company to obtain information to determine the extent of its obligation and to protect itself from false claims, and the provision requiring the production of documents is designed to serve the same purpose. While these provisions do not give the insurer license to harass plaintiff with aimless questions and demands for documents, questions asked and documents sought which relate to the validity of the insured's claim are material and relevant. *Chavis v. State Farm Fire & Cas. Co.*, — N.C. App. —, 338 S.E.2d 787 (1986).

Production of Documents as Condition

Precedent to Suit. — Compliance with provisions of an insurance policy requiring the insured to produce documents "as often as may be reasonably required" at a "reasonable time and place" is a condition precedent to bringing suit where the insurer notifies the insured of the time and place for production. The "reasonable time and place" clause ordinarily means that a demand must be made within a reasonable period of time and that the location must be in the locality of the insured property. *Chavis v. State Farm Fire & Cas. Co.*, — N.C. App. —, 338 S.E.2d 787 (1986).

The financial condition of the insured is relevant to an arson defense in a suit upon a fire insurance policy. *Chavis v. State Farm*

Fire & Cas. Co., — N.C. App. —, 338 S.E.2d 787 (1986).

The burden is on plaintiff to offer evidence in support of all essential elements to establish his claim. The occurrence of a condition precedent is an essential element of plaintiff's case, and it is therefore incumbent upon plaintiff to offer proof of compliance with the terms of the contract. *Chavis v. State Farm Fire & Cas. Co.*, — N.C. App. —, 338 S.E.2d 787 (1986).

To prevail in an affirmative defense, etc. — In accord with 1985 Cumulative Supplement. See *Pittman v. Nationwide Mut. Fire Ins. Co.*, — N.C. App. —, 339 S.E.2d 441 (1986).

§ 58-177. Standard policy; permissible variations.

CASE NOTES

Negligent Conduct by Insurance Company on Binder Application. — Where the evidence showed only that the insurance company negligently delayed in acting upon plaintiff's application for insurance, even if such

conduct constituted a violation of subdivision (4) of this section, such a violation did not justify an award of punitive damages. *Hornby v. Pennsylvania Nat'l Mut. Cas. Ins. Co.*, 77 N.C. App. 475, 335 S.E.2d 335 (1985).

ARTICLE 21.

Insuring State Property, Officials and Employees.

§ 58-191.4. Transfer from fund for local fire protection.

Of the funds available in the cash balance of the State Property Fire Insurance Fund, the sum of one million four hundred fifty thousand dollars (\$1,450,000) shall be transferred annually beginning in 1983-84 to the Office of State Budget and Management for compensating political subdivisions of the State for providing local fire protection on State-owned buildings and their contents, provided, however that beginning with the 1984-85 fiscal year if the State Treasurer makes a written finding to the Director of the Budget that the transfer for the 1984-85 fiscal year (or appropriate succeeding years) would cause financial instability in the State Property Fire Insurance Fund, then with the approval of the Director of the Budget, funds from the general fund shall supplement funds from the State Property Fire Insurance Fund that the State Treasurer certifies are available without causing financial instability so that the total State aid to local subdivisions under this section will remain at one million four hundred fifty thousand dollars (\$1,450,000) for each fiscal year. The Office of State Budget and Management shall develop an equitable and uniform statewide method for distributing these funds to the State's political subdivisions. Prior to taking any action under this section, the Director of the Budget may consult with the Advisory Budget Commission. (1983, c. 761, s. 21; 1985 (Reg. Sess., 1986), c. 955, ss. 4, 5.)

Editor's Note. — Section 1 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "This act may be cited as the Separation of Powers Act of 1986."

Section 127 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "If any part of this act shall be declared invalid by any court, this shall not affect any other part of this act."

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 1, 1986, deleted "after receiving the advice of the Advisory Budget Commission" following "approval of the Director of the Budget" in the first sentence and added the last sentence.

§ 58-194.3. Competitive selection of payroll deduction insurance products paid for by State employees.

(c) Payroll Deduction Slots. — Each payroll unit shall be entitled to not less than four payroll deduction slots to be used for payment of insurance premiums for products selected by the Employee Insurance Committee and offered to the employees of the payroll unit. The Employee Insurance Committee shall select only one company per payroll deduction slot. The Company selected by the Employee Insurance Committee shall be permitted to sell through payroll deduction only the products specifically approved by the Employee Insurance Committee. The assignment by the Employee Insurance Committee of a payroll deduction slot shall be for a period of not less than two years unless the insurance company shall be in violation of the terms of the written agreement specified in this subsection. The insurance company awarded a payroll deduction slot shall, pursuant to a written agreement setting out the rights and duties of the insurance company, be afforded an adequate opportunity to solicit employees of the payroll unit by making such employees aware that a representative of the company will be available at a specified time and at a location convenient to the employees.

Notwithstanding any other provision of the General Statutes, once an employee has selected an insurance product for payroll deduction, that product may not be removed from payroll deduction for that employee without his or her specific written consent.

(1985, c. 213, s. 1; 1985 (Reg. Sess., 1986), c. 1013, s. 15.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Sess., 1986) amendment, effective May 21, 1985, added the second paragraph of subsection (c).

Effect of Amendments. — The 1985 (Reg.

SUBCHAPTER V. AUTOMOBILE INSURANCE.

ARTICLE 25A.

North Carolina Motor Vehicle Reinsurance Facility.

§ 58-248.26. Definitions.

Legal Periodicals. —

For 1984 survey, "Application of the Tate

Test to Notice Requirements in Reinsurance Contracts," see 63 N.C.L. Rev. 1240 (1985).

§ 58-248.33. The Facility; functions; administration.

(b) The Facility shall reinsure for each coverage available therein to the standard percentage of one hundred percent (100%) or lesser equitable percentage established in the plan of operation as follows:

- (1) For the following coverages of motor vehicle insurance and in at least the following amounts of insurance:
 - a. Bodily injury liability: twenty-five thousand dollars (\$25,000) each person, fifty thousand dollars (\$50,000) each accident;
 - b. Property damage liability: ten thousand dollars (\$10,000) each person;
 - c. Medical payments: one thousand dollars (\$1,000) each person; except that this coverage shall not be available for motorcycles;
 - d. Uninsured motorist: twenty-five thousand dollars (\$25,000) each person; fifty thousand dollars (\$50,000) each accident for bodily injury; ten thousand dollars (\$10,000) each accident property damage (one hundred dollars (\$100.00) deductible);
 - e. Any other motor vehicle insurance or financial responsibility limits in the amounts required by any federal law or federal agency regulation; by any law of this State; or by any rule duly adopted under Chapter 150B of the General Statutes or by the North Carolina Utilities Commission.
- (2) Additional ceding privileges for motor vehicle insurance shall be provided by the Board of Governors if there is a substantial public demand for a coverage or coverage limit of any component of motor vehicle insurance up to the following:

Bodily injury liability: one hundred thousand dollars (\$100,000) each person, three hundred thousand dollars (\$300,000) each accident;

Property damage liability: fifty thousand dollars (\$50,000) each accident;

Medical payments: two thousand dollars (\$2,000) each person;

Underinsured motorist: one hundred thousand dollars (\$100,000) each person and three hundred thousand dollars (\$300,000) each accident for bodily injury liability;

Uninsured motorist: one hundred thousand dollars (\$100,000) each person and each accident for bodily injury and ten thousand dollars (\$10,000) for property damage (one hundred dollars (\$100.00) deductible).
- (3) Whenever the additional ceding privileges are provided as in G.S. 58-248.33(b)(2) for any component of motor vehicle insurance, the same additional ceding privileges shall be available to "all other" types of risks subject to the rating jurisdiction of the North Carolina Rate Bureau.

(d) The Facility shall be administered by a Board of Governors. The Board of Governors shall consist of nine members having one vote each from the classifications hereinafter enumerated plus the Commissioner who shall serve ex officio without vote. Each Facility insurance company member serving on the Board shall be represented by a senior officer of the company. Not more than one company in a group under the same ownership or management shall be represented on the Board at the same time. Five members of the Board shall be selected by the member insurers, which members shall be fairly representative of the industry. To insure representative member insurers, one each shall be selected from the following groups: the American Insurance Association (or its successors), the American Mutual Insurance Alliance (or its successors), the National Association of Independent Insurers (or its successors), all other stock insurers not affiliated with the above groups, and all

other nonstock insurers not affiliated with the above groups. The Commissioner of Insurance shall appoint four members of the Board who shall be fire and casualty insurance agents licensed in this State and actively engaged in writing motor vehicle insurance in this State. The Commissioner shall select one agent from among a list of two nominees submitted by the Independent Insurance Agents of North Carolina, Inc., and one agent from among a list of two nominees submitted by the Carolinas Association of Professional Insurance Agents. The initial term of office of said Board members shall be two years. Following completion of initial terms, successors to the members of the original Board of Governors shall be selected to serve three years. All members of the Board of Governors shall serve until their successors are selected and qualified and the Commissioner may fill any vacancy on the Board from any of the aforementioned classifications until such vacancies are filled in accordance with the provisions of this Article. The Board of Governors of the Facility shall also have as nonvoting members two persons who are not employed by or affiliated with any insurance company or the Department of Insurance and who are appointed by the Governor to serve at his pleasure.

(g) Except as may be delegated specifically to others in the plan of operation or reserved to the members, power and responsibility for the establishment and operation of the Facility is vested in the Board of Governors, which power and responsibility include but is not limited to the following:

- (1) To sue and be sued in the name of the Facility. No judgment against the Facility shall create any direct liability in the individual member companies of the Facility.
- (2) To receive and record cessions.
- (3) To assess members on the basis of participation ratios established in the plan of operation to cover anticipated or incurred costs of operation and administration of the Facility at such intervals as are established in the plan of operation.
- (4) To contract for goods and services from others to assure the efficient operation of the Facility.
- (5) To hear and determine complaints of any company, agent or other interested party concerning the operation of the Facility.
- (6) Upon the request of any licensed fire and casualty agent meeting any two of the standards set forth below as determined by the Commissioner of Insurance within 10 days of the receipt of the application, the Facility shall contract with one or more members within 20 days of receipt of the determination to appoint such licensed fire and casualty agent as designated agents in accordance with reasonable rules as are established by the plan of operation. Such standard shall be:
 - a. Whether the agent's evidence establishes that he has been conducting his business in a community for a period of at least one year;
 - b. Whether the agent's evidence establishes that he had a gross premium volume during the 13 months next preceding the date of his application of at least twenty thousand dollars (\$20,000) from motor vehicle insurance;
 - c. Whether the agent's evidence establishes that the number of eligible risks served by him during the 13 months next preceding the date of application was 200 or more;
 - d. Whether the agent's evidence establishes a growth in eligible risks served and premium volume during his years of service as an agent;
 - e. Whether the agent's evidence establishes that he made available to eligible risks premium financing or any other plan for deferred payment of premiums.

If no insurer is willing to contract with any such agent on terms acceptable to the Board, the Facility shall license such agents to write directly on behalf of the Facility. However, for this purpose, the Facility does not act as an insurer, but only as the statutory agent of all the members of the Facility which shall be bound on risks written by the Facility's appointed agent. Adequate provision shall be made by the Facility to assure that business produced by designated agents which would meet the underwriting criteria of the company shall be written at the voluntary rate and not at the Facility rate if higher. The Facility may contract with one or more servicing carriers and shall promulgate fair and reasonable underwriting procedures to require that business produced by Facility agents and written through said carriers shall be appropriately classified and rated. To this end, the same underwriting criteria for classification and rates used for its voluntary agents shall be used by the servicing carrier servicing such Facility agents in order to determine whether the voluntary rate or the Facility rate shall apply. All business produced by designated agents or Facility agents may be ceded to the Facility.

The Commissioner shall require, as a condition precedent to the issuance, renewal, or continuation of a resident agent's license to any designated agent to act for the company appointing such designated agent under contract with the Facility, that the designated agent file and thereafter maintain in force while so licensed a bond in favor of the State of North Carolina executed by an unauthorized corporate surety approved by the Commissioner, cash, mortgage on real property, or other securities approved by the Commissioner, in the amount of ten thousand dollars (\$10,000) for the use of aggrieved persons. Such bond, cash, mortgage, or other securities shall be conditioned on the accounting by the designated agent (i) to any person requesting the designated agent to obtain motor vehicle insurance for moneys or premiums collected in connection therewith, and (ii) to the company providing coverage with respect to any such moneys or premiums under contract with the Facility. Any such bond shall remain in force until the surety is released from liability by the Commissioner, or until the bond is cancelled by the surety. Without prejudice to any liability accrued prior to such cancellation, the surety may cancel the bond upon 30 days' advance notice in writing filed with the Commissioner.

No agent may be designated under this subdivision to any insurer that does not actively write voluntary market business.

- (7) To maintain all loss, expense, and premium data relative to all risks reinsured in the Facility, and to require each member to furnish such statistics relative to insurance reinsured by the Facility at such times and in such form and detail as may be required.
- (8) To establish fair and reasonable procedures for the sharing among members of any loss on Facility business which cannot be recouped pursuant to G.S. 58-248.34(f) and other costs, charges, expenses, liabilities, income, property and other assets of the Facility and for assessing or distributing to members their appropriate shares. Such shares may be based on the member's premiums for voluntary business for the appropriate category of motor vehicle insurance or by any other fair and reasonable method.
- (9) To receive or distribute all sums required by the operation of the Facility.
- (10) To accept all risks submitted in accordance with this Article.

- (11) To establish procedures for reviewing claims practices of member companies to the end that claims to the account of the Facility will be handled fairly and efficiently.
- (12) To adopt and enforce all rules and to do anything else where the Board is not elsewhere herein specifically empowered which is otherwise necessary to accomplish the purpose of the Facility and is not in conflict with the other provisions of this Article.
- (1973, c. 818, s. 1; 1977, c. 710; c. 828, ss. 14-19; 1977, 2nd Sess., c. 1135; 1979, c. 676, ss. 1, 2; 1981, c. 776, ss. 2, 3; c. 776, ss. 2, 3; 1983, c. 416, ss. 3, 4; c. 690; 1985, c. 666, s. 49; 1985 (Reg. Sess., 1986), c. 1027, ss. 7, 19, 33, 43.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1027, s. 57, contains a severability clause.

Effect of Amendments. — Session Laws 1985 (Reg. Sess., 1986), c. 1027, s. 7, effective July 16, 1986, added the last sentence of subsection (d).

Session Laws 1985 (Reg. Sess., 1986), c. 1027, s. 19, effective September 1, 1986, rewrote paragraph (b)(1)e.

Session Laws 1985 (Reg. Sess., 1986), c. 1027, s. 33, effective July 16, 1986, added the last paragraph of subdivision (g)(6).

Session Laws 1985 (Reg. Sess., 1986), c. 1027, s. 43, effective October 1, 1986, added languages relating to underinsured motorist coverage in subdivision (b)(2).

§ 58-248.34. Plan of operation.

- (i) The Facility shall file with the Commissioner revisions in the Facility plan of operation for his approval or modification. Such revisions shall be made for the purpose of revising the classification and rating plans for other than nonfleet private passenger motor vehicle insurance ceded to the Facility. (1973, c. 818, s. 1; 1975, c. 19, s. 18; 1977, c. 828, ss. 20, 21; 1981, c. 590; c. 916, ss. 2, 3; 1985 (Reg. Sess., 1986), c. 1027, s. 34.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1027, s. 57, contains a severability clause.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 16, 1986, added subsection (i).

SUBCHAPTER VI. ACCIDENT AND HEALTH INSURANCE.

ARTICLE 27.

General Regulations.

§ 58-260. Discrimination forbidden; right to choose services of optometrist, podiatrist, dentist or chiropractor.

Legal Periodicals. — For note, "ERISA Preemption of State Mandated-Provider Laws," see 6 Duke L. Rev. 1194 (1985).

SUBCHAPTER IX. MISCELLANEOUS PROVISIONS.

ARTICLE 36.

Surplus Lines Act.

§ 58-422. Definitions.

As used in this Article:

- (8) "Surplus lines insurance" means any insurance in this State of risks resident, located, or to be performed in this State, permitted to be placed through a surplus lines licensee with a nonadmitted insurer eligible to accept such insurance, other than reinsurance, wet marine and transportation insurance, insurance independently procured, life and accident or health insurance, and annuities.

(1985, c. 688, s. 1; 1985 (Reg. Sess., 1986), c. 1027, s. 45.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1027, s. 57, contains a severability clause.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 16, 1986, inserted "insurance" preceding "independently procured" in subdivision (8).

§ 58-423. Placement of surplus lines insurance.

Insurance may be procured through a surplus lines licensee from nonadmitted insurers if:

- (2) The full amount or kind of insurance cannot be obtained from insurers who are admitted to do business in this State. Such full amount or kind of insurance may be procured from eligible surplus lines insurers, provided that a diligent search is made among the insurers who are admitted to transact and are actually writing the particular kind and class of insurance in this State; and

(1985, c. 688, s. 1; 1985 (Reg. Sess., 1986), c. 1013, s. 5.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective September 1, 1986, rewrote subdivision (2).

§ 58-424. Eligible surplus lines insurers required.

(a) No surplus lines licensee shall place any coverage with a nonadmitted insurer, unless at the time of placement, such nonadmitted insurer:

- (1) Has established satisfactory evidence of good repute and financial integrity; and
- (2) Qualifies under one of the following subdivisions:
- a. Has capital and surplus or its equivalent under the laws of its domiciliary jurisdiction, which equals this State's minimum capital and surplus requirements under G.S. 58-77.

In addition, an alien insurer qualifies under this subdivision if it maintains in the United States an irrevocable trust fund in either a national bank or a member of the Federal Reserve System, in an amount not less than one million five hundred thou-

sand dollars (\$1,500,000) for the protection of all of its policyholders in the United States and such trust fund consists of cash, securities, letters of credit, or of investment of substantially the same character and quality as those which are eligible investments for the capital and statutory reserves of admitted insurers authorized to write like kinds of insurance in this State. Such trust fund, which shall be included in any calculation of capital and surplus or its equivalent, shall have an expiration date which at no time shall be less than five years; or

- b. In the case of any Lloyd's or other similar unincorporated group of alien individual insurers, maintains a trust fund of not less than fifty million dollars (\$50,000,000) as security to the full amount thereof for all policyholders and creditors in the United States of each member of the group, and such trust shall likewise comply with the terms and conditions established in subdivision (2)a. of this section for alien insurers; and
 - c. In the case of an "insurance exchange" created by the laws of individual states, maintain capital and surplus, or the substantial equivalent thereof, of not less than fifteen million dollars (\$15,000,000) in the aggregate. For insurance exchanges which maintain funds for the protection of all insurance exchange policyholders, each individual syndicate shall maintain minimum capital and surplus, or the substantial equivalent thereof, of not less than one million five hundred thousand dollars (\$1,500,000). In the event the insurance exchange does not maintain funds for the protection of all insurance exchange policyholders, each individual syndicate shall meet the minimum capital and surplus requirements of subdivision (2)(a). of this section.
- (3) Has caused to be provided to the Commissioner a copy of its current annual statement certified by such insurer; such statement to be provided no more than two months, and for alien insurers six months, after the close of the period reported upon and that is either:
- a. Filed with and approved by the regulatory authority in the domicile of the nonadmitted insurer; or
 - b. Certified by an accounting or auditing firm licensed in the jurisdiction of the insurer's domicile; or
 - c. In the case of an insurance exchange, the statement may be an aggregate combined statement of all underwriting syndicates operating during the period reported.
- (1985, c. 688, s. 1; c. 793; 1985 (Reg. Sess., 1986), c. 1027, s. 46.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1027, s. 57, contains a severability clause.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 16, 1986, substituted "one million five hundred thousand dollars (\$1,500,000)" for "four million five hundred thousand dollars (\$4,500,000)" in subdivision (a)(2)c.

§ 58-433. Licensing of surplus lines licensee.

(b) The Commissioner shall issue a surplus lines license to any qualified holder of a current fire and casualty broker's or general agent's license, but only when the broker or agent has:

- (1) Remitted the fifty dollars (\$50.00) annual fee to the Commissioner;
- (2) Submitted a completed license application on a form supplied by the Commissioner, and the application has been approved by the Commissioner;
- (3) Passed a qualifying examination approved by the Commissioner; except that all holders of a license prior to July 11, 1985 shall be deemed to have passed such an examination; and
- (4) Filed with the Commissioner, and maintains during the term of the license, in force and unimpaired a bond in favor of this State in the sum of ten thousand dollars (\$10,000), aggregate liability, with corporate sureties approved by the Commissioner. The bond shall be conditioned that the surplus lines licensee will conduct business in accordance with the provisions of this Article and will promptly remit the taxes as provided by law. No bond shall be terminated unless at least 30 days prior written notice is given to the licensee and Commissioner.

(c) Corporations shall be eligible to be resident surplus lines licensees, upon the following conditions:

- (1) The corporate licensee shall list individuals within the corporation who have satisfied all requirements of this Article to become surplus lines licensees; and
- (2) Only those individuals listed on the corporate license and who are surplus lines licensees shall transact surplus lines business.

(d) Each surplus lines license shall be issued on September 1 of each year and expire August 31 of the following year unless renewed. Application for renewal shall be made 30 days before the expiration date. The license shall be renewed upon payment of the annual license fee and compliance with the other applicable provisions of this section. Any person who places surplus lines insurance without a valid surplus lines license in effect shall pay a penalty of one thousand dollars (\$1,000) and be subject to such other penalties as provided by law. (1985, c. 688, s. 1; 1985 (Reg. Sess., 1986), c. 928, s. 6; c. 1013, ss. 4, 16.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — Session Laws 1985 (Reg. Sess., 1986) c. 928, s. 6, effective September 1, 1986, substituted "ten thousand dollars (\$10,000)" for "fifty thousand dollars (\$50,000)" in the first sentence of subdivision (b)(4).

Session Laws 1985 (Reg. Sess., 1986), c. 1013, s. 4, effective September 1, 1986, rewrote subsection (d).

Session Laws 1985 (Reg. Sess., 1986), c. 1013, s. 16, effective July 15, 1986, inserted "and who are surplus lines licensees" in subdivision (c)(2).

§ 58-437. Surplus lines tax.

(c) The section does not apply to insurance on risks of the State government, counties, municipal corporations, or any agency thereof. (1985, c. 688, s. 1; 1985 (Reg. Sess., 1986), c. 928, s. 11.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 8, 1986,

rewrote subsection (c), which read: "This section shall not apply to insurance of risks of the State government, its political subdivisions, or of any agency thereof."

§ 58-438. Collection of tax.

All provisions of Chapter 105 of the General Statutes, not inconsistent with this Article, relating to administration, auditing and making returns, the imposition and collection of tax and the lien thereon, assessments, refunds, and penalties, shall be applicable to the tax imposed by this Article; and with respect thereto, the Commissioner has the same power and authority as is given to the Secretary of Revenue under the provisions of Chapter 105 of the General Statutes. (1985, c. 688, s. 1; 1985 (Reg. Sess., 1986), c. 928, s. 7.)

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective September 1, 1986, rewrote this section.

§§ 58-442 to 58-449: Reserved for future codification purposes.

ARTICLE 37.

Mandatory or Voluntary Risk Sharing Plans.

§ 58-450. Establishment of plans.

If the Commissioner finds, after a hearing held in accordance with G.S. 58-9.2, that in all or any part of this State, any amount or kind of insurance authorized by G.S. 58-72(4) through G.S. 58-72(22) is not readily available in the voluntary market and that the public interest requires the availability of that insurance, he may either:

- (1) Promulgate plans to provide insurance coverage for any risks in this State that are, based on reasonable underwriting standards, entitled to obtain but are otherwise unable to obtain coverage; or
- (2) Call upon insurers to prepare plans for his approval. (1986, Ex. Sess., c. 7, s. 1.)

Editor's Note. — Session Laws 1986, Extra Session, c. 7, s. 13 makes this Article effective upon ratification and provides that it shall expire on June 30, 1988. Section 13 further provides: "Within 30 days after the effective date of this act the boards of directors of the FAIR Plan and the Beach Plan shall each submit a

revised plan of operation for approval by the Commissioner in accordance with G.S. 58-173.21(b) and G.S. 58-173.7, respectively." The act was ratified on February 18, 1986.

Section 12 of Session Laws 1986, Extra Session, c. 7 is a severability clause.

§ 58-451. Purposes, contents, and operation of risk sharing plans.

- (a) Each plan promulgated or prepared pursuant to G.S. 58-450 shall:
- (1) Give consideration to:
 - a. The need for adequate and readily accessible coverage;
 - b. Optional methods of improving the market affected;
 - c. The inherent limitations of the insurance mechanism;
 - d. The need for reasonable underwriting standards; and
 - e. The requirement of reasonable loss prevention measures;
 - (2) Establish procedures that will create minimum interference with the voluntary market;
 - (3) Distribute the obligations imposed by the plan, and any profits or losses experienced by the plan, equitably and efficiently among the participating insurers; and
 - (4) Establish procedures for applicants and participants to have their grievances reviewed by an impartial body. The filing and processing of a grievance pursuant to this subdivision does not stay the requirement for participation in a plan mandated by G.S. 58-452.
- (b) Each plan may, on behalf of its participants:
- (1) Issue policies of insurance to eligible applicants;
 - (2) Underwrite, adjust, and pay losses on insurance issued by the plan;
 - (3) Appoint a service company or companies to perform the functions enumerated in this subsection; and
 - (4) Obtain reinsurance for any part or all of its risks. (1986, Ex. Sess., c. 7, s. 1.)

§ 58-452. Persons required to participate.

- (a) Each plan shall require participation:
- (1) By all insurers licensed in this State to write the kinds of insurance covered by the specific plan;
 - (2) By all agents licensed to represent those insurers for that kind of insurance; and
 - (3) By every rating organization that makes rates for that kind of insurance.
- (b) The Commissioner shall exclude from each plan any person if participation would impair the solvency of that person. (1986, Ex. Sess., c. 7, s. 1.)

§ 58-453. Voluntary participation.

Each plan may provide for participation by:

- (1) Insurers that are not required to participate by G.S. 58-452;
- (2) Eligible surplus lines insurers as defined in G.S. 58-422(3); or
- (3) Reinsurers approved by the Commissioner. (1986, Ex. Sess., c. 7, s. 1.)

§ 58-454. Classification and rates.

Each plan shall provide for:

- (1) The method of classifying risks;
- (2) The making and filing of rates which are not excessive, inadequate, or unfairly discriminatory and policy forms applicable to the various risks insured by the plan;
- (3) The adjusting and processing of claims;
- (4) The commission rates to be paid to agents or brokers for coverages written by the plan; and
- (5) Any other insurance or investment functions that are necessary for the purpose of providing adequate and readily accessible coverage. (1986, Ex. Sess., c. 7, s. 1.)

§ 58-455. Basis for participation.

Each plan shall specify the basis for participation by insurers, agents, rating organizations, and other participants and shall specify the conditions under which risks shall be accepted and underwritten by the plan. (1986, Ex. Sess., c. 7, s. 1.)

§ 58-456. Duty to provide information.

Every participating insurer and agent shall provide to any person seeking the insurance available in each plan, information about the services prescribed in the plan, including full information on the requirements and procedures for obtaining insurance under the plan, whenever the insurance is not readily available in the voluntary market. (1986, Ex. Sess., c. 7, s. 1.)

§ 58-457. Provision of marketing facilities.

If the Commissioner finds that the lack of participating insurers or agents in a geographic area makes the functioning of a plan difficult, he may order that the plan appoint agents on such terms as he designates or that the plan take other appropriate steps to guarantee that service is available. (1986, Ex. Sess., c. 7, s. 1.)

§ 58-458. Voluntary risk sharing plans.

Insurers doing business within this State or reinsurers approved by the Commissioner may prepare voluntary plans that will provide any specific amount or kind of insurance or component thereof for all or any part of this State in which that insurance is not readily available in the voluntary market and in which the public interest requires the availability of the coverage. These plans shall be submitted to the Commissioner and, if approved by him, may be put into operation. (1986, Ex. Sess., c. 7, s. 1.)

§ 58-459. Article not subject to Administrative Procedure Act.

The provisions of Chapter 150B of the General Statutes shall not apply to this Article, except that G.S. 150B-39 and G.S. 150B-41 shall apply to hearings conducted pursuant to G.S. 58-450. (1986, Ex. Sess., c. 7, s. 1.)

§ 58-460. Immunity of Commissioner and plan participants.

There shall be no liability on the part of, and no cause of action shall arise against the Commissioner, his representatives, or any plan, its participants, or its employees for any good faith action taken by them in the performance of their powers and duties in creating any plan pursuant to this Article. (1986, Ex. Sess., c. 7, s. 1.)

§§ 58-461 to 58-469: Reserved for future codification purposes.

ARTICLE 38.

Insurance Regulatory Reform Act.

§ 58-470. Short title.

This Article is known and may be cited as the Insurance Regulatory Reform Act. (1985 (Reg. Sess., 1986), c. 1027, s. 14.)

Editor's Note. — Session Laws 1985 (Regular Session, 1986), c. 1027, s. 58, makes this Article effective September 1, 1986. Session Laws 1985 (Reg. Sess., 1986), c. 1027, s. 57, contains a severability clause.

§ 58-471. Legislative findings and intent.

(a) Due to conditions in national and international property and liability insurance markets, insureds in the United States have experienced unprecedented in-term cancellations of existing policies for entire books of business, have been afforded little or no notice that existing policies would not be renewed at their expiration dates, or would be renewed only at substantially higher rates or on less favorable terms. The General Assembly finds that such conditions pose an imminent peril to the public welfare for the following reasons:

- (1) In-term cancellations of insurance coverages erode insureds' confidence and breach insureds' trust; unfairly and prematurely terminate the promised coverage; force persons to go without needed insurance protection or force the procurement of substitute insurance at greater cost; and create marketplace confusion resulting in product unavailability.
- (2) Failures to provide timely notices of nonrenewals or of renewals with altered terms deprive persons of adequate opportunities to secure affordable replacement coverages or require persons to go without needed insurance protection.

(b) The General Assembly finds that there is no uniform requirement for the notice of cancellation, renewal, or nonrenewal for commercial property and liability insurance and that it should adopt reasonable requirements for such notices and should regulate in-term cancellations of entire books of business by companies. (1985 (Reg. Sess., 1986), c. 1027, s. 14.)

§ 58-472. Scope.

(a) Except as otherwise provided, this Article applies to all kinds of insurance authorized by G.S. 58-72(4) through (14) and G.S. 58-72(18) through (22), and to all insurance companies licensed by the Commissioner to write those kinds of insurance. This Article does not apply to insurance written under Articles 12B, 18A, 18B, 25A or 36 of this Chapter; to marine and personal inland marine insurance; to aviation insurance; nor to policies issued in this State covering risks with multistate locations, except with respect to coverages applicable to locations within this State.

(b) This Article is not exclusive, and the Commissioner may also consider other provisions of this Chapter to be applicable to the circumstances or situations addressed in this Article. Policies may provide terms more favorable to insureds than are required by this Article. The rights provided by this Article are in addition to and do not prejudice any other rights the insured may have at common law, under statutes, or under administrative rules. (1985 (Reg. Sess., 1986), c. 1027, s. 14.)

§ 58-473. Certain policy cancellations prohibited.

(a) No insurance policy or renewal thereof may be cancelled by the insurer prior to the expiration of the term or anniversary date stated in the policy and without the prior written consent of the insured, except for any one of the following reasons:

- (1) Nonpayment of premium in accordance with the policy terms;
- (2) An act or omission by the insured or his representative that constitutes material misrepresentation or nondisclosure of a material fact in obtaining the policy, continuing the policy, or presenting a claim under the policy;
- (3) Increased hazard or material change in the risk assumed that could not have been reasonably contemplated by the parties at the time of assumption of the risk;
- (4) Substantial breach of contractual duties, conditions, or warranties that materially affects the insurability of the risk;
- (5) A fraudulent act against the company by the insured or his representative that materially affects the insurability of the risk;
- (6) Willful failure by the insured or his representative to institute reasonable loss control measures that materially affect the insurability of the risk after written notice by the insurer;
- (7) Loss of facultative reinsurance, or loss of or substantial changes in applicable reinsurance as provided in G.S. 58-476;
- (8) Conviction of the insured of a crime arising out of acts that materially affect the insurability of the risk; or
- (9) A determination by the Commissioner that the continuation of the policy would place the insurer in violation of the laws of this State;
- (10) The named insured fails to meet the requirements contained in the corporate charter, articles of incorporation, or bylaws of the insurer, when the insurer is a company organized for the sole purpose of providing members of an organization with insurance coverage in this State.

(b) Any cancellation permitted by subsection (a) of this section is not effective unless written notice of cancellation has been delivered or mailed to the insured, not less than 15 days before the proposed effective date of cancellation. The notice must be given or mailed to the insured, and any designated mortgagee or loss payee at their addresses shown in the policy or, if not indicated in the policy, at their last known addresses. The notice must state the precise reason for cancellation. Proof of mailing is sufficient proof of notice. Failure to send this notice to any designated mortgagee or loss payee invalidates the cancellation only as to the mortgagee's or loss payee's interest.

(c) This section does not apply to any insurance policy that has been in effect for less than 60 days and is not a renewal of a policy. That policy may be cancelled for any reason by furnishing to the insured at least 15 days prior written notice of and reasons for cancellation.

(d) Cancellation for nonpayment of premium is not effective if the amount due is paid before the effective date set forth in the notice of cancellation.

(e) Copies of the notice required by this section shall also be sent to the agent or broker of record; however, failure to send copies of the notice to such persons shall not invalidate the cancellation. (1985 (Reg. Sess., 1986), c. 1027, s. 14.)

§ 58-474. Notice of nonrenewal, premium increase, or change in coverage required.

(a) No insurer may refuse to renew an insurance policy except in accordance with the provisions of this section, and any nonrenewal attempted or made that is not in compliance with this section is not effective. This section does not apply if the policyholder has insured elsewhere, has accepted replacement coverage, or has requested or agreed to nonrenewal.

(b) An insurer may refuse to renew a policy that has been written for a term of one year or less at the policy's expiration date by giving or mailing written notice of nonrenewal to the insured not less than 45 days prior to the expiration date of the policy.

(c) An insurer may refuse to renew a policy that has been written for a term of more than one year or for an indefinite term at the policy anniversary date by giving or mailing written notice of nonrenewal to the insured not less than 45 days prior to the anniversary date of the policy.

(d) The notice required by this section must be given or mailed to the insured and any designated mortgagee or loss payee at their addresses shown in the policy or, if not indicated in the policy, at their last known addresses. Proof of mailing is sufficient proof of notice. The notice of nonrenewal must state the precise reason for nonrenewal. Failure to send this notice to any designated mortgagee or loss payee invalidates the nonrenewal only as to the mortgagee's or loss payee's interest.

(e) Copies of the notice required by this section shall also be sent the agent or broker of record; however, failure to send copies of the notice to such persons shall not invalidate the nonrenewal. (1985 (Reg. Sess., 1986), c. 1027, s. 14.)

§ 58-475. Notice of renewal of policies with premium or coverage changes.

(a) If an insurer intends to renew a policy, the insurer must furnish to the insured the renewal terms and a statement of the amount of premium due for the renewal policy period.

(b) If the policy being renewed was written for a term of one year or less, the renewal terms and statement of premium due must be given or mailed not less than 45 days before the expiration date of that policy. If the policy being renewed was written for a term of more than one year or for an indefinite term, the renewal terms and statement of premium due must be given or mailed not less than 45 days before the anniversary date of that policy. The renewal terms and statement of premium due must be given or mailed to the insured and any designated mortgagee or loss payee at their addresses shown in the policy, or, if not indicated in the policy, at their last known addresses.

(c) If the insurer fails to furnish the renewal terms and statement of premium due in the manner required by this section, the insured may cancel the renewal policy within the 30-day period following receipt of the renewal terms and statement of premium due. For refund purposes, earned premium for any period of coverage shall be calculated pro rata upon the premium applicable to the policy being renewed instead of the renewal policy.

(d) If a policy has been issued for a term longer than one year, and for additional consideration a premium has been guaranteed for the entire term, it is unlawful for the insurer to increase that premium or require policy deductibles or other policy or coverage provisions less favorable to the insured during the term of the policy.

(e) Copies of the notice required by this section shall also be given or mailed to any designated mortgagee or loss payee and may also be given or mailed to the agent or broker of record. (1985 (Reg. Sess., 1986), c. 1027, s. 14.)

§ 58-476. Loss of reinsurance.

An insurer may cancel or refuse to renew a kind of insurance when the cancellation or nonrenewal is necessary because of a loss of or substantial reduction in applicable reinsurance, by filing a plan with the Commissioner pursuant to the requirements of this section. The insurer's plan must be filed with the Commissioner at least 15 business days prior to the issuance of any notice of cancellation or nonrenewal. The insurer may implement its plan upon the approval of the Commissioner, which shall be granted or denied in writing, with the reasons for his actions, within 15 business days of the Commissioner's receipt of the plan. Any plan submitted for approval shall contain a certification by an elected officer of the company:

- (1) That the loss or substantial change in applicable reinsurance necessitates the cancellation or nonrenewal action;
- (2) That the insurer has made a good faith effort to obtain replacement reinsurance but was unable to do so because of the unavailability or unaffordability of replacement reinsurance;
- (3) Identifying the category of risks, the total number of risks written by the company in that category, and the number of risks intended to be cancelled or not renewed;
- (4) Identifying the total amount of the insurer's net retention for the risks intended to be cancelled or not renewed;
- (5) Identifying the total amount of risk ceded to each reinsurer and the portion of that total that is no longer available;

- (6) Explaining how the loss of or reduction in reinsurance affects the insurer's risks throughout the kind of insurance proposed for cancellation or nonrenewal;
- (7) Explaining why cancellation or nonrenewal is necessary to cure the loss of or reduction in reinsurance; and
- (8) Explaining how the cancellations or nonrenewals, if approved, will be implemented and the steps that will be taken to ensure that the cancellation or nonrenewal decisions will not be applied in an arbitrary, capricious, or unfairly discriminatory manner. (1985 (Reg. Sess., 1986), c. 1027, s. 14.)

§ 58-477. Notice of cessation of business through insurance agency.

(a) Each insurer must, upon the cessation of any of its business through a North Carolina insurance agency, furnish the Commissioner with the following information on a form to be prescribed by the Commissioner:

- (1) The kinds of policies no longer written through the agency. In describing the kinds of these policies, those appearing on page 14 of the annual statement convention blank will suffice, except that liability coverages should be more specifically described;
- (2) The number of policies, by kind, no longer written through the agency;
- (3) A statement as to whether or not the cessation of business is by nonrenewal of business at policy expiration dates, or is a decision not to accept new business from the agency, or a combination of these;
- (4) If the cessation is by the insurer, the specific reason or reasons for the cessation; and
- (5) The names and addresses of the insurer and the agency and the effective date of the cessation of the business.

(b) This section applies to the cessation of the writing of any kind of insurance subject to this Article through an agency located in North Carolina. Reports are required even though other kinds of insurance may still be written through the agency. (1985 (Reg. Sess., 1986), c. 1027, s. 14.)

§ 58-478. No liability for statements or communications made in good faith; prior notice to agents or brokers.

(a) There is no liability on the part of and no cause of action for defamation or invasion of privacy arises against any insurer or its authorized representatives, agents, or employees, or any licensed insurance agent or broker, for any communication or statement made, unless shown to have been made in bad faith with malice, in any of the following:

- (1) A written notice of cancellation under G.S. 58-473, of nonrenewal under G.S. 58-474, or of cessation of business through an agency under G.S. 58-477, specifying the reasons therefor;
- (2) Communications providing information pertaining to such cancellation, nonrenewal, or cessation of business through an agency;
- (3) Evidence submitted at any court proceeding, administrative hearing, or informal inquiry in which such cancellation, nonrenewal, or cessation of business through an agency is an issue.

(b) With respect to the notices that must be given or mailed to agents or brokers under G.S. 58-473 and G.S. 58-474, the insurer may give or mail that notice at the same time or prior to giving or mailing the notice to the insured. (1985 (Reg. Sess., 1986), c. 1027, s. 14.)

§ 58-479. Termination of writing kind of insurance.

(a) Except as provided in G.S. 58-476, no insurer may terminate, by nonrenewals, an entire book of business of any kind of insurance without 60 days prior written notice to the Commissioner; unless the Commissioner determines that continuation of the line of business would impair the solvency of the insurer or unless the Commissioner determines that such termination is effected under a plan that minimizes disruption in the marketplace or that makes provisions for alternative coverage at comparable rates and terms.

(b) Except as provided in G.S. 58-476, in-term cancellation by an insurer of an entire book of business of any kind of insurance is presumed to be unfair, inequitable, and contrary to the public interest, unless the Commissioner determines that continuation of the line of business would impair the solvency of the insurer or unless the Commissioner determines that such termination is effected under a plan that minimizes disruption in the marketplace or that makes provisions for alternative coverage at comparable rates and terms. (1985 (Reg. Sess., 1986), c. 1027, s. 14.)

§ 58-480. Policy form and rate filings; punitive damages; data required to support filings.

(a) With the exception of inland marine insurance, which by general custom of the business is not written according to manual rates and rating plans, all policy forms must be filed with and either approved by the Commissioner or 90 days have elapsed and he has not disapproved the form before they may be used in this State. With respect to liability insurance policy forms, an insurer may exclude or limit coverage for punitive damages awarded against its insured.

(b) With the exception of inland marine insurance, which by general custom of the business is not written according to manual rates and rating plans, all rates by licensed fire and casualty companies or their designated rating organizations must be filed with the Commissioner at least 60 days before they may be used in this State.

(c) A filing that does not include the statistical and rating information required by subsections (d) and (e) of this section is not a proper filing, and will be returned to the filing insurer or organization.

(d) The following information must be included in each policy form, rule, and rate filing:

- (1) A detailed list of the rates, rules, and policy forms filed, accompanied by a list of those superseded; and
- (2) A detailed description, properly referenced, of all changes in policy forms, rules, and rates, including the effect of each change.

(e) Each policy form, rule, and rate filing that is based on statistical data must be accompanied by the following properly identified information:

- (1) North Carolina earned premiums at the actual and current rate level; losses and loss adjustment expenses, each on paid and incurred bases without trending or other modification for the experience period, including the loss ratio anticipated at the time the rates were promulgated for the experience period;

- (2) Credibility factor development and application;
- (3) Loss development factor derivation and application on both paid and incurred bases and in both numbers and dollars of claims;
- (4) Trending factor development and application;
- (5) Changes in premium base resulting from rating exposure trends;
- (6) Limiting factor development and application;
- (7) Overhead expense development and application of commission and brokerage, other acquisition expenses, general expenses, taxes, licenses, and fees;
- (8) Percent rate change;
- (9) Final proposed rates;
- (10) Investment earnings, consisting of investment income and realized plus unrealized capital gains, from loss, loss expense, and unearned premium reserves;
- (11) Identification of applicable statistical plans and programs and a certification of compliance with them;
- (12) Investment earnings on capital and surplus;
- (13) Level of capital and surplus needed to support premium writings without endangering the solvency of the company or companies involved; and
- (14) Such other information that may be required by any rule adopted by the Commissioner.

Provided, however, that no filing may be returned or disapproved on the grounds that such information has not been furnished if the filer has not been required to collect such information pursuant to statistical plans or programs or to report such information to statistical agents, except where the Commissioner has given reasonable prior notice to the filer to begin collecting and reporting such information or except when the information is readily available to the filer.

(f) It is unlawful for an insurer to charge or collect, or attempt to charge or collect, any premium for insurance except in accordance with filings made with the Commissioner under this section and Article 13C of this Chapter. (1985 (Reg. Sess., 1986), c. 1027, s. 14.)

§ 58-481. Penalties; restitution.

In addition to criminal penalties for acts declared unlawful by this Article, any violation of this Article subjects an insurer to revocation or suspension of its certificate of authority, or monetary penalties or payment of restitution as provided in G.S. 58-9.7. (1985 (Reg. Sess., 1986), c. 1027, s. 14.)

§§ 58-482 to 58-489: Reserved for future codification purposes.

ARTICLE 39.

*Local Government Risk Pools.***§ 58-490. Short title; definition.**

This Article shall be known and may be cited as the Local Government Risk Pool Act. As used in this Article, "local government" means any county or municipal corporation located in this State. (1985 (Reg. Sess., 1986), c. 1027, s. 26.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1027, s. 58, makes this Article effective July 16, 1986.

Session Laws 1985 (Reg. Sess., 1986), c. 1027, s. 57, contains a severability clause.

§ 58-491. Local government pooling of property, liability and workers' compensation coverages.

In addition to other authority granted pursuant to Chapters 153A and 160A of the General Statutes, two or more local governments may enter into contracts or agreements pursuant to this Article for the joint purchasing of insurance or to pool retention of their risks for property losses and liability claims and to provide for the payment of such losses of or claims made against any member of the pool on a cooperative or contract basis with one another, or may enter into a trust agreement to carry out the provisions of this Article. In addition to other authority granted pursuant to Chapters 153A and 160A of the General Statutes, two or more local governments may enter into contracts or agreements pursuant to this Article to establish a separate workers' compensation pool to provide for the payment of workers' compensation claims pursuant to Chapter 97 of the General Statutes or to establish pools providing for life or accident and health insurance for their employees on a cooperative or contract basis with one another; or may enter into a trust agreement to carry out the provisions of this Article. A workers' compensation pool established pursuant to this Article may only provide coverage for workers' compensation, employers' liability, and occupational disease claims. (1985 (Reg. Sess., 1986), c. 1027, s. 26.)

§ 58-492. Board of trustees.

(a) Each pool will be operated by a board of trustees consisting of at least five persons who are elected officials or employees of local governments within this State. The board of trustees of each pool will:

- (1) Establish terms and conditions of coverage within the pool, including underwriting criteria and exclusions of coverage;
- (2) Ensure that all valid claims are paid promptly;
- (3) Take all necessary precautions to safeguard the assets of the pool;
- (4) Maintain minutes of its meeting and make those minutes available to the Commissioner;
- (5) Designate an administrator to carry out the policies established by the board of trustees and to provide day to day management of the group and delineate in written minutes of its meetings the areas of authority it delegates to the administrator; and
- (6) Establish guidelines for membership in the pool.

(b) The board of trustees may not:

- (1) Extend credit to individual members for payment of a premium, except pursuant to payment plans approved by the Commissioner.
- (2) Borrow any moneys from the pool or in the name of the pool, except in the ordinary course of business, without first advising the Commissioner of the nature and purpose of the loan and obtaining prior approval from the Commissioner. (1985 (Reg. Sess., 1986), c. 1027, s. 26.)

§ 58-493. Contract.

A contract or agreement made pursuant to this Article must contain provisions:

- (1) For a system or program of loss control;
- (2) For termination of membership including either:
 - a. Cancellation of individual members of the pool by the pool; or
 - b. Election by an individual member of the pool to terminate its participation;
- (3) Requiring the pool to pay all claims for which each member incurs liability during each member's period of membership, except where a member has individually retained the risk, where the risk is not covered, and except for amount of claims above the coverage provided by the pool.
- (4) For the maintenance of claim reserves equal to known incurred losses and loss adjustment expenses and to an estimate of incurred but not reported losses;
- (5) For a final accounting and settlement of the obligations of or refunds to a terminating member to occur when all incurred claims are concluded, settled, or paid;
- (6) That the pool may establish offices where necessary in this State and employ necessary staff to carry out the purposes of the pool;
- (7) That the pool may retain legal counsel, actuaries, claims adjusters, auditors, engineers, private consultants, and advisors, and other persons as the board of trustees or the administrator deem to be necessary;
- (8) That the pool may make and alter bylaws and rules pertaining to the exercise of its purpose and powers;
- (9) That the pool may purchase, lease, or rent real and personal property it deems to be necessary; and
- (10) That the pool may enter into financial services agreements with financial institutions and that it may issue checks in its own name. (1985 (Reg. Sess., 1986), c. 1027, s. 26.)

§ 58-494. Termination.

A pool or a terminating member must provide at least 90 days' written notice of the termination or cancellation. A workers' compensation pool must notify the Commissioner of the termination or cancellation of a member within 10 days after notice of termination or cancellation is received or issued. (1985 (Reg. Sess., 1986), c. 1027, s. 26.)

§ 58-495. Audit.

Each pool must be audited annually at the expense of the pool by a certified public accounting firm, with a copy of the report available to the governing body or chief executive officer of each member of the pool and to the Commissioner. The board of trustees of the pool must obtain an appropriate actuarial evaluation of the loss and loss adjustment expense reserves of the pool, including an estimate of losses and loss adjustment expenses incurred but not reported. The Commissioner must examine each pool once every three years. The costs of such examination expenses will be paid by the pool that is subject to the examination. The Commissioner may examine a pool earlier than three years after a previous examination if he has reason to believe that the pool is insolvent or financially impaired. (1985 (Reg. Sess., 1986), c. 1027, s. 26.)

§ 58-496. Insolvency or impairment of pool.

(a) If, as a result of the annual audit or an examination by the Commissioner, it appears that the assets of a pool are insufficient to enable the pool to discharge its legal liabilities and other obligations, the Commissioner must notify the administrator and the board of trustees of the pool of the deficiency and his list of recommendations to abate the deficiency, including a recommendation not to add any new members until the deficiency is abated. If the pool fails to comply with the recommendations within 60 days after the date of the notice, the Commissioner must notify the chief executive officers or the governing bodies of the members of the pool, the Governor, the President of the Senate, and the Speaker of the House of Representatives that the pool has failed to comply with the recommendations of the Commissioner.

(b) If a pool is determined to be insolvent, financially impaired, or is otherwise found to be unable to discharge its legal liabilities and other obligations, each pool contract will provide that the members of the pool shall be assessed on a pro rata basis as calculated by the amount of each member's average annual contribution in order to satisfy the amount of deficiency. The assessment may not exceed the amount of each member's average annual contribution to the pool. (1985 (Reg. Sess., 1986), c. 1027, s. 26.)

§ 58-497. Immunity of administrators and boards of trustees.

There is no liability on the part of and no cause of action arises against any board of trustees established or administrator appointed pursuant to G.S. 58-492, their representatives, or any pool, its members, or its employees, agents, contractors, or subcontractors for any good faith action taken by them in the performance of their powers and duties in creating or administering any pool under this Article. (1985 (Reg. Sess., 1986), c. 1027, s. 26.)

§ 58-498. Pools not covered by guaranty associations or solvency funds.

The provisions of Articles 17B and 17C of this Chapter and of Article 3 of Chapter 97 of the General Statutes do not apply to any risks retained by local governments pursuant to this Article. (1985 (Reg. Sess., 1986), c. 1027, s. 26.)

§§ 58-499 to 58-504: Reserved for future codification purposes.

ARTICLE 40.

Product Liability Risk Retention Groups.

§ 58-505. Purpose.

The purpose of this Article is to regulate the formation and operation of risk retention groups in this State formed under the provisions of the Federal Product Liability Risk Retention Act of 1981 (Public Law 97-45) and to protect the public by the appropriate regulation of these risk retention groups. (1985 (Reg. Sess., 1986), c. 1013, s. 8.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1013, s. 18, makes this Article effective September 1, 1986.

§ 58-506. Definitions.

In this Article:

- (1) "Another state" means the District of Columbia or any state of the United States.
- (2) "Completed operations liability" means liability, including liability for activities that are completed or abandoned before the date of the occurrence giving rise to the liability, arising out of the installation, maintenance, or repair of any product at a site that is not owned or controlled by:
 - a. A person who performs that work; or
 - b. A person who hires an independent contractor to perform that work.
- (3) "Insurance" means primary insurance, excess insurance, reinsurance, surplus lines insurance, and any other arrangement for shifting or distributing risk that is determined to be insurance under the law of this State.
- (4) "Insurance regulator of another state" includes the commissioner, director, or superintendent of insurance in another state.
- (5) "Product liability" means liability for damages because of any personal injury, death, emotional harm, consequential economic damage, or property damage (including damages resulting from the loss of use of property) arising out of the manufacture, design, importation, distribution, packaging, labeling, lease, or sale of a product, but does not include the liability of any person for those damages if the product involved was in the possession of such a person when the incident giving rise to the claim occurred.

- (6) "Risk retention group" means a corporation or other limited liability association taxable as a corporation or as an insurance company formed under this Article:
- a. That is organized for the primary purpose of assuming and spreading the product liability or completed operations liability risk exposure of its members;
 - b. Whose primary activity consists of assuming and spreading all or any part of the product liability or completed operations liability risk exposure of its group members; and
 - c. That is composed of members each of whose principal activity consists of the manufacture, design, import, distribution, packaging, labeling, lease, or sale of a product.
- (7) "Service provider" means a person providing insurance-related services or management services to or for a risk retention group, including an agent, broker, claims appraiser or adjuster, insurer, actuary, or financial or management consultant. (1985 (Reg. Sess., 1986), c. 1013, s. 8.)

§ 58-507. Risk retention groups chartered in this State.

(a) A person may not engage in business as a risk retention group unless the person has complied with this Article.

(b) Except as required by this Article, a risk retention group seeking to be chartered in this State must be chartered and licensed as an insurance company authorized by this Chapter and must comply with all of the laws, rules, and requirements applicable to insurers chartered and licensed under this Chapter. (1985 (Reg. Sess., 1986), c. 1013, s. 8.)

§ 58-508. Risk retention groups not chartered in this State.

(a) A risk retention group chartered in another state, Bermuda, or the Cayman Islands and seeking to do business as a risk retention group in this State must:

- (1) Register with the Commissioner;
- (2) Designate the Commissioner as its agent for service of process and receipt of legal documents;
- (3) File with the Commissioner not later than March 1 of each year its annual statement as filed with the insurance regulator of another state in which it is chartered;
- (4) File with the Commissioner a copy of the last examination, if any, made of the risk retention group, certified by the insurance regulator of another state in which it is chartered;
- (5) File with the Commissioner not later than March 1 of each year a product liability loss experience data report;
- (6) File with the Commissioner, not more than 30 days after filing with the insurance regulator of another state in which it is chartered or of another state conducting any examination or investigation of its financial condition or impairment, a copy of each document filed by it in connection with the examination or investigation; and
- (7) File with the Commissioner not more than 30 days after filing with the insurance regulator of another state in which it is chartered any document concerning its financial condition.

(b) A risk retention group chartered in Bermuda or the Cayman Islands, in addition to the requirements of subsection (a) of this section, must:

- (1) Be chartered or licensed and authorized to do business under the laws of Bermuda or the Cayman Islands before January 1, 1985;
- (2) File with the Commissioner a copy of the certification filed with the insurance regulator of another state, showing that it satisfies the capitalization requirements of that state, together with evidence that the certification has been accepted by the insurance regulator of that state as meeting the requirements of that state; and
- (3) File with the insurance regulator of another state in which it certifies its capitalization a waiver of any secrecy laws of the jurisdiction in which it is chartered. (1985 (Reg. Sess., 1986), c. 1013, s. 8.)

§ 58-509. Agents.

(a) A person who is a resident of this State, who is acting or offering to act as an agent or broker for a risk retention group, and whose activities include the solicitation, negotiation, or placement of insurance on behalf of a risk retention group operating in this State, or any of its members in this State, must obtain a license as an agent or broker under Article 3 of this Chapter.

(b) An agent or broker licensed by another state and residing outside of this State may act as an agent or broker for a risk retention group operating in this State, or any of its members in this State, in the same manner as a resident agent or broker on obtaining a license under the provisions of Article 3 of this Chapter relating to licensing of nonresident agents or brokers.

(c) An agent or broker licensed as provided by subsection (a) or (b) of this section must report to the Commissioner not later than March 1 of each year the activities and scope of services being provided to the risk retention group.

(d) Before placing business with a risk retention group, each agent or broker shall secure from the appropriate insurance regulator a certified copy of the certificate of authority verifying that the insurer is authorized in its domiciliary jurisdiction to write the product liability or completed operations insurance policy proposed to be procured from it by the agent or broker.

(e) Every contract of insurance placed by an agent or broker with a risk retention group chartered or licensed in this State shall have printed on its face in not less than 10-point bold red type and in contrasting color, the following statement:

"THE INSURANCE HEREBY EVIDENCED IS WRITTEN BY A RISK RETENTION GROUP LICENSED IN THE STATE OF NORTH CAROLINA, BUT IN THE EVENT OF INSOLVENCY, THIS RISK RETENTION GROUP IS NOT PROTECTED BY ANY GUARANTY FUND IN THE STATE OF NORTH CAROLINA."

(f) Each contract of insurance placed by an agent or broker with a risk retention group not chartered or licensed in this State shall have printed on its face in not less than 10-point bold red type and in contrasting color, the following statement:

"THE INSURANCE HEREBY EVIDENCED IS WRITTEN BY A RISK RETENTION GROUP NOT LICENSED BY THE STATE OF NORTH CAROLINA, NOT SUBJECT TO ITS SUPERVISION, AND NOT PROTECTED, IN THE EVENT OF THE INSOLVENCY, BY ANY GUARANTY OR SOLVENCY FUND IN THE STATE OF NORTH CAROLINA." (1985 (Reg. Sess., 1986), c. 1013, s. 8.)

§ 58-510. Other service providers.

(a) A service provider that is not a licensed agent or broker must:

(1) Register with the Commissioner; and

(2) Report, not later than March 1 of each year in which any activities or services are provided, the activities and scope of services that it is providing to the risk retention group.

(b) This section may not be construed to allow service providers whose activities otherwise require licensing in another state to act on behalf of a risk retention group without such a license. (1985 (Reg. Sess., 1986), c. 1013, s. 8.)

§ 58-511. Taxes.

(a) The tax provided by Article 8B of Chapter 105 of the General Statutes is imposed on each risk retention group.

(b) A risk retention group is subject to taxation under and is considered to be an insurer for the purpose of assessing and collecting taxes as provided by Article 8B of Chapter 105 of the General Statutes.

(c) An agent shall report and pay the taxes on the premiums for risks that he has placed with or on behalf of a risk retention group that is not chartered in this State in the same manner for reporting and paying taxes as provided by Article 36 of this Chapter. (1985 (Reg. Sess., 1986), c. 928, s. 8.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 928, s. 14 makes this section effective September 1, 1986.

§ 58-512. Restrictions.

A risk retention group may not:

(1) Insure risks other than those of its member companies;

(2) Provide an insurance or insurance-related service other than for product liability or completed operations unless the risk retention group obtains a certificate of authority in this State and becomes subject to all the laws and rules of this State with respect to those additional lines of insurance and related services; or

(3) Exclude any person from membership in the group solely to provide for members of the group a competitive advantage over the person. (1985 (Reg. Sess., 1986), c. 1013, s. 8.)

§ 58-513. Exemption from compulsory associations.

A risk retention group, with respect to its product liability or completed operations insurance, may not be a member of or contribute financially to any insurance insolvency guaranty fund or similar mechanism in this State, nor may a risk retention group or its insured receive any benefit from any guaranty fund or similar mechanism for claims arising out of the operations of the risk retention group for product liability or completed operations insurance. (1985 (Reg. Sess., 1986), c. 1013, s. 8.)

§ 58-514. Countersignature not required.

A policy or contract of insurance issued to a risk retention group or any member of that group is not required to be countersigned as provided by G.S. 58-44. (1985 (Reg. Sess., 1986), c. 1013, s. 8.)

§ 58-515. Unfair claims settlement practices.

A risk retention group doing business in this State is subject to G.S. 58-39(5) and to Article 3A of this Chapter. (1985 (Reg. Sess., 1986), c. 1013, s. 8.)

§ 58-516. Examination for financial impairment.

(a) A risk retention group chartered in this State must submit to examination to determine its financial condition as considered necessary by the Commissioner. The examination shall be conducted in accordance with the laws, rules, and procedures applicable to insurers licensed in this State under this Chapter.

(b) A risk retention group that is not chartered in this State but is doing business in this State must submit to the same type of examination as if it were chartered in this State if:

- (1) The Commissioner has reason to believe the risk retention group is or may be in a hazardous financial condition; and
- (2) The insurance regulator of another state in which the group is chartered has not begun or has refused to initiate an examination of the group comparable in scope to an examination by this State. (1985 (Reg. Sess., 1986), c. 1013, s. 8.)

§ 58-517. Delinquency proceedings.

(a) A risk retention group chartered and licensed in this State is subject to Article 17A of this Chapter and must comply with all lawful orders issued in any delinquency proceeding commenced by the Commissioner.

(b) A risk retention group not chartered in this State but doing business in this State is subject to Article 17A of this Chapter and must comply with a lawful order issued in any delinquency proceeding commenced by the Commissioner relating to its operations and financial affairs in this State. (1985 (Reg. Sess., 1986), c. 1013, s. 8.)

§ 58-518. Penalties.

(a) A risk retention group that is chartered and licensed under G.S. 58-507 or G.S. 58-508 and that violates this Article is subject to all sanctions and penalties applicable to an insurer that holds a certificate of authority under this Chapter, including revocation of its license and the right to do business in this State.

(b) A risk retention group doing business in this State that is not chartered or licensed under G.S. 58-507 or G.S. 58-508 is considered an unauthorized insurer and is subject to Articles 3B, 3C, and 17A of this Chapter. (1985 (Reg. Sess., 1986), c. 1013, s. 8.)

Chapter 59.

Partnership.

Article 1.

Uniform Limited Partnership Act.

Sec.

59-1 to 59-30.1. [Repealed.]

Article 4.

Business Under Assumed Name Regulated.

59-90 to 59-100. [Reserved.]

Article 5.

Revised Uniform Limited Partnership Act.

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ARTICLE 1.

Uniform Limited Partnership Act.

§§ 59-1 to 59-30.1: Repealed by Session Laws 1985 (Regular Session, 1986), c. 989, s. 2, effective October 1, 1986.

Cross References. — For the Revised Uniform Limited Partnership Act, see § 59-101 et seq.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 989, s. 2 enacted a new Revised Uniform Limited Partnership Act, as Article 5 of Chapter 59, and repealed this Article, effective October 1, 1986. Limited partnerships created after October 1, 1986, are governed by Article 5 of Chapter 59. As to the effective date

and applicability of various provisions of the new Article and of this Article to transactions entered into and partnerships formed before October 1, 1986, see § 59-1104.

Section 1 of Session Laws 1985 (Reg. Sess., 1986), c. 989 added a new § 59-30.1 to repealed Article 1, reading as follows: "§ 59-30.1. No limited partnership shall be formed under this Article after September 30, 1986."

ARTICLE 2.

Uniform Partnership Act.

Part 1. Preliminary Provisions.

§ 59-31. Name of Article.

CASE NOTES

Applied in *Hewes v. Wolfe*, 74 N.C. App. 610, 330 S.E.2d 16 (1985).

Part 2. Nature of a Partnership.

§ 59-36. Partnership defined.

CASE NOTES

Failure to Show Partnership. — Where plaintiffs, who filed an action to enjoin foreclosure on real property, contending that the option contract, contract to purchase and note entered into between plaintiffs and defendants created a partnership relationship rather than a mortgagee-mortgagor relationship, failed to

show probable cause to believe that they would be able to establish the partnership rights they asserted, the trial court did not err in denying a preliminary injunction and allowing foreclosure to proceed. *Carefree Carolina Communities, Inc. v. Cilley*, — N.C. App. —, 340 S.E.2d 529 (1986).

§ 59-37. Rules for determining the existence of a partnership.

CASE NOTES

Failure to Show Partnership. — Where plaintiffs, who filed an action to enjoin foreclosure on real property, contending that the option contract, contract to purchase and note entered into between plaintiffs and defendants created a partnership relationship rather than a mortgagee-mortgagor relationship, failed to

show probable cause to believe that they would be able to establish the partnership rights they asserted, the trial court did not err in denying a preliminary injunction and allowing foreclosure to proceed. *Carefree Carolina Communities, Inc. v. Cilley*, — N.C. App. —, 340 S.E.2d 529 (1986).

Part 3. Relations of Partners to Persons Dealing with the Partnership.

§ 59-40. Conveyance of real property of the partnership.

CASE NOTES

Land owned individually by one who entered into a partnership could not become a partnership asset absent some written agreement sufficient to satisfy the statute of frauds, despite subsection (c) of this section, which recognizes that title to real property

may be in the name of one or more, but not all the partners, and § 59-56, which makes a partner's interest in partnership property, even real property, a personal property interest. *Ludwig v. Walter*, 75 N.C. App. 584, 331 S.E.2d 177 (1985).

§ 59-45. Nature of partner's liability.

CASE NOTES

Partner Individually Must Be Served With Process Before Personally Liable. — While a partnership cannot insulate its members from liability, it is a distinct legal entity, and the act of a partner done in his representative capacity is not per se an action made in his individual capacity; the law clearly requires that a partner individually be served with process before being held personally liable for judgment against the partnership. *Stevens v. Lawyers Mut. Liab. Ins. Co.*, 107 F.R.D. 112 (E.D.N.C. 1985).

Partnership is represented by partner who is served, and as to him judgment in action in which he is served would be binding upon him individually, and as to partnership property; but as to a partner not served with a summons, the judgment would not be

binding on him individually. *Stevens v. Lawyers Mut. Liab. Ins. Co.*, 107 F.R.D. 112 (E.D.N.C. 1985).

Repayment of Note Out of Partnership Funds. — Regardless of whether a note was signed by the parties as individuals or as partners, its legal effect was the same. Nevertheless, in a dissolution action, where it appeared that the note was executed in furtherance of the partnership, and that there may have been partnership funds available to satisfy it, the court should have determined the nature of the note and ordered it repaid out of partnership funds if possible. *Ludwig v. Walter*, 75 N.C. App. 584, 331 S.E.2d 177 (1985).

Cited in *Stevens v. Lawyers Mut. Liab. Ins. Co.*, 789 F.2d 1056 (4th Cir. 1986).

Part 5. Property Rights of a Partner.

§ 59-56. Nature of partner's interest in the partnership.

CASE NOTES

Land owned individually by one who entered into a partnership could not become a partnership asset absent some written agreement sufficient to satisfy the statute of frauds, despite § 59-40(c), which recognizes that title to real property may be in the name

of one or more, but not all the, partners, and this section, which makes a partner's interest in partnership property, even real property, a personal property interest. *Ludwig v. Walter*, 75 N.C. App. 584, 331 S.E.2d 177 (1985).

Part 6. Dissolution and Winding Up.

§ 59-62. Dissolution by decree of court.

CASE NOTES

Order of Dissolution Upheld. — An order of dissolution, having been prayed for and not resisted, and the court's order having resolved all differences between the parties regarding liability to each other, as well as having re-

solved that the partnership would conduct no further business, undoubtedly was appropriate. *Ludwig v. Walter*, 75 N.C. App. 584, 331 S.E.2d 177 (1985).

§ 59-64. Right of partner to contribution from copartners after dissolution.

CASE NOTES

Applied in *Ludwig v. Walter*, 75 N.C. App. 584, 331 S.E.2d 177 (1985).

§ 59-65. Power of partner to bind partnership to third persons after dissolution; publication of notice of dissolution.

CASE NOTES

Applied in *Ludwig v. Walter*, 75 N.C. App. 584, 331 S.E.2d 177 (1985).

§ 59-68. Rights of partners to application of partnership property.

CASE NOTES

Applied in *Ludwig v. Walter*, 75 N.C. App. 584, 331 S.E.2d 177 (1985).

ARTICLE 4.

Business Under Assumed Name Regulated.

§§ 59-90 to 59-100: Reserved for future codification purposes.

ARTICLE 5.

Revised Uniform Limited Partnership Act.

Part 1. General Provisions.

§ 59-101. Short title.

This Article may be cited as the Revised Uniform Limited Partnership Act. (1985 (Reg. Sess., 1986), c. 989, s. 2.)

Editor's Note. — Section 3 of Session Laws 1985 (Reg. Sess., 1986), makes this Article effective October 1, 1986.

§ 59-102. Definitions.

As used in this Article, unless the context otherwise requires:

- (1) "Certificate of limited partnership" means the certificate referred to in G.S. 59-201, and the certificate as amended.
- (2) "Conformed copy" shall include a photostatic or other photographic copy of the original document.
- (3) "Contribution" means any cash, property, services rendered, or a promissory note or other binding obligation to contribute cash or property or to perform services, which a partner contributes to a limited partnership in his capacity as a partner.
- (4) "Event of withdrawal of a general partner" means an event that causes a person to cease to be a general partner as provided in G.S. 59-402.
- (5) "Foreign limited partnership" means a partnership formed under the laws of any state, province, country, or other jurisdiction other than this State and having as partners one or more general partners and one or more limited partners.
- (6) "General partner" means a person who has been admitted to a limited partnership as a general partner in accordance with the partnership agreement and named in the certificate of limited partnership as a general partner.
- (7) "Limited partner" means a person who has been admitted to a limited partnership as a limited partner in accordance with the partnership agreement.
- (8) "Limited partnership" and "domestic limited partnership" mean a partnership formed by two or more persons under the laws of this State and having one or more general partners and one or more limited partners.
- (9) "Partner" means a limited or general partner.
- (10) "Partnership agreement" means any valid agreement, written or oral, of the partners as to the affairs of a limited partnership and the conduct of its business.

- (11) "Partnership interest" means a partner's share of the allocations of income, gain, loss, deduction or credit of a limited partnership and the right to receive distributions of cash or other partnership assets.
- (12) "Person" means a natural person, partnership, limited partnership (domestic or foreign), trust, estate, association, or corporation.
- (13) "State" means a state, territory, or possession of the United States, the District of Columbia, or the Commonwealth of Puerto Rico. (1985 (Reg. Sess., 1986), c. 989, s. 2.)

§ 59-103. Name.

(a) The name of the limited partnership shall contain without abbreviation the words "limited partnership";

(b) The limited partnership name shall not contain the name of a limited partner unless (i) it is also the name of a general partner or the corporate name of a corporate general partner, or (ii) the business of the limited partnership has been carried on under that name before the admission of that limited partner;

(c) The limited partnership name shall not contain any word or phrase which is likely to mislead the public or which indicates or implies that it is organized for any purpose other than one or more of the purposes contained in its certificate of limited partnership;

(d) The limited partnership name shall not be the same as, or deceptively similar to, the name of any domestic corporation or limited partnership or of any foreign corporation or limited partnership authorized to transact business in this State, or a name the exclusive right to which is, at the time, reserved or registered by some other person in the manner prescribed by G.S. 59-104. (1985 (Reg. Sess., 1986), c. 989, s. 2.)

§ 59-104. Reservation of name.

(a) The exclusive right to a limited partnership name not prohibited by G.S. 59-103 may be reserved for a period of 90 days by:

- (1) Any person intending to organize a limited partnership under this Article;
- (2) Any domestic limited partnership intending to change its name;
- (3) Any foreign limited partnership intending to make application for a certificate of authority to transact business in this State;
- (4) Any foreign limited partnership authorized to transact business in this State and intending to change its name;
- (5) Any person intending to organize a foreign limited partnership and intending to have such limited partnership make application for a certificate of authority to transact business in this State.

(b) The same name shall not be reserved for two or more consecutive 90-day periods by the same applicant or for the use and benefit of the same applicant; nor shall such consecutive reservations be made of names so similar as to fall within the prohibition of this section.

(c) The reservation of name, pursuant to subsection (a), shall be made by filing with the Secretary of State an executed application therefor stating the name and address of the applicant, and the Secretary of State shall, upon tender of the fee hereinafter prescribed, reserve the name exclusively for the applicant unless he finds that the name is not available under the provisions of this section.

(d) The exclusive right to a specified limited partnership name reserved hereunder, may, on tender of the fee hereinafter prescribed, be transferred to any other limited partnership by filing in the office of the Secretary of State a notice of such transfer, executed by the applicant for whom the name was reserved and specifying the name and address of the transferee.

(e) The Secretary of State may revoke any reservation of a limited partnership name if he finds, upon a hearing held not less than five days after written notice has been sent by registered mail to the person or limited partnership who made the reservation, that the application therefor or any transfer thereof was not made in good faith or that any statement contained in the application for reservation was false when such application was filed or has thereafter become false.

(f) The use by a limited partnership of a name in violation of this section may be enjoined notwithstanding the filing of its certificate of limited partnership by the Secretary of State.

(g) The filing of a certificate of limited partnership by any domestic limited partnership shall not authorize the use in this State of the limited partnership name in violation of the rights of any third party under the federal Trademark Act, the Trademark Act of this State, or the common law; and the filing of such certificate shall not be a defense to an action for violation of any such rights. (1985 (Reg. Sess., 1986), c. 989, s. 2.)

§ 59-105. Registered office and registered agent.

Each limited partnership shall have and continuously maintain in this State:

- (1) A registered office, which may be, but need not be, its place of business;
- (2) A registered agent, which agent may be either an individual resident of this State whose business office is identical with such registered office, or, a domestic corporation, or a foreign corporation authorized to transact business in this State, having a business office identical with such registered office. (1985 (Reg. Sess., 1986), c. 989, s. 2.)

§ 59-106. Records to be kept.

- (a) Each limited partnership shall keep in this State at its registered office:
 - (1) A current list of the full name and last known mailing address of each partner set forth in alphabetical order;
 - (2) A copy of the certificate of limited partnership and all certificates of amendment thereto, together with executed copies of any powers of attorney pursuant to which any certificate has been executed;
 - (3) Copies of the limited partnership's federal, State and local income tax returns and reports, if any, for the three most recent years;
 - (4) Copies of any then effective written partnership agreements and copies of any financial statements of the limited partnership for the three most recent years; and
 - (5) Unless contained in a written partnership agreement:
 - (i) The amount of cash and a description and statement of the agreed value of the other property or services contracted by each partner and which each partner has agreed to contribute;
 - (ii) The times at which or events on the happening of which any additional contributions agreed to be made by each partner are to be made;

- (iii) Any right of a partner to receive distribution of property, including cash from the limited partnership; and
- (iv) Events upon the happening of which the limited partnership is to be dissolved and its affairs wound up.

(b) The books and records are subject to inspection and copying at the reasonable request, and at the expense, of any partner during ordinary business hours. (1985 (Reg. Sess., 1986), c. 989, s. 2.)

§ 59-107. Nature of business.

A limited partnership may carry on any business that a partnership without limited partners may carry on. (1985 (Reg. Sess., 1986), c. 989, s. 2.)

§ 59-108. Business transactions of partner with the partnership.

Except as provided in the partnership agreement, a partner may lend money to and transact other business with the limited partnership and, subject to G.S. 59-804 and other applicable law, has the same rights and obligations with respect thereto as a person who is not a partner. (1985 (Reg. Sess., 1986), c. 989, s. 2.)

Part 2. Formation; Certificate of Limited Partnership.

§ 59-201. Certificate of limited partnership.

(a) In order to form a limited partnership, a certificate of limited partnership must be executed and filed in the office of the Secretary of State and set forth:

- (1) The name of the limited partnership;
- (2) The address, including county and city or town, and street and number, if any, of the registered office and the name of the registered agent at such address for service of process required to be maintained by G.S. 59-105;
- (3) The latest date upon which the limited partnership is to dissolve; and
- (4) The name and the address, including county and city or town, and street and number, if any, of each general partner.

(b) A limited partnership is formed at the time of the filing of the certificate of limited partnership in the office of the Secretary of State or at any later time not more than 20 days subsequent to the endorsement of the Secretary of State specified in the certificate of limited partnership if, in either case, there has been substantial compliance with the requirements of this section. (1985 (Reg. Sess., 1986), c. 989, s. 2.)

Editor's Note. — Section 3 of Session Laws 1985 (Reg. Sess., 1986), makes this Article effective October 1, 1986.

§ 59-202. Amendment to certificate.

(a) A certificate of limited partnership is amended by filing a certificate of amendment thereto in the office of the Secretary of State. The certificate shall set forth:

- (1) The name of the limited partnership;
- (2) The date of filing of the certificate; and
- (3) The amendment to the certificate.

(b) Within 30 days after the happening of any of the following events an amendment to a certificate of limited partnership reflecting the occurrence of the event or events shall be filed:

- (1) The admission of a new general partner;
- (2) The withdrawal of a general partner; or
- (3) The continuation of the business under G.S. 59-801 after an event of withdrawal of a general partner.

(c) A general partner who becomes aware that any statement in a certificate of limited partnership was false when made or that any arrangements or other facts described have changed, making the certificate inaccurate in any respect, shall promptly amend the certificate.

(d) A certificate of limited partnership may be amended at any time for any other proper purpose the partners may determine. (1985 (Reg. Sess., 1986), c. 989, s. 2.)

§ 59-203. Cancellation of certificate.

A certificate of limited partnership shall be cancelled upon the dissolution and the commencement of winding up of the partnership or at any other time that there are no limited partners. A certificate of cancellation shall be filed in the office of the Secretary of State and set forth:

- (1) The name of the limited partnership;
- (2) The date of filing of its certificate of limited partnership;
- (3) The reason for filing the certificate of cancellation;
- (4) The effective date (which shall be a date certain not more than 20 days from the date of filing) of cancellation if it is not to be effective upon the filing of the certificate; and
- (5) Any other information the partners filing the certificate determine. (1985 (Reg. Sess., 1986), c. 989, s. 2.)

§ 59-204. Execution of certificates.

(a) Each certificate required by this Article to be filed in the office of the Secretary of State shall be executed in the following manner:

- (1) An original certificate of limited partnership must be signed by all general partners;
 - (2) A certificate of amendment must be signed by all general partners and by each other partner designated in the certificate as a new general partner; and
 - (3) A certificate of cancellation must be signed by all general partners.
- (b) Any person may sign a certificate by an attorney-in-fact.
- (c) The execution of a certificate or amendment by a general partner constitutes an affirmation under the penalties of perjury that the facts stated therein are true. (1985 (Reg. Sess., 1986), c. 989, s. 2.)

§ 59-205. Amendment or cancellation by judicial act.

If a person required by G.S. 59-204 to execute a certificate of amendment or cancellation fails or refuses to do so, any other partner, and any assignee of a partnership interest, who is adversely affected by the failure or refusal, may petition the court for the county in which the partnership's registered office is located to direct the amendment or cancellation. If the court finds that the amendment or cancellation is proper and that any person so designated has failed or refused to execute the certificate, it shall order the Secretary of State to record an appropriate certificate of amendment or cancellation. (1985 (Reg. Sess., 1986), c. 989, s. 2.)

§ 59-206. Filing in office of Secretary of State.

(a) Whenever the provisions of this Article require any document relating to a limited partnership to be executed and filed in accordance with this Article, unless otherwise specifically stated in this Article:

(1) There shall be an original executed document and also one conformed copy.

(2) The original document so signed, together with the conformed copy, shall be delivered to the Secretary of State. Unless he finds that it does not conform to law, the Secretary of State shall, when the proper taxes and fees have been tendered, endorse upon the original the word "filed" and the hour, day, month and year of the filing thereof and shall file the same in his office. The Secretary of State shall thereupon immediately compare the copy with the original and if he finds that they are identical he shall make upon the conformed copy the same endorsement which appears on the original and shall attach to the copy a certificate stating that attached thereto is a true copy of the document, designated by an appropriate title, filed in his office and showing the date of such filing. He shall thereupon return the copy so certified to the limited partnership or its representatives.

(3) The copy certificate as aforesaid, shall, within 60 days after the receipt by the limited partnership or its representative be delivered to the register of deeds of the county wherein the limited partnership has its registered office, and, when the proper fees shall have been tendered, it shall be recorded and properly indexed as is customary for partnerships. Promptly after the recordation, the register of deeds shall note the fact of recordation on the said copy and return it to the limited partnership or its representatives.

(b) Any such document required to be filed shall be completely effective when endorsed by the Secretary of State as provided in subsection (a)(2) above and the transaction to be effectuated thereby shall thereupon be deemed to be completely consummated as if all the required recording had been perfected, provided, however, that in lieu of the time of such endorsement by the Secretary of State, such document may fix an hour, day, month and year not more than 20 days subsequent to the endorsement of the Secretary of State and the transaction shall be deemed to be completely consummated at the time fixed by such document as if all the required recording had been perfected.

(c) It shall be the duty of the Secretary of State, whenever so requested and upon tender of the proper fees, to certify as aforesaid any true copy of any such document on file in his office, or if such be the request, to make or cause to be made typewritten or photostatic copies of such documents and to certify the same as aforesaid. (1985 (Reg. Sess., 1986), c. 989, s. 2.)

§ 59-207. Liability for false statement in certificate.

If any certificate of limited partnership or certificate of amendment or cancellation contains a false statement, one who suffers loss by reliance on the statement may recover damages for the loss from:

- (1) Any person who executes the certificate, or causes another to execute it on his behalf, and knew, and any general partner who knew or should have known, the statement to be false at the time the certificate was executed; and
- (2) Any general partner who thereafter knows or should have known that any arrangement or other fact described in the certificate has changed, making the statement inaccurate in any respect within a sufficient time before the statement was relied upon reasonably to have enabled that general partner to cancel or amend the certificate, or to file a petition for its cancellation or amendment under G.S. 59-205. (1985 (Reg. Sess., 1986), c. 989, s. 2.)

§ 59-208. Notice.

The fact that a certificate of limited partnership is on file in the office of the Secretary of State is notice that the partnership is a limited partnership and the persons designated therein as general partners are general partners, but it is not notice of any other fact. (1985 (Reg. Sess., 1986), c. 989, s. 2.)

Part 3. Limited Partners.

§ 59-301. Admission of additional limited partners.

After the filing of a limited partnership's original certificate of limited partnership, a person may be admitted as an additional limited partner:

- (1) In the case of a person acquiring a partnership interest directly from the limited partnership, upon the compliance with the partnership agreement, or, if the partnership agreement does not so provide, upon the written consent of all partners; and
- (2) In the case of an assignee of a partnership interest of a partner who has the power, as provided in G.S. 59-704, to grant the assignee the right to become a limited partner, upon the exercise of that power and compliance with any conditions limiting the grant or exercise of the power. (1985 (Reg. Sess., 1986), c. 989, s. 2.)

Editor's Note. — Section 3 of Session Laws 1985 (Reg. Sess., 1986), makes this Article effective October 1, 1986.

§ 59-302. Voting.

Subject to G.S. 59-303, the partnership agreement may grant to all or a specified group of the limited partners the right to vote (on a per capita or other basis) upon any matter. (1985 (Reg. Sess., 1986), c. 989, s. 2.)

§ 59-303. Liability to third parties.

(a) Except as provided in subsection (d), a limited partner is not bound by the obligations of a limited partnership unless he is also a general partner or, in addition to the exercise of his rights and powers as a limited partner, he takes part in the control of the business. However, if the limited partner's participation in the control of the business is not substantially the same as the exercise of the powers of a general partner, he is liable only to persons who transact business with the limited partnership with actual knowledge of his participation in control.

(b) A limited partner does not participate in the control of the business within the meaning of subsection (a) solely by doing one or more of the following:

- (1) Being a contractor for or an agent or employee of the limited partnership or of a general partner, or an officer, director, or shareholder of a corporate general partner;
- (2) Consulting with and advising a general partner with respect to the business of the limited partnership;
- (3) Acting as surety for the limited partnership;
- (4) Proposing, approving or disapproving an amendment to the partnership agreement;
- (5) Proposing or voting on one or more of the following matters:
 - (i) The dissolution and winding up of the limited partnership;
 - (ii) The sale, exchange, lease, mortgage, pledge, or other transfer of all or substantially all of the assets of the limited partnership other than in the ordinary course of its business;
 - (iii) The incurrence of indebtedness by the limited partnership other than in the ordinary course of its business;
 - (iv) A change in the nature of the business; or
 - (v) The addition, removal or substitution of general partners;
- (6) Bringing an action in the right of a limited partnership to recover a judgment in its favor pursuant to Part 10 of this Article;
- (7) Approving or disapproving a transaction involving an actual or potential conflict of interest between a general partner and the limited partnership; or
- (8) Requesting or attending a meeting of partners.

(c) The enumeration in subsection (b) does not mean that the possession or exercise of any other powers by a limited partner constitutes participation by him in the control of the business of the limited partnership.

(d) A limited partner who knowingly permits his name to be used in the name of the limited partnership, except under circumstances permitted by G.S. 59-103(b)(i), is liable to creditors who extend credit to the limited partnership without actual knowledge that the limited partner is not a general partner. (1985 (Reg. Sess., 1986), c. 989, s. 2.)

§ 59-304. Person erroneously believing himself limited partner.

(a) Except as provided in subsection (b), a person who makes a contribution to a business enterprise and erroneously but in good faith believes that he has become a limited partner in the enterprise is not a general partner in the enterprise and is not bound by its obligations by reason of making the contribution, receiving distributions from the enterprise, or exercising any rights of a limited partner, if, on ascertaining the mistake, he:

(1) Causes an appropriate certificate of limited partnership to be executed and filed; or

(2) Withdraws from future equity participation in the enterprise.

(b) A person who makes a contribution of the kind described in subsection (a) is liable as a general partner to any third party who transacts business with the enterprise (i) before the person withdraws from the enterprise, or (ii) before the person gives notice to the partnership of his withdrawal from future equity participation, but only if the third party actually believed in good faith that the person was a general partner at the time of the transaction. (1985 (Reg. Sess., 1986), c. 989, s. 2.)

§ 59-305. Information.

Each limited partner has the right to:

- (1) Inspect and copy any of the partnership records required to be maintained by G.S. 59-106; and
- (2) Obtain from the general partners from time to time upon reasonable demand (i) information regarding the state of the business and financial condition of the limited partnership, (ii) promptly after becoming available, a copy of the limited partnership's federal, State, and local income tax returns for each year, and (iii) other information regarding the affairs of the limited partnership as is just and reasonable. (1985 (Reg. Sess., 1986), c. 989, s. 2.)

Part 4. General Partners.

§ 59-401. Admission of additional general partners.

Unless otherwise provided in the partnership agreement, after the filing of a limited partnership's original certificate of limited partnership, additional general partners may be admitted only with the specific written consent of each partner. (1985 (Reg. Sess., 1986), c. 989, s. 2.)

Editor's Note. — Section 3 of Session Laws 1985 (Reg. Sess., 1986), makes this Article effective October 1, 1986.

§ 59-402. Events of withdrawal.

Except as approved by the specific written consent of all partners at the time, a person ceases to be a general partner of a limited partnership upon the happening of any of the following events:

- (1) The general partner withdraws from the limited partnership as provided in G.S. 59-602;
- (2) The general partner ceases to be a member of the limited partnership as provided in G.S. 59-702;
- (3) The general partner is removed as a general partner in accordance with the partnership agreement;
- (4) Unless otherwise provided in the partnership agreement, the general partner: (i) makes an assignment for the benefit of creditors; (ii) files a voluntary petition in bankruptcy; (iii) is adjudicated a bankrupt or insolvent; (iv) files a petition or answer seeking for himself any reorganization, arrangement, composition, readjustment, liquidation,

- dissolution, or similar relief under any statute, law, or regulation; (v) files an answer or other pleading admitting or failing to contest the material allegations of a petition filed against him in any proceeding of this nature; or (vi) seeks, consents to, or acquiesces in the appointment of a trustee, receiver, or liquidator of the general partner or of all or any substantial part of his properties;
- (5) Unless otherwise provided in the partnership agreement, 120 days after the commencement of any proceeding against the general partner seeking reorganization, arrangement, composition, readjustment, liquidation, dissolution, or similar relief under any statute, law, or regulation, the proceeding has not been dismissed, or if within 90 days after the appointment without his consent or acquiescence of a trustee, receiver, or liquidator of the general partner or of all or any substantial part of his properties, the appointment is not vacated or stayed, or within 90 days after the expiration of any such stay, the appointment is not vacated;
 - (6) In the case of a general partner who is a natural person,
 - (i) His death; or
 - (ii) The entry on an order by a court of competent jurisdiction adjudicating him incompetent to manage his person or his estate;
 - (7) In the case of a general partner who is acting as a general partner by virtue of being a trustee of a trust, the termination of the trust (but not merely the substitution of a new trustee);
 - (8) In the case of a general partner that is a separate partnership, the dissolution and commencement of winding up of the separate partnership;
 - (9) In the case of a general partner that is a corporation, the filing of a certificate of dissolution, or its equivalent, for the corporation or the revocation of its charter; or
 - (10) In the case of an estate, the distribution by the fiduciary of the estate's entire interest in the partnership. (1985 (Reg. Sess., 1986), c. 989, s. 2.)

§ 59-403. General powers and liabilities.

Except as provided in this Article or in the partnership agreement, a general partner of a limited partnership has the rights and powers and is subject to the restrictions and liabilities of a partner in a partnership without limited partners. (1985 (Reg. Sess., 1986), c. 989, s. 2.)

§ 59-404. Contributions by a general partner.

A general partner of a limited partnership may make contributions to the partnership and share in the profits and losses of, and in distributions from, the limited partnership as a general partner. A general partner also may make contributions to and share in profits, losses, and distributions as a limited partner. A person who is both a general partner and a limited partner has the rights and powers, and is subject to the restrictions and liabilities, of a general partner and, except as provided in the partnership agreement, also has the powers, and is subject to the restrictions, of a limited partner to the extent of his participation in the partnership as a limited partner. (1985 (Reg. Sess., 1986), c. 989, s. 2.)

§ 59-405. Voting.

The partnership agreement may grant to all or certain identified general partners the right to vote (on a per capita or any other basis), separately or with all or any class of the limited partners, on any matter. (1985 (Reg. Sess., 1986), c. 989, s. 2.)

Part 5. Finance.

§ 59-501. Form of contribution.

The contribution of a partner may be in cash, property, or services rendered, or a promissory note or other obligation to contribute cash or property or to perform services. (1985 (Reg. Sess., 1986), c. 989, s. 2.)

Editor's Note. — Section 3 of Session Laws 1985 (Reg. Sess., 1986), makes this Article effective October 1, 1986.

§ 59-502. Liability for contributions.

(a) Except as provided in the agreement of limited partnership, a partner is obligated to the limited partnership to perform any promise to contribute cash or property or to perform services, even if he is unable to perform because of death, disability or any other reason. If a partner does not make the required contribution of property or services, he is obligated at the option of the limited partnership to contribute cash equal to that portion of the value of the stated contribution that has not been made.

(b) Unless otherwise provided in the partnership agreement, the obligation of a partner to make a contribution or return money or other property paid or distributed in violation of this Article may be compromised only by consent of all the partners. Any such compromise, however, shall not affect the rights of a creditor whose claim arose prior to the date of the compromise.

(c) No promise by a limited partner to contribute to the limited partnership is enforceable unless in a writing signed by the limited partner. (1985 (Reg. Sess., 1986), c. 989, s. 2.)

§ 59-503. Sharing income, gain, loss, deduction or credit.

Allocation of the income, gain, loss, deduction or credit of a limited partnership shall be allocated among the partners, and among classes of partners, in the manner provided in the partnership agreement. If the partnership agreement does not so provide in writing, items of income, gain, loss, deduction or credit shall be allocated on the basis of the value of the contributions made by each partner to the extent they have been received by the partnership and have not been returned. (1985 (Reg. Sess., 1986), c. 989, s. 2.)

§ 59-504. Sharing of distributions.

Distributions of cash or other assets of a limited partnership shall be made among the partners, and among classes of partners, in the manner provided in the partnership agreement. If the partnership agreement does not so provide in writing, distributions shall be made on the basis of the value of the contributions made by each partner to the extent they have been received by the partnership and have not been returned. (1985 (Reg. Sess., 1986), c. 989, s. 2.)

Part 6. Distribution and Withdrawal.

§ 59-601. Interim distributions.

Except as provided in this Article, a partner is entitled to receive distributions from a limited partnership before his withdrawal from the limited partnership and before the dissolution and winding up thereof to the extent and at the times or upon the happening of the events specified in the partnership agreement. (1985 (Reg. Sess., 1986), c. 989, s. 2.)

Editor's Note. — Section 3 of Session Laws 1985 (Reg. Sess., 1986), makes this Article effective October 1, 1986.

§ 59-602. Withdrawal of general partner.

After filing of the original certificate of limited partnership a general partner may withdraw from a limited partnership at any time by giving written notice to the other partners, but if the withdrawal violates the partnership agreement, the limited partnership may recover from the withdrawing general partner, in addition to its other remedies, and damages for breach of the partnership agreement. (1985 (Reg. Sess., 1986), c. 989, s. 2.)

§ 59-603. Withdrawal of limited partner.

A limited partner may withdraw from a limited partnership at the time or upon the happening of events specified in writing in the partnership agreement. If the partnership agreement does not specify the time or the events upon the happening of which a limited partner may withdraw or a definite time for the dissolution and winding up of the limited partnership, a limited partner may withdraw upon not less than six months prior written notice to each general partner at his address on the books of the limited partnership at its registered office in this State. (1985 (Reg. Sess., 1986), c. 989, s. 2.)

§ 59-604. Distribution upon withdrawal.

Except as provided in this Article, upon withdrawal any withdrawing partner is entitled to receive any distribution to which he is entitled under the partnership agreement and, if not otherwise provided in the agreement, he is entitled to receive, within a reasonable time after withdrawal, the fair value of his interest in the limited partnership as of the date of withdrawal. (1985 (Reg. Sess., 1986), c. 989, s. 2.)

§ 59-605. Distribution in kind.

Except as provided in writing in the limited partnership agreement, (1) a partner, regardless of the nature of his contribution, has no right to demand and receive any distribution from a limited partnership in any form other than cash; and (2) a partner may not be compelled to accept a distribution of any asset in kind from a limited partnership to the extent that the percentage of the asset distributed to him exceeds a percentage of that asset which is equal to the percentage in which he shares in distributions from the limited partnership. (1985 (Reg. Sess., 1986), c. 989, s. 2.)

§ 59-606. Right to distribution.

Subject to the provisions of Part 6 of this Article, at the time a partner becomes entitled to receive a distribution, he has the status of, and is entitled to all remedies available to, a creditor of the limited partnership with respect to the distribution. (1985 (Reg. Sess., 1986), c. 989, s. 2.)

§ 59-607. Limitations on distribution.

A partner shall not receive a distribution from a limited partnership to the extent that, after giving effect to the distribution, all liabilities of the limited partnership, other than liabilities to partners on account of their partnership interests, exceed the fair value of the partnership assets. (1985 (Reg. Sess., 1986), c. 989, s. 2.)

§ 59-608. Liability upon return of contribution.

(a) If a partner has received the return of any part of his contribution without violation of the partnership agreement or this Article, he is liable to the limited partnership for a period of one year thereafter for the amount of the returned contribution, but only to the extent necessary to discharge the limited partnership's liabilities to creditors who extended credit to the limited partnership during the period the contribution was held by the partnership.

(b) If a partner has received the return of any part of his contribution in violation of the partnership agreement or this Article, he is liable to the limited partnership for a period of six years thereafter for the amount of the contribution wrongfully returned.

(c) A partner receives a return of his contribution to the extent that a distribution to him reduces his share of the fair value of the net assets of the limited partnership below the value of his contribution which has not been distributed to him. (1985 (Reg. Sess., 1986), c. 989, s. 2.)

Part 7. Assignment of Partnership Interest.

§ 59-701. Nature of partnership interest.

A partnership interest is personal property. (1985 (Reg. Sess., 1986), c. 989, s. 2.)

Editor's Note. — Section 3 of Session Laws 1985 (Reg. Sess., 1986), makes this Article effective October 1, 1986.

§ 59-702. Assignment of partnership interest.

Except as provided in the partnership agreement, a partnership interest is assignable in whole or in part. An assignment of a partnership interest does not dissolve a limited partnership or entitle the assignee to become or to exercise any rights of a partner. An assignment entitles the assignee to receive, to the extent assigned, only the allocation and distribution to which the assignor would be entitled. Except as provided in the partnership agreement, a limited partner shall continue to be a limited partner after assignment of all or any part of his partnership interest. Except as provided in the partnership agreement, a general partner ceases to be a general partner upon assignment of all his partnership interest. (1985 (Reg. Sess., 1986), c. 989, s. 2.)

§ 59-703. Rights of creditor.

On application to a court of competent jurisdiction by any judgment creditor of a partner, the court may charge the partnership interest of the partner with payment of the unsatisfied amount of the judgment with interest. The general partners shall have no liability to a partner for payments to a judgment creditor pursuant to this provision. To the extent so charged, the judgment creditor has only the rights of an assignee of the partnership interest. This Article does not deprive any partner of the benefit of any exemption laws applicable to his partnership interest. (1985 (Reg. Sess., 1986), c. 989, s. 2.)

§ 59-704. Right of assignee to become limited partner.

(a) An assignee of a partnership interest, including an assignee of a general partner, may become a limited partner if and to the extent that (1) the assignor gives the assignee that right in accordance with authority described in the partnership agreement, or (2) all other partners consent.

(b) An assignee who has become a limited partner has, to the extent assigned, the rights and powers, and is subject to the restrictions and liabilities, of a limited partner under the partnership agreement and this Article. An assignee who becomes a limited partner also is liable for the obligations of his assignor to make and return contributions as provided in Part 6 of this Article. However, the assignee is not obligated for liabilities unknown to the assignee at the time he became a limited partner and which could not be ascertained from the partnership agreement.

(c) If an assignee of a partnership interest becomes a limited partner, the assignor is not released from his liability to the limited partnership under G.S. 59-207, 59-502, and 59-608. (1985 (Reg. Sess., 1986), c. 989, s. 2.)

§ 59-705. Power of estate of deceased or incompetent partner.

If a partner who is an individual dies or a court of competent jurisdiction adjudges him to be incompetent to manage his person or his property, the partner's executor, administrator, guardian, conservator, or other legal representative may exercise all of the partner's rights for the purpose of settling his estate or administering his property, including any power the partner had to give an assignee the right to become a limited partner. If a partner is a corporation, trust, or other entity and is dissolved or terminated, the powers of that partner may be exercised by its legal representative or successor. (1985 (Reg. Sess., 1986), c. 989, s. 2.)

Part 8. Dissolution.

§ 59-801. Nonjudicial dissolution.

A limited partnership is dissolved and its affairs shall be wound up upon the happening of the first to occur of the following:

- (1) At the time specified in the certificate of limited partnership or upon the happening of events specified in writing in the partnership agreement;
- (2) Written consent of all partners;
- (3) An event of withdrawal of a general partner unless at the time there is at least one other general partner and the written provisions of the partnership agreement permit the business of the limited partnership to be carried on by the remaining general partner and that partner does so, but the limited partnership is not dissolved and is not required to be wound up by reason of any event of withdrawal if, within 90 days after the withdrawal, all remaining partners agree in writing to continue the business of the limited partnership and to the appointment of one or more additional general partners if necessary or desired; or
- (4) Entry of a decree of judicial dissolution under G.S. 59-802. (1985 (Reg. Sess., 1986), c. 989, s. 2.)

Editor's Note. — Section 3 of Session Laws 1985 (Reg. Sess., 1986), makes this Article effective October 1, 1986.

§ 59-802. Judicial dissolution.

On application by or for a partner the court may decree dissolution of a limited partnership whenever it is not reasonably practicable to carry on the business in conformity with the partnership agreement. (1985 (Reg. Sess., 1986), c. 989, s. 2.)

§ 59-803. Winding up.

Except as provided in the partnership agreement, the general partners who have not wrongfully dissolved a limited partnership or, if none, the limited partners, may wind up the limited partnership's affairs; but the court may wind up the limited partnership's affairs upon application of any partner, his legal representative, or assignee. (1985 (Reg. Sess., 1986), c. 989, s. 2.)

§ 59-804. Distribution of assets.

Upon the winding up of a limited partnership, the assets shall be distributed as follows:

- (1) To creditors, including limited partners who are creditors, to the extent otherwise permitted by law, in satisfaction of liabilities of the limited partnership other than liabilities for distributions to partners under G.S. 59-601 or G.S. 59-604;
- (2) To general partners who are creditors to the extent otherwise permitted by law, in satisfaction of liabilities of the limited partnership other than liabilities for distributions to partners under G.S. 59-601 or G.S. 59-604;
- (3) Except as provided in the partnership agreement, to partners and former partners in satisfaction of liabilities for distributions under G.S. 59-601 or G.S. 59-604; and
- (4) Except as provided in the partnership agreement, to partners first for the return of their contributions and secondly respecting their partnership interests, in the proportions in which the partners share in distributions. (1985 (Reg. Sess., 1986), c. 989, s. 2.)

Part 9. Foreign Limited Partnerships.

§ 59-901. Law governing.

Subject to the Constitution of this State, (1) the laws of the jurisdiction under which a foreign limited partnership is organized govern its organization and internal affairs and the liability of its limited partners, and (2) a foreign limited partnership may not be denied registration by reason of any difference between those laws and the laws of this State. (1985 (Reg. Sess., 1986), c. 989, s. 2.)

Editor's Note. — Section 3 of Session Laws 1985 (Reg. Sess., 1986), makes this Article effective October 1, 1986.

§ 59-902. Registration.

(a) Before transacting business in this State, a foreign limited partnership shall procure a certificate of authority to transact business in this State from the Secretary of State. No foreign limited partnership shall be entitled to transact in this State any business which a limited partnership organized under this Article is not permitted to transact. In order to register, a foreign limited partnership shall deliver to the Secretary of State an original and one conformed copy of an application for registration as a foreign limited partnership, signed by a general partner and setting forth:

- (1) The name of the foreign limited partnership and, if different, the name under which it proposes to register and transact business in this State;
 - (2) The jurisdiction and date of its formation;
 - (3) The date of formation and the period of duration;
 - (4) The address, including county and city or town, and street and number, if any, of the principal office of the foreign limited partnership in the jurisdiction under the laws of which it is formed;
 - (5) The address, including county and city or town, and street and number, if any, of the proposed registered office of the foreign limited partnership in this State, and the name of its proposed registered agent in this State at such address; the agent must be an individual resident of this State, a domestic corporation, or a foreign corporation having a place of business in, and authorized to do business in this State;
 - (6) If the certificate of limited partnership filed in the foreign limited partnership's state of organization is not required to include the names and addresses of the partners, a list of the names and addresses or, at the election of the foreign limited partnership, a list of the names and addresses of the general partners and the address, including county and city or town, and street and number, of the office at which is kept a list of the names and addresses of the limited partners and their capital contributions, together with an undertaking by the foreign limited partnership to keep such records until such foreign limited partnership's registration in this State is cancelled;
 - (7) A statement that in consideration of the issuance of a certificate of authority to transact business in this State, the foreign limited partnership appoints the Secretary of State of North Carolina as the agent to receive service of process, notice, or demand, whenever the foreign limited partnership fails to appoint or maintain a registered agent in this State or whenever any such registered agent cannot with reasonable diligence be found at the registered office;
 - (8) The names and addresses including county and city or town, and street and number, if any, of all of the general partners;
 - (9) The execution of a certificate or amendment by a general partner constitutes an affirmation under the penalties of perjury that the facts stated therein are true.
- (b) Without excluding other activities which may not constitute transacting business in this State, a foreign limited partnership shall not be considered to be transacting business in this State, for the purpose of this Article, by reason of carrying on in this State any one or more of the following activities:
- (1) Maintaining or defending any action or suit or any administrative or arbitration proceeding, or effecting the settlement thereof or the settlement of claims or disputes;
 - (2) Holding meetings of its partners or carrying on other activities concerning its internal affairs;
 - (3) Maintaining bank accounts or borrowing money in this State, with or without security, even if such borrowings are repeated and continuous transactions;
 - (4) Maintaining offices or agencies for the transfer, exchange, and registration of its securities, or appointing and maintaining trustees or depositaries with relation to its securities;
 - (5) Soliciting or procuring orders, whether by mail or through employees or agents or otherwise, where such orders require acceptance without this State before becoming binding contracts;

- (6) Making or investing in loans with or without security including servicing of mortgages or deeds of trust through independent agencies within the State, the conducting of foreclosure proceedings and sale, the acquiring of property at foreclosure sale and the management and rental of such property for a reasonable time while liquidating its investment, provided no office or agency therefor is maintained in this State;
- (7) Taking security for or collecting debts due to it or enforcing any rights in property securing the same;
- (8) Transacting business in interstate commerce;
- (9) Conducting an isolated transaction completed within a period of six months and not in the course of a number of repeated transactions of like nature. (1985 (Reg. Sess., 1986), c. 989, s. 2.)

§ 59-903. Issuance of registration.

If the Secretary of State finds that an application conforms to law he shall, when all requisite taxes and fees have been tendered as in this Article prescribed:

- (1) Endorse on the application the word "Filed", and the hour, day, month and year of the filing thereof;
- (2) File in his office the application;
- (3) Issue a certificate of authority to transact business in this State to which he shall affix the conformed copy of the application; and
- (4) Send to the foreign limited partnership or its representative the certificate of authority, together with the conformed copy of the application affixed thereto. (1985 (Reg. Sess., 1986), c. 989, s. 2.)

§ 59-904. Name.

A foreign limited partnership may register with the Secretary of State under any name (whether or not it is the name under which it is registered in its state of organization) that includes without abbreviation the words "limited partnership" and that could be registered by a domestic limited partnership. (1985 (Reg. Sess., 1986), c. 989, s. 2.)

§ 59-905. Changes and amendments.

If any statement in the application for registration of a foreign limited partnership was false when made or any arrangements or other facts described have changed, making the application inaccurate in any respect, the foreign limited partnership shall promptly file in the office of the Secretary of State an original and one conformed copy of a certificate, signed by a general partner, correcting such statement. (1985 (Reg. Sess., 1986), c. 989, s. 2.)

§ 59-906. Cancellation of registration.

A foreign limited partnership may cancel its registration by filing with the Secretary of State a certificate of cancellation signed by a general partner. A cancellation does not terminate the authority of the Secretary of State to accept service of process on the foreign limited partnership with respect to causes of action arising out of the transactions of business in this State. (1985 (Reg. Sess., 1986), c. 989, s. 2.)

§ 59-907. Transaction of business without registration.

(a) No foreign limited partnership transacting business in this State without permission obtained through a certificate of authority under this Article shall be permitted to maintain any action or proceeding in any court of this State unless such foreign limited partnership shall have obtained a certificate of authority prior to trial.

(b) The failure of a foreign limited partnership to obtain a certificate of authority to transact business in this State shall not impair the validity of any contract act of the foreign limited partnership and shall not prevent the foreign limited partnership from defending any action or proceeding in any court of this State.

(c) A foreign limited partnership failing to obtain permission to transact business in this State as required by this Article or by prior statutes then applicable shall be liable to the State for the years or parts thereof during which it transacted business in this State without such permission in an amount equal to all fees and taxes which would have been imposed by law upon such foreign limited partnership had it duly applied for and received such permission plus interest and all penalties imposed by law for failure to pay such fees and taxes, plus five hundred dollars (\$500.00) and costs. The Attorney General shall bring actions to recover all amounts due the State under the provisions of this section.

(d) The Secretary of State is hereby directed to require that every foreign limited partnership transacting business in this State comply with the provisions of this Article. The Secretary of State is authorized to employ such assistants as shall be deemed necessary in his office for the purpose of enforcing the provisions of this Article and for making such investigations as shall be necessary to ascertain foreign limited partnerships now transacting business in this State which may have failed to comply with the provisions of this Article.

(e) A limited partner of a foreign limited partnership is not liable as a general partner of the foreign limited partnership solely by reason of having transacted business in this State without registration.

(f) A foreign limited partnership, by transacting business in this State without registration, appoints the Secretary of State as its agent for service of process with respect to causes of action arising out of the transaction of business in this State. (1985 (Reg. Sess., 1986), c. 989, s. 2.)

§ 59-908. Action by Attorney General.

The Attorney General may bring an action to restrain a foreign limited partnership from transacting business in this State in violation of this Article. (1985 (Reg. Sess., 1986), c. 989, s. 2.)

Part 10. Derivative Actions.**§ 59-1001. Right of action.**

A limited partner may bring an action in the right of a limited partnership to recover a judgment in its favor if general partners with authority to do so have refused to bring the action or if an effort to cause those general partners to bring the action is not likely to succeed. (1985 (Reg. Sess., 1986), c. 989, s. 2.)

Editor's Note. — Section 3 of Session Laws 1985 (Reg. Sess., 1986), makes this Article effective October 1, 1986.

§ 59-1002. Proper plaintiff.

In a derivative action, the plaintiff must be a partner at the time of bringing the action and (1) at the time of the transaction of which he complains or (2) his status as a partner had devolved upon him by operation of law or pursuant to the terms of the partnership agreement from a person who was a partner at the time of the transaction. (1985 (Reg. Sess., 1986), c. 989, s. 2.)

§ 59-1003. Pleading.

In a derivative action, the complaint shall set forth with particularity the effort of the plaintiff to secure initiation of the action by a general partner or the reasons for not making the effort. (1985 (Reg. Sess., 1986), c. 989, s. 2.)

§ 59-1004. Expenses.

(a) If a derivative action is successful, in whole or in part, or if anything is received by the plaintiff as a result of a judgment, compromise, or settlement of any action or claim, the court may award the plaintiff reasonable expenses, including reasonable attorney's fees, and shall direct him to remit to the limited partnership the remainder of those proceeds received by him.

(b) In any such action, the court, upon final judgment and a finding that the action was brought without reasonable cause, may require the plaintiff or plaintiffs to pay to the defendant or defendants the reasonable expenses, including attorneys' fees, incurred by them in defense of the action. (1985 (Reg. Sess., 1986), c. 989, s. 2.)

§ 59-1005. Dismissal of action.

Such action shall not be discontinued, dismissed, compromised or settled without the approval of the court. If the court shall determine that the interest of the partners or of the creditors of the partnership will be substantially affected by such discontinuance, dismissal, compromise, or settlement, the court, in its discretion, may direct that notice, by publication or otherwise, shall be given to such partners or creditors whose interest it determines will be so affected. If notice is so directed to be given, the court may determine which one or more of the parties to the action shall bear the expense of giving the same, in such amount as the court shall be awarded as costs of the action. (1985 (Reg. Sess., 1986), c. 989, s. 2.)

§ 59-1006. Construction.

The provisions of this Article shall not be construed to deprive a partner of whatever rights of action he may possess in his individual capacity. (1985 (Reg. Sess., 1986), c. 989, s. 2.)

Part 11. Miscellaneous.**§ 59-1101. Construction and application.**

This Article shall be so applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this Article among states enacting it. (1985 (Reg. Sess., 1986), c. 989, s. 2.)

Editor's Note. — Section 3 of Session Laws 1985 (Reg. Sess., 1986), makes this Article effective October 1, 1986.

§ 59-1102. Rules for cases not provided for in this Article.

In any case not provided for in this Article the provisions of Article 2 of this Chapter govern. (1985 (Reg. Sess., 1986), c. 989, s. 2.)

§ 59-1103. Severability.

If any provision of this Article or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the Article which can be given effect without the invalid provision or application, and to this end the provisions of this Article are severable. (1985 (Reg. Sess., 1986), c. 989, s. 2.)

§ 59-1104. Effective date and repeal.

(a) Except as set forth below, the effective date of this Article is October 1, 1986, and Article 1 of Chapter 59 of the North Carolina General Statutes is hereby repealed subject to the following:

- (1) G.S. 59-501, 59-502, and 59-608 shall apply only to contributions and distributions made after the effective date;
- (2) G.S. 59-704 applies only to admissions made after the effective date;

- (3) G.S. 59-804 shall not be construed so as to change the priority of creditors for transactions entered into prior to the effective date;
- (4) Unless agreed otherwise by the partners, the applicable provisions of existing law governing allocation of profits and losses (rather than the provisions of G.S. 59-503), distribution to a withdrawing partner (rather than the provisions of G.S. 59-604), and the distribution of assets upon the winding up of a limited partnership (rather than the provisions of G.S. 59-804) shall govern limited partnerships formed before the effective date of this Article herein.
- (5) The repeal of any prior statutory provision by this Article shall not impair, or otherwise affect, the organization or continued existence of a limited partnership existing at the effective date of this Article, nor shall the repeal by this Article of any such prior provision be construed so as to impair any contract or to affect any right accrued prior to the effective date of this Article.
- (b) Any foreign limited partnership formed under the laws of another jurisdiction doing business in this State prior to the effective date shall within two years thereafter comply with Part 9 of Article 5 of Chapter 59. (1985 (Reg. Sess., 1986), c. 989, s. 2.)

Cross References. — For provisions of Chapter 59, Article 1, the Uniform Limited Partnership Act, repealed by this section, see the main volume and the Editor's Note in this supplement under the repeal line to §§ 59-1 to 59-30.1.

§ 59-1105. Forms.

The Department of the Secretary of State shall prescribe forms to be used for all filings required to be made with the Office of the Secretary of State pursuant to this Article and shall furnish copies of such forms upon request. (1985 (Reg. Sess., 1986), c. 989, s. 2.)

§ 59-1106. Fees.

The Secretary of State shall collect the following fees and remit them to the State Treasurer for the use of the State:

(1) For filing a certificate of limited partnership (G.S. 59-201)	\$50.00
(2) For filing a certificate of amendment (G.S. 59-202; 59-905)	25.00
(3) For filing a certificate of cancellation (G.S. 59-203; 59-906)	25.00
(4) For filing an application for reservation of name (G.S. 59-104(a))	10.00
(5) For filing a transfer of name (G.S. 59-104(d))	10.00
(6) For filing an application for registration as foreign limited partnership (G.S. 59-502)	50.00
(7) For preparing and furnishing a copy of any document, instrument or paper filed or recorded relating to a limited partnership (G.S. 59-206(c))	
For the first page thereof	1.00
For each additional page40
For affixing his certificate and official seal thereto	2.00
(8) For comparing a copy furnished to him of any document, instrument or paper filed or recorded relating to a limited partnership	
For each page20

(9) For filing any other document not herein specifically provided
for \$10.00.
(1985 (Reg. Sess., 1986), c. 989, s. 2.)

Chapter 62.

Public Utilities.

Article 3.

Powers and Duties of Utilities Commission.

Sec.

62-48. Appearance before courts and agencies.

ARTICLE 1.

General Provisions.

§ 62-1. Short title.

CASE NOTES

Cited in State ex rel. Utilities Comm'n v. Thornburg, — N.C. —, 342 S.E.2d 28 (1986).

§ 62-2. Declaration of policy.

CASE NOTES

Purpose of Chapter. —

In accord with 1st paragraph in the main volume. See *State ex rel. Utilities Comm'n v. Thornburg*, 314 N.C. 509, 334 S.E.2d 772 (1985).

The status of an entity as a public utility, entitled to the rights conferred by statute and subject to the jurisdiction of the Commission, does not depend upon whether it has secured a certificate of public convenience and necessity, pursuant to § 62-110, but is determined instead according to whether it is, in fact, operating a business defined by the Legislature as a public utility. *State ex rel. Utilities Comm'n v. Mackie*, — N.C. App. —, 338 S.E.2d 888 (1986).

If an entity is, in fact, operating as a public utility, it is subject to the regulatory powers of the Commission, notwithstanding the fact that it has failed to comply with § 62-110 before beginning its operation. *State ex rel. Utilities Comm'n v. Mackie*, — N.C. App. —, 338 S.E.2d 888 (1986).

The Commission, not the courts, has been given the authority to regulate the rates of public utilities. *State ex rel. Utilities Comm'n v. Thornburg*, — N.C. —, 342 S.E.2d 28 (1986).

Cited in State ex rel. Utilities Comm'n v. Carolina Util. Customers Ass'n, 314 N.C. 171, 333 S.E.2d 259 (1985).

§ 62-3. Definitions.

CASE NOTES

A common carrier generally is not authorized to act as a contract carrier. *State ex rel. Utilities Comm'n v. Tar Heel Indus., Inc.*, 77 N.C. App. 75, 334 S.E.2d 396 (1985).

A common carrier must charge all customers uniform rates for the same kind and degree of services; contract carriers, by contrast, are not subject to this requirement. *State ex rel. Utilities*

Comm'n v. Tar Heel Indus., Inc., 77 N.C. App. 75, 334 S.E.2d 396 (1985).

A "certificate" authorizes performance as a common carrier, while a "permit" authorizes performance as a contract carrier. *State ex rel. Utilities Comm'n v. Tar Heel Indus., Inc.*, 77 N.C. App. 75, 334 S.E.2d 396 (1985).

Whether Party Operating As Common

Carrier Question of Law. — Whether under the undisputed facts a party is operating as a common carrier is a question of law for the court. State ex rel. Utilities Comm'n v. Tar Heel Indus., Inc., 77 N.C. App. 75, 334 S.E.2d 396 (1985).

The "crucial test" in determining whether an entity is operating as a common carrier is whether it is holding itself out as such. State ex rel. Utilities Comm'n v. Tar Heel Indus., Inc., 77 N.C. App. 75, 334 S.E.2d 396 (1985).

A contract carrier is not authorized to act as a common carrier; it may not offer its services to the general public. Indeed, it may serve at most a very limited number of shippers, and then only under a private individual contract with each shipper to be served. State ex rel. Utilities Comm'n v. Tar Heel Indus., Inc., 77 N.C. App. 75, 334 S.E.2d 396 (1985).

Legislative Intent as to Water Systems. — By excluding from its definition of public utility those water systems serving fewer than 10 customers, the General Assembly manifested its clear intent that systems serving 10 or more customers serve a sufficient segment of the public to create a public interest in their

regulation, so as to make certain that adequate service is provided at fair rates. State ex rel. Utilities Comm'n v. Mackie, — N.C. App. —, 338 S.E.2d 888 (1986).

Provision of Water and Sewage Service "To or for the Public". — Individual who, at the time of hearing, was selling water to 18 customers and providing sewage disposal service to 19 customers, was providing water and sewage disposal service "to or for the public", where, since her acquisition of the water distribution and sewage disposal facilities, she had provided services to any resident of a house connected thereto who desired the services, and where although she had solicited no customers and had not extended her facilities to any residences not previously served, she had willingly provided service to new customers who moved into homes already connected to her facilities. State ex rel. Utilities Comm'n v. Mackie, — N.C. App. —, 338 S.E.2d 888 (1986).

Applied in State ex rel. Utilities Comm'n v. Nantahala Power & Light Co., 313 N.C. 614, 332 S.E.2d 397 (1985); State ex rel. Utilities Comm'n v. Edmisten, 314 N.C. 122, 333 S.E.2d 453 (1985).

ARTICLE 3.

Powers and Duties of Utilities Commission.

§ 62-30. General powers of Commission.

CASE NOTES

As to the piercing of the corporate veil between corporation and its wholly-owned public utility subsidiary to establish refund obligation, see State ex rel. Utilities Comm'n v. Nantahala Power & Light Co., 313 N.C. 614, 332 S.E.2d 397, probable jurisdiction noted, — U.S. —, 106 S. Ct. 565, 88 L. Ed. 2d 550 (1985).

The Commission is empowered to compel a parent company's financial support of its subsidiary public utility's future rates. Pursuant to this section, the Commission is vested with broad authority to insure the effective regulation of public utilities in North Carolina, including all such powers and duties as may be necessary or incident to the proper discharge of its duties. State ex rel. Utilities Comm'n v. Edmisten, 314 N.C. 122, 333 S.E.2d 453 (1985).

Refunds and Payments by Parent Company. — Upon the appropriate findings of fact, the Commission is well-endowed with powers under the provisions of this Chapter to protect a public utility from financial hardship as to any past rates collected which are determined

to be excessive by requiring parent company to make refunds. As to future rates, the public utility can be protected from any financial hardship that the Commission may determine to result from rolled-in rates simply by requiring the parent company to periodically pay to the public utility any revenue shortfall which appears in the public utility's accounting data as a result of the parent company's decision to maintain separate corporate entities for a public utility and its affiliate. State ex rel. Utilities Comm'n v. Edmisten, 314 N.C. 122, 333 S.E.2d 453 (1985).

Propriety of Order Requiring Continued Operation of Utilities. — An order of the Commission, based upon proper findings and conclusions, requiring appellant to continue operation of her utilities would not violate constitutional prohibitions against involuntary servitude. Appellant voluntarily put her land and equipment to a public use and collected compensation for the services which she provided, and having done so, the Commission could require that she continue to use them in

the service to which she voluntarily dedicated them, so long as she was justly compensated for such service. State ex rel. Utilities Comm'n

v. Mackie, — N.C. App. —, 338 S.E.2d 888 (1986).

§ 62-32. Supervisory powers; rates and service.

CASE NOTES

Authority of Commission, etc. —

The Utilities Commission is the administrative agency charged with the duty of regulating the intrastate retail rates of public utilities within this State. State ex rel. Utilities Comm'n v. Nantahala Power & Light Co., 313 N.C. 614, 332 S.E.2d 397, probable jurisdiction noted, — U.S. —, 106 S. Ct. 565, 88 L. Ed. 2d 550 (1985).

Propriety of Order Requiring Continued Operation of Utilities. — An order of the Commission, based upon proper findings and conclusions, requiring appellant to continue operation of her utilities would not violate constitutional prohibitions against involuntary servitude. Appellant voluntarily put her land and equipment to a public use and collected compensation for the services which she provided, and having done so, the Commission

may require that she continue to use it in the service to which she voluntarily dedicated it so long as she is justly compensated for such service. State ex rel. Utilities Comm'n v. Mackie, — N.C. App. —, 338 S.E.2d 888 (1986).

When the Utilities Commission found that natural gas corporation had received payments in lieu of what it would have received under a service contract and that the customers of the company were bearing the company's contract costs, it was within the power of the Commission under subsection (b) of this section and G.S. 62-130(a) and (d) to take these payments into account in setting a reasonable rate. State ex rel. Utilities Comm'n v. North Carolina Natural Gas Corp., 76 N.C. App. 330, 332 S.E.2d 755, cert. denied, 314 N.C. 675, 336 S.E.2d 405 (1985).

§ 62-42. Compelling efficient service, extensions of services and facilities, additions and improvements.

CASE NOTES

Quoted in State ex rel. Utilities Comm'n v. Nantahala Power & Light Co., 313 N.C. 614, 332 S.E.2d 397 (1985).

§ 62-48. Appearance before courts and agencies.

(b) The Commission may, when appearing before federal courts and agencies on behalf of the using and consuming public in matters relating to the wholesale rates and supply of natural gas, employ, subject to the approval of the Governor, private legal counsel and be reimbursed for any resulting legal fees and costs from past and future refunds received by the North Carolina natural gas distribution companies, and may establish procedures for those natural gas distribution companies to set aside reasonable amounts of those refunds for this purpose. The Commission is also authorized to establish procedures whereby the State may be reimbursed from past and future refunds received by the North Carolina natural gas distribution companies for travel expenses incurred by staff members of the Commission and Public Staff designated to provide assistance to the Commission's private legal counsel in natural gas matters before federal courts and agencies. (1899, c. 164, s. 14; Rev., s. 1110; 1907, c. 469, s. 5; C.S., s. 1075; 1929, c. 235; 1933, c. 134, s. 8; 1941, c. 97; 1963, c. 1165, s. 1; 1977, c. 468, s. 11; 1985, c. 312, s. 1; 1985 (Reg. Sess., 1986), c. 1014, s. 233.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 243, contains a severability clause.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 1, 1986, added the last sentence of subsection (b).

ARTICLE 4.

Procedure before the Commission.

§ 62-60.1. Commission to sit in panels of three.

CASE NOTES

Cited in State ex rel. Utilities Comm'n v. Thornburg, — N.C. —, 342 S.E.2d 28 (1986).

§ 62-73. Complaints against public utilities.

CASE NOTES

The Utilities Commission was without jurisdiction to require VEPCO to comply with regulations of the Roanoke Voyages Corridor Commission, or to effect and encourage restoration, preservation, and enhancement of the appearance and aesthetic quality of the U.S. Highway 64 and 264 travel corridor through Roanoke Island, to bear the

additional expense of supplying electrical service through underground facilities. The Corridor Commission did not argue or allege inadequate service or unreasonable rates, so the complaint was properly dismissed. State ex rel. Utilities Comm'n v. Roanoke Voyages Corridor Comm'n, 76 N.C. App. 324, 332 S.E.2d 753 (1985).

§ 62-79. Final orders and decisions; findings; service; compliance.

CASE NOTES

The Commission is required, etc. —

Subsection (a) of this section requires the Commission to find all facts which are essential to a determination of the issues before it, in order that the reviewing court may have sufficient information to determine whether an adequate basis exists, in law and in fact, to support the Commission's resolution of the controverted issues. State ex rel. Utilities Comm'n v. Mackie, — N.C. App. —, 338 S.E.2d 888 (1986).

Commission Need Not Comment on Every Fact Presented. — Although the Utilities Commission must consider and determine

controverted questions by making findings of fact and conclusions of law, and must set forth the reasons and bases therefor "upon all the material issues of fact, law, or discretion," it need not comment upon every single fact or item of evidence presented by the parties. State ex rel. Utilities Comm'n v. Nantahala Power & Light Co., 313 N.C. 614, 332 S.E.2d 397, probable jurisdiction noted, — U.S. —, 106 S. Ct. 565, 88 L. Ed. 2d 550 (1985).

Quoted in State ex rel. Utilities Comm'n v. Carolina Util. Customers Ass'n, 314 N.C. 171, 333 S.E.2d 259 (1985).

ARTICLE 5.

Review and Enforcement of Orders.

§ 62-90. Right of appeal; filing of exceptions.

CASE NOTES

Cited in State ex rel. Utilities Comm'n v. Thornburg, — N.C. —, 342 S.E.2d 28 (1986).

§ 62-93. No evidence admitted on appeal; remission for further evidence.

CASE NOTES

Cited in State ex rel. Utilities Comm'n v. Mackie, — N.C. App. —, 338 S.E.2d 888 (1986).

§ 62-94. Record on appeal; extent of review.

CASE NOTES

I. IN GENERAL.

Function of Court on Review. —

The test upon appeal from a determination of the Utilities Commission is whether the Commission's findings of fact are supported by competent, material and substantial evidence in view of the entire record. State ex rel. Utilities Comm'n v. Nantahala Power & Light Co., 313 N.C. 614, 332 S.E.2d 397, probable jurisdiction noted, — U.S. —, 106 S. Ct. 565, 88 L. Ed. 2d 550 (1985).

The credibility of testimony and the weight to be given, etc. —

It is a well-established rule that it is for administrative body, in an adjudicatory proceeding, to determine weight and sufficiency of evidence and the credibility of the witnesses, to draw inferences from the facts, and to appraise conflicting and circumstantial evidence. State ex rel. Utilities Comm'n v. Thornburg, 314 N.C. 509, 334 S.E.2d 772 (1985).

The credibility of testimony and the weight to be accorded it are matters to be determined by the Commission. However, a summary disposition which indicates that the Commission accorded only minimal consideration to competent evidence constitutes error at law and is correctable on appeal. State ex rel. Utilities Comm'n v. Thornburg, — N.C. —, 342 S.E.2d 28 (1986).

Presumption That Commission Considered All Competent Evidence. — In the ab-

sence of an express statement by the Commission to the contrary, some record evidence to the contrary, or a summary disposition which indicates to the contrary, the court would presume that the Commission gave proper consideration to all competent evidence presented. State ex rel. Utilities Comm'n v. Thornburg, — N.C. —, 342 S.E.2d 28 (1986).

Determination by Commission, etc. —

In accord with 3rd paragraph in the main volume. See State ex rel. Utilities Comm'n v. Thornburg, — N.C. —, 342 S.E.2d 28 (1986).

Findings supported, etc. —

In accord with 1st paragraph in the main volume. See State ex rel. Utilities Comm'n v. Thornburg, 314 N.C. 509, 334 S.E.2d 772 (1985).

An appellate court will not disturb the findings of fact of the Utilities Commission as long as, upon an examination of the whole record, they are supported by competent, material and substantial evidence. State ex rel. Utilities Comm'n v. Nantahala Power & Light Co., 314 N.C. 246, 333 S.E.2d 217 (1985).

Even Though Reviewing Court Might Have Reached, etc. —

In accord with 1st paragraph in the main volume. See State ex rel. Utilities Comm'n v. Thornburg, 314 N.C. 509, 334 S.E.2d 772 (1985).

Burden Is on Appellant, etc. —

In accord with 2nd paragraph in the main volume. See State ex rel. Utilities Comm'n v. Thornburg, — N.C. —, 342 S.E.2d 28 (1986).

Minimal Consideration of Competent Evidence, etc. —

In accord with 1st paragraph in the main volume. See State ex rel. Utilities Comm'n v. Thornburg, 314 N.C. 509, 334 S.E.2d 772 (1985).

When Order Will Be Affirmed. —

In accord with 2nd paragraph in main volume. See State ex rel. Utilities Comm'n v. Edmisten, 314 N.C. 122, 333 S.E.2d 453 (1985); State ex rel. Utilities Comm'n v. Thornburg, — N.C. —, 342 S.E.2d 28 (1986).

Findings, inferences, conclusions or decisions of Utilities Commission which are arbitrary or capricious and which prejudice substantial rights of appellants are not binding on reviewing court. State ex rel. Utilities Comm'n v. Thornburg, 314 N.C. 509, 334 S.E.2d 772 (1985).

The burden of showing the impropriety of rates established by the Commission lies with the party alleging such error. State ex rel. Utilities Comm'n v. Edmisten, 314 N.C. 122, 333 S.E.2d 453 (1985).

Where the individualized nature of a shuttle operation precluded performance by a common carrier, the Utilities Commission erred as a matter of law in finding that performance of the shuttle contract constitutes common carriage. State ex rel. Utilities Comm'n v. Tar Heel Indus., Inc., 77 N.C. App. 75, 334 S.E.2d 396 (1985).

Quoted in State ex rel. Utilities Comm'n v. Mackie, — N.C. App. —, 338 S.E.2d 888 (1986).

Cited in State ex rel. Utilities Comm'n v. Carolina Util. Customers Ass'n, 314 N.C. 171, 333 S.E.2d 259 (1985).

ARTICLE 6.

The Utility Franchise.

§ 62-110. Certificate of convenience and necessity.

CASE NOTES

The status of an entity as a public utility, entitled to the rights conferred by statute and subject to the jurisdiction of the Commission, does not depend upon whether it has secured a certificate of public convenience and necessity, pursuant to this section, but is determined instead according to whether it is, in fact, operating a business defined by the legislature as a public utility. State ex rel. Utilities Comm'n v. Mackie, — N.C. App. —, 338 S.E.2d 888 (1986).

If an entity is, in fact, operating as a public utility, it is subject to the regulatory powers of the Commission, notwithstanding the fact that it has failed to comply with this section before beginning its operation. State ex rel. Utilities Comm'n v. Mackie, — N.C. App. —, 338 S.E.2d 888 (1986).

Evidence Held to Show Convenience and Necessity of Services. — Evidence before the Commission indicating that a number of the residences served by applicant's water and sewer systems were situated on quarter-acre lots, which were of insufficient size to support both a well and septic system, and that the occupants of these residences, who were cur-

rently among appellant's customers, had no alternative means of water supply or sewage disposal other than the service provided by appellant, clearly supported the conclusion not only that appellant's services constituted a convenience to that segment of the public who used them, but also that such services were necessary to the safety and health of the public. State ex rel. Utilities Comm'n v. Mackie, — N.C. App. —, 338 S.E.2d 888 (1986).

Commission's order that appellant apply for a certificate of public convenience and necessity was unnecessary where the Commission had already concluded that appellant's application to abandon service should be denied. Instead, in such a case the Commission should proceed to establish the territory to be served by appellant, issue the certificate (franchise), establish the rates to be charged for the services, and, if necessary, exercise its statutory powers and authority to compel compliance with its lawful orders. State ex rel. Utilities Comm'n v. Mackie, — N.C. App. —, 338 S.E.2d 888 (1986).

§ 62-110.2. Electric service areas outside of municipalities.

Legal Periodicals. — For 1984 survey of commercial law, "Utilities — Extension of Electric Service: The Municipalities' Power Play," see 63 N.C.L. Rev. 1095 (1985).

§ 62-118. Abandonment and reduction of service.

CASE NOTES

Showing Required for Abandonment. —

Where a utility seeks authorization to abandon service, the ultimate issue for resolution is whether the operation of the system can produce sufficient revenues to meet the expenses of operation. To resolve this issue, there must be findings of fact as to the reasonable expenses of operation and the revenues which the system may be reasonably expected to produce. State ex rel. Utilities Comm'n v. Mackie, — N.C. App. —, 338 S.E.2d 888 (1986).

The burden is on the utility seeking authorization to abandon service to establish that there is no reasonable probability of its being able to realize sufficient revenue by the rendition of such service to meet its expenses. State ex rel. Utilities Comm'n v. Mackie, — N.C. App. —, 338 S.E.2d 888 (1986).

The Commission's power to require a utility to continue a service is not unlimited. To require a utility, particularly a small operation, to continue an unprofitable operation would violate constitutional guarantees against the taking of property without just compensation. State ex rel. Utilities Comm'n v. Mackie, — N.C. App. —, 338 S.E.2d 888 (1986).

Discretionary Power of Commission to Authorize Discontinuance. —

The power of the Commission to authorize an abandonment of service is, in large measure, discretionary. State ex rel. Utilities Comm'n v. Mackie, — N.C. App. —, 338 S.E.2d 888 (1986).

Evidence Held to Show Convenience and

Necessity. — Evidence before the Commission indicating that a number of the residences served by applicant's water and sewer systems were situated on quarter-acre lots, which were of insufficient size to support both a well and septic system, and that the occupants of these residences, who were currently among appellant's customers, had no alternative means of water supply or sewage disposal other than the service provided by appellant, clearly supported the conclusion not only that appellant's services constituted a convenience to that segment of the public who used them, but also that such services were necessary to the safety and health of the public. State ex rel. Utilities Comm'n v. Mackie, — N.C. App. —, 338 S.E.2d 888 (1986).

Propriety of Order Requiring Continued

Operation. — An order of the Commission, based upon proper findings and conclusions, requiring appellant to continue operation of her utilities would not violate constitutional prohibitions against involuntary servitude. Appellant voluntarily put her land and equipment to a public use and collected compensation for the services which she provided, and having done so, the Commission may require that she continue to use it in the service to which she voluntarily dedicated it, so long as she is justly compensated for such service. State ex rel. Utilities Comm'n v. Mackie, — N.C. App. —, 338 S.E.2d 888 (1986).

ARTICLE 7.

Rates of Public Utilities.

§ 62-130. Commission to make rates for public utilities.

CASE NOTES

When the Utilities Commission found that natural gas corporation had received payments in lieu of what it would have received under a service contract and that the customers of the company were bearing the company's contract costs, it was within the power of the Commission under G.S. 62-32(b)

and subsections (a) and (d) of this section to take these payments into account in setting a reasonable rate. State ex rel. Utilities Comm'n v. North Carolina Natural Gas Corp., 76 N.C. App. 330, 332 S.E.2d 755, cert. denied, 314 N.C. 675, 336 S.E.2d 405 (1985).

§ 62-133. How rates fixed.

CASE NOTES

I. IN GENERAL.

Purpose of Chapter. —

In accord with 1st paragraph in the main volume. See *State ex rel. Utilities Comm'n v. Thornburg*, 314 N.C. 509, 334 S.E.2d 772 (1985).

It is a well-established rule that it is for the administrative body, in an adjudicatory proceeding, to determine the weight and sufficiency of the evidence and the credibility of the witnesses, to draw inferences from the facts, and to appraise conflicting and circumstantial evidence. *State ex rel. Utilities Comm'n v. Thornburg*, 314 N.C. 509, 334 S.E.2d 772 (1985).

An order which indicates that the Utilities Commission accorded only minimal consideration to competent evidence constitutes error at law and is correctable on appeal. *State ex rel. Utilities Comm'n v. Thornburg*, 314 N.C. 509, 334 S.E.2d 772 (1985).

II. POWERS AND DUTIES OF THE UTILITIES COMMISSION, GENERALLY.

Commission to Fix Rates As Low As, etc. —

In accord with 1st paragraph in the main volume. See *State ex rel. Utilities Comm'n v. Thornburg*, 314 N.C. 509, 334 S.E.2d 772 (1985).

The Findings of the Commission, etc. —

In accord with 1st paragraph in the 1985 Cumulative Supplement. See *State ex rel. Utilities Comm'n v. Thornburg*, 314 N.C. 509, 334 S.E.2d 772 (1985).

And May Not Be Disturbed Merely Because, etc. —

In accord with 1st paragraph in the main volume. See *State ex rel. Utilities Comm'n v. Thornburg*, 314 N.C. 509, 334 S.E.2d 772 (1985).

The Commission may permissibly reject uncontradicted testimony. Even where there is no direct evidence in the record contrary to the expert's opinion, a regulatory body may use its own judgment in evaluating evidence as to a matter within its expertise and is not bound by the uncontradicted recommendations of experts. *State ex rel. Utilities Comm'n v. Edmisten*, 314 N.C. 122, 333 S.E.2d 453 (1985).

Findings, inferences, conclusions or decisions of the Commission which are arbitrary or capricious and which prejudice sub-

stantial rights of appellants are not binding on a reviewing court. *State ex rel. Utilities Comm'n v. Thornburg*, 314 N.C. 509, 334 S.E.2d 772 (1985).

III. FIXING OF RATES, GENERALLY.

Fixing of "reasonable and just" rates involves a balancing of shareholder and consumer interests; the Utilities Commission must therefore set rates which will protect both the right of the public utility to earn a fair rate of return for its shareholders and ensure its financial integrity, while also protecting the right of the utility's intrastate customers to pay a retail rate which reasonably and fairly reflects the cost of service rendered on their behalf. *State ex rel. Utilities Comm'n v. Nantahala Power & Light Co.*, 313 N.C. 614, 332 S.E.2d 397, probable jurisdiction noted, — U.S. —, 106 S. Ct. 565, 88 L. Ed. 2d 550 (1985).

The question of whether rates prescribed under this Chapter are so unreasonable and unjust to the company and its stockholders that they amount to an unconstitutional confiscation of a utility's property necessarily involves an inquiry as to what is reasonable and just for the public. The public cannot properly be subject to unreasonable rates in order simply that stockholders may earn dividends. *State ex rel. Utilities Comm'n v. Nantahala Power & Light Co.*, 313 N.C. 614, 332 S.E.2d 397, probable jurisdiction noted, — U.S. —, 106 St. Ct. 565, 88 L. Ed. 2d 550 (1985).

Commission Need Not Guarantee Return Requested. — While the Utilities Commission is to fix rates that will enable the utility by sound management to pay all of its costs of operation and to have left over a fair return upon the fair value of its properties, it is not required to guarantee the return requested by the utility where the facts and circumstances warrant otherwise. *State ex rel. Utilities Comm'n v. Nantahala Power & Light Co.*, 313 N.C. 614, 332 S.E.2d 397, probable jurisdiction noted, — U.S. —, 106 St. Ct. 565, 88 L. Ed. 2d 550 (1985).

Roll-In Method of Rate Making. — Although it is true that one of the purposes of the roll-in method of rate making is to "cancel" or at least to "true-up" concealed benefits that the Commission found flowing to a parent company under power supply agreements, the central and overriding purpose of this technique remains its usefulness, for rate making purposes, in preventing a public utility, as an integral unit in a comprehensive power system owned by a single corporate parent, from con-

cealing excessive rates to its retail customers through the mechanisms of separate corporate structure and intercorporate contractual agreement. *State ex rel. Utilities Comm'n v. Edmisten*, 314 N.C. 122, 333 S.E.2d 453 (1985).

A rate must not only be fair, etc. —

The rates established by the Commission must be fair to both the utility and the customer. *State ex rel. Utilities Comm'n v. Thornburg*, — N.C. —, 342 S.E.2d 28 (1986).

In finding essential, ultimate facts, the Commission must, etc. —

In setting rates, the Utilities Commission must consider not only those specific indicia of a utility's economic status set out in subsection (b) of this section, but also all other material facts of record which may have a significant bearing on the determination of reasonable and just rates. *State ex rel. Utilities Comm'n v. Thornburg*, 314 N.C. 509, 334 S.E.2d 772 (1985).

As to the practice of rolling-together accounting data and allocating costs between jurisdictional and nonjurisdictional service, see *State ex rel. Utilities Comm'n v. Nantahala Power & Light Co.*, 313 N.C. 614, 332 S.E.2d 397, probable jurisdiction noted, — U.S. —, 106 S. Ct. 565, 88 L. Ed. 2d 550 (1985).

Shifting of Onus to Parent Corporation.

— In view of the Utilities Commission's determination that unsound or "absentee" management decisions on the part of a utility, and parental domination on the part of an aluminum producing company that was both parent and customer, left the utility with insufficient resources to meet its steadily increasing public load and lacking in contractual power supply arrangements tailored to meet its public service needs at reasonable prices, it was well within the Commission's rate making authority to shift the onus of those managerial shortcomings from the pockets of utility's retail rate payers to the corporate offices of the aluminum producing company. *State ex rel. Utilities Comm'n v. Nantahala Power & Light Co.*, 313 N.C. 614, 332 S.E.2d 397, probable jurisdiction noted, — U.S. —, 106 S. Ct. 565, 88 L. Ed. 2d 550 (1985).

The Commission properly exercised its discretion in refusing to single out one customer and set rates for that "class" based on the average costs of serving that isolated customer, where the customer in question caused the utility to incur high incremental costs. *State ex rel. Utilities Comm'n v. Edmisten*, 314 N.C. 122, 333 S.E.2d 453 (1985).

Although one of the goals of rate structure is the elimination of intra-class cross-subsidies, another goal is simplicity of rate structure. Obviously, it is impractical to have a separate class for each customer, despite the existence of some significant differences in load character-

istics. Therefore, a balance must be struck. *State ex rel. Utilities Comm'n v. Edmisten*, 314 N.C. 122, 333 S.E.2d 453 (1985).

Refund of Over-Collection. — The Commission erred by refunding utility's over-collection by deducting the amount of the deferred fuel account from the utility's annual rate increase, as this would, in effect, require the company to pay the refund annually for as long as the rates fixed in the case remained in effect. The Commission should have provided for a lump-sum refund (i.e., a onetime rate reduction) or a rate reduction over a period of time. *State ex rel. Utilities Comm'n v. Thornburg*, — N.C. —, 342 S.E.2d 28 (1986).

IV. RATE BASE.

A. In General.

Question Whether Property Is, etc. —

In accord with main volume. See *State ex rel. Utilities Comm'n v. Carolina Util. Customers Ass'n*, 314 N.C. 171, 333 S.E.2d 259 (1985).

What Operating Expenses May Be Considered. — This section limits the property upon which North Carolina consumers are required to pay a return to the property used and useful in providing intrastate service; when the provisions of (b)(1), (b)(3) and (c) are read in *pari materia*, it is apparent that the only operating expenses which the Utilities Commission may consider in setting intrastate rates for North Carolina public utilities are those incurred in the provision of service to a utility's North Carolina consumers. *State ex rel. Utilities Comm'n v. Nantahala Power & Light Co.*, 313 N.C. 614, 332 S.E.2d 397, probable jurisdiction noted, — U.S. —, 106 S. Ct. 565, 88 L. Ed. 2d 550 (1985).

This section clearly provides that the rate base and allowable operating expenses of a utility are limited to those costs incurred in providing service to the company's North Carolina retail customers. *State ex rel. Utilities Comm'n v. Carolina Util. Customers Ass'n*, 314 N.C. 171, 333 S.E.2d 259 (1985).

Only Reasonable Construction Work in Progress, etc. —

Under the "financial stability" requirement of subdivision (b)(1) of this section, construction work in progress may be included in a utility's rate base to the extent that the Commission determines that the inclusion is necessary to allow the utility to maintain a generally good overall financial status. *State ex rel. Utilities Comm'n v. Thornburg*, — N.C. —, 342 S.E.2d 28 (1986).

Subdivision (b)(1) clearly commits to the discretion of the Commission the determination of what amount of construction work in progress, if any, to include in the utility's rate base. This

discretion is tempered, however, by the statute's requirement that the expenditures be reasonable and prudent and that the Commission find that the inclusion is in the public interest and necessary to the financial stability of the utility in question. *State ex rel. Utilities Comm'n v. Thornburg*, — N.C. —, 342 S.E.2d 28 (1986).

Evidence as to Construction Work in Progress. —

Evidence that utility's bond rating was in jeopardy of falling from an A rating to a BAA rating and that the inclusion of the additional construction work in progress was necessary to "stabilize" the company at its A rating level, along with other evidence, supported the Commission's finding that the inclusion of additional construction work in progress was necessary to the utility's financial stability. *State ex rel. Utilities Comm'n v. Thornburg*, — N.C. —, 342 S.E.2d 28 (1986).

VII. TEST PERIOD.

Adjustments for Abnormalities, etc. —

Provisions in this section compel the conclusion that the Utilities Commission is required to adjust test period data to reflect abnormalities which had a probable impact on the utility's revenues and expenses during the test pe-

riod. *State ex rel. Utilities Comm'n v. Carolina Util. Customers Ass'n*, 314 N.C. 171, 333 S.E.2d 259 (1985).

This section requires the Commission to adjust test period data to reflect abnormalities which had a probable impact on the utility's revenues and expenses during the test period. This allows for a reasonably accurate estimate of what may be anticipated in the future. However, no pro forma adjustment is to be made unless the Commission finds that an abnormality having a probable impact on the utility's revenues and expenses existed during the test period. *State ex rel. Utilities Comm'n v. Thornburg*, — N.C. —, 342 S.E.2d 28 (1986).

Since fuel costs comprise a large portion of a utility's expenses, the statutory mandate to normalize test period data includes a requirement that the Commission adjust the test period fuel costs for any abnormalities established by competent, material, and substantial evidence. *State ex rel. Utilities Comm'n v. Thornburg*, — N.C. —, 342 S.E.2d 28 (1986).

Since the system nuclear capacity factor directly impacts upon the generation mix, which in turn affects fuel costs, any abnormality in the system nuclear capacity which is shown to have existed during the test year must be adjusted. *State ex rel. Utilities Comm'n v. Thornburg*, — N.C. —, 342 S.E.2d 28 (1986).

§ 62-133.2. Fuel charge adjustments for electric utilities.

CASE NOTES

Cited in State ex rel. Utilities Comm'n v. Thornburg, — N.C. —, 342 S.E.2d 28 (1986).

§ 62-134. Change of rates; notice; suspension and investigation.

CASE NOTES

I. IN GENERAL.

Tar Heel Indus., Inc., 77 N.C. App. 75, 334 S.E.2d 396 (1985).

Cited in State ex rel. Utilities Comm'n v.

§ 62-137. Scope of rate case.

CASE NOTES

Applied in State ex rel. Utilities Comm'n v. Edmisten, 314 N.C. 122, 333 S.E.2d 453 (1985).

§ 62-140. Discrimination prohibited.

CASE NOTES

Section Prohibits Unreasonable or Unjust Discrimination. — Every rate schedule necessarily discriminates between customers within the class to which it applies to some extent. This section, however, prohibits only unreasonable or unjust discrimination. State ex rel. Utilities Comm'n v. Edmisten, 314 N.C. 122, 333 S.E.2d 453 (1985).

The burden of proving that a rate is dis-

criminatory lies with the complaining party. State ex rel. Utilities Comm'n v. Edmisten, 314 N.C. 122, 333 S.E.2d 453 (1985).

Applied in State ex rel. Utilities Comm'n v. Carolina Util. Customers Ass'n, — N.C. —, 333 S.E.2d 259 (1985).

Cited in State ex rel. Utilities Comm'n v. Tar Heel Indus., Inc., 77 N.C. App. 75, 334 S.E.2d 396 (1985).

ARTICLE 12.

Motor Carriers.

§ 62-259. Additional declaration of policy for motor carriers.

CASE NOTES

Cited in State ex rel. Utilities Comm'n v. Tar Heel Indus., Inc., 77 N.C. App. 75, 334 S.E.2d 396 (1985).

§ 62-260. Exemptions from regulations.

CASE NOTES

Cited in State ex rel. Utilities Comm'n v. Tar Heel Indus., Inc., 77 N.C. App. 75, 334 S.E.2d 396 (1985).

OPINIONS OF ATTORNEY GENERAL

Subdivision (a) (1) of this section specifically exempts political subdivisions from regulation by the Utilities Commission. See opinion of Attorney General to Mr. David D.

King, Director of Division of Public Transportation, North Carolina Department of Transportation, 55 N.C.A.G. 76 (1986).

§ 62-262. Applications and hearings other than for bus companies.

CASE NOTES

I. IN GENERAL.

"Certificate" authorizes performance as common carrier, while **"permit"** autho-

rizes performance as contract carrier. State ex rel. Utilities Comm'n v. Tar Heel Indus., Inc., 77 N.C. App. 75, 334 S.E.2d 396 (1985).

§ 62-264. Dual operations.**CASE NOTES**

Quoted in State ex rel. Utilities Comm'n v.
Tar Heel Indus., Inc., 77 N.C. App. 75, 334
S.E.2d 396 (1985).

§ 62-265. Emergency operating authority.**CASE NOTES**

Cited in State ex rel. Utilities Comm'n v.
Tar Heel Indus., Inc., 77 N.C. App. 75, 334
S.E.2d 396 (1985).

Chapter 64.

Aliens.

Sec.

64-3. Nonresident aliens' rights of inheritance.

64-4. Escheats.

Sec.

64-5. Burden of proof.

§ 64-3. Nonresident aliens' rights of inheritance.

No alien residing outside the United States or its territories shall be entitled to take personal property located in this State by succession or testamentary disposition if the laws of the nation of which such alien is a resident prohibit residents of the United States from inheriting personal property located within that nation. Except as hereinabove provided, no alien shall, by reason of his citizenship or place of residence, be disqualified from inheriting property in this State. (1959, c. 1208; 1985 (Reg. Sess., 1986), c. 797, s. 1.)

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective June 18, 1986, rewrote this section.

§ 64-4. Escheats.

If a decedent owning personal property located within North Carolina shall leave no heirs, heirs at law or legatees other than persons disqualified from inheritance under G.S. 64-3, then such personal property shall escheat. (1959, c. 1208; 1985 (Reg. Sess., 1986), c. 797, s. 2.)

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective June 18, 1986, rewrote this section, which formerly

related to the burden of establishing reciprocal rights.

§ 64-5. Burden of proof.

The burden of proof in any action or proceeding to disqualify a nonresident alien from taking personal property located within this State by succession or testamentary disposition by reason of the provisions of G.S. 64-3, shall be upon the person asserting the disqualification. (1959, c. 1208; 1985 (Reg. Sess., 1986), c. 797, s. 3.)

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective June 18, 1986, rewrote this section, which formerly

related to the absence of reciprocity and escheat.

Chapter 66.

Commerce and Business.

ARTICLE 19.

Business Opportunity Sales.

§ 66-94. Definition.

CASE NOTES

In order for the Business Opportunity Sales Act to apply there must be a sale or lease of products, equipment, supplies, or services, for the purpose of enabling the purchaser to start a business; in addition, the seller must make one of the four types of representations listed in this section to the purchaser. *Bunting v. Perdue, Inc.*, 611 F. Supp. 682 (E.D.N.C. 1985).

Violation Predating Effective Date of Article. — Where plaintiff initially contracted with defendant in June, 1976, over one year before October 1, 1977, the effective date of the Business Opportunity Sales Act, and all further contracts between plaintiff and defendant enabled plaintiff to continue and/or expand his business as an independent contract grower,

none of them being for the purpose of starting a business, any violation of the Business Opportunity Sales Act, assuming its applicability, occurred before the statute became operative. *Bunting v. Perdue, Inc.*, 611 F. Supp. 682 (E.D.N.C. 1985).

Act Held Inapplicable. — Where the trial court found that no representations were made until after the sale was consummated and that the agreement was for sellers to be sales and purchase agents on a commission basis, based on these findings, the transaction did not come within the purview of the Business Opportunity Sales Act and plaintiffs were not required to comply with the provisions of the Act. *Anchor Paper Corp. v. Anchor Converting Co.*, — N.C. App. —, 338 S.E.2d 821 (1986).

§ 66-99. Contracts to be in writing; form; provisions.

CASE NOTES

Cited in *Varnell v. Henry M. Milgrom, Inc.*, 78 N.C. App. 451, 337 S.E.2d 616 (1985).

ARTICLE 26.

Farm Machinery Franchises.

§ 66-180. Definitions.

Legal Periodicals. — For comment, "The North Carolina Farm Machinery Franchise Act: Its Provisions, Context and Contribution

to the Law of Franchising," see 8 Campbell L. Rev. 289 (1986).

Chapter 67.

Dogs.

ARTICLE 2.

License Taxes on Dogs.

§ 67-12. Permitting dogs to run at large at night; penalty; liability for damage.

Local Modification. — Yancey County:
1985 (Reg. Sess., 1986), c. 897.

ARTICLE 5.

Protection of Livestock and Poultry from Ranging Dogs.

§ 67-30. Appointment of animal control officers authorized; salary, etc.

Local Modification. — County of Rowan:
1985 (Reg. Sess., 1986), c. 872.

Chapter 74D.

Alarm Systems.

Article 1.

Alarm Systems Licensing Act.

lished; members; terms; vacancies; compensation; officers; meetings.

Sec.

74D-4. Alarm Systems Licensing Board estab-

ARTICLE 1.

Alarm Systems Licensing Act.

§ 74D-1. Title.

OPINIONS OF ATTORNEY GENERAL

Licensing Required. — The Alarm Systems Licensing Act requires that businesses which install and service retail storefront alarms be licensed. See opinion of Attorney

General to Mr. James F. Kirk, Administrator, Alarm Systems Licensing Board, 55 N.C.A.G. 89 (1986).

§ 74D-4. Alarm Systems Licensing Board established; members; terms; vacancies; compensation; officers; meetings.

(c) Each member shall be appointed for a term of three years and shall serve until a successor is installed. No member shall serve more than two complete consecutive terms. The initial appointments shall be made by October 1, 1983. By October 1, 1986, the General Assembly shall appoint upon the recommendation of the President of the Senate under G.S. 120-121 a successor to its licensed appointment who also shall be licensed under this Chapter and shall appoint upon the recommendation of the Speaker of the House of Representatives under G.S. 120-121 a successor to its public appointment who also shall be a public member. Every three years thereafter the recommendation of the Lieutenant Governor and of the Speaker of the House of Representatives with respect to the licensed and public status of the persons they recommend shall continue likewise to alternate.

(1983, c. 786, s. 1; 1985, c. 561, s. 4; 1985 (Reg. Sess., 1986), c. 1026, s. 18.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective July 16, 1986, substituted "President of

the Senate" for "Speaker of the House of Representatives" and substituted "Speaker of the House of Representatives" for "Lieutenant Governor" in the fourth sentence of subsection (c).

Chapter 75.

Monopolies, Trusts and Consumer Protection.

Article 2.

Prohibited Acts by Debt Collectors.

Sec.

75-56. Application.

75-57 to 75-79. [Reserved.]

Article 3.

Motor Fuel Marketing Act.

75-80. Title.

Sec.

75-81. Definitions.

75-82. Unlawful below-cost selling; exceptions.

75-83. Unlawful inducement; civil penalty.

75-84. Separate offense; injunctions.

75-85. Investigations by Attorney General.

75-86. Private actions.

75-87. Private action presumptions.

75-88. Public disclosure.

75-89. Powers and remedies supplementary.

ARTICLE 1.

General Provisions.

§ 75-1. Combinations in restraint of trade illegal.

CASE NOTES

I. GENERAL CONSIDERATION.

Unfair or Deceptive Trade Practice Based on Conduct Proscribed by Chapter 95. — Although Chapter 95, relating to labor, is regulatory in nature, this fact does not prevent the finding of an unfair or deceptive trade practice based on the conduct proscribed by Chapter 95. *Winston Realty Co. v. G.H.G., Inc.*, 314 N.C. 90, 331 S.E.2d 677 (1985).

Contributory negligence is not a defense to a Chapter 75 violation, and thus the trial judge did not err in failing to submit that issue to jury considering an unfair or deceptive trade practices claim. *Winston Realty Co. v. G.H.G., Inc.*, 314 N.C. 90, 331 S.E.2d 677 (1985).

Cited in *Cooper v. Forsyth County Hosp. Auth.*, 789 F.2d 278 (4th Cir. 1986).

§ 75-1.1. Methods of competition, acts and practices regulated; legislative policy.

Legal Periodicals. —

For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

For article discussing pendent claims for damages in actions under the Federal Racketeer Influenced and Corrupt Organizations Act, see 7 Campbell L. Rev. 299 (1985).

CASE NOTES

I. GENERAL CONSIDERATION.

Legislative Intent. —

The North Carolina Legislature must have intended that substantial aggravating circumstances be present before any practice is deemed unfair under this section, since it provided that any damages suffered by the victim are to be trebled. *General United Co. v. American Honda Motor Co.*, 618 F. Supp. 1452 (W.D.N.C. 1985).

Purpose of the statute, etc. —

The more recent pronouncements from the North Carolina Supreme Court concerning the applicability of this section emphasize the consumer protection purpose of the statute. *Bunting v. Perdue, Inc.*, 611 F. Supp. 682 (E.D.N.C. 1985).

The purpose of this section is to provide a civil means to maintain ethical standards of dealings between persons engaged in business and the consuming public within this State,

and it applies to dealings between buyers and sellers at all levels of commerce. *United Va. Bank v. Air-Lift Assocs.*, — N.C. App. —, 339 S.E.2d 90 (1986).

The 1977 amendments to this section constituted, etc. —

The 1977 amendment to this section, which deleted the term "trade" from the phrase "trade or commerce" and rewrote subsection (b), clearly constituted a substantive revision intended to expand the potential liability for certain proscribed acts. *Talbert v. Mauney*, — N.C. App. —, 343 S.E.2d 5 (1986).

An action for unfair or deceptive acts, etc. —

An action for unfair and deceptive trade practices is a distinct action separate from fraud, breach of contract, and breach of warranty. *United Va. Bank v. Air-Lift Assocs.*, — N.C. App. —, 339 S.E.2d 90 (1986).

This section is separate and distinct from any contractual relationship between plaintiff and defendants. *United Va. Bank v. Air-Lift Assocs.*, — N.C. App. —, 339 S.E.2d 90 (1986).

The provisions of the UCC are not exclusive and do not preclude an action for unfair and deceptive trade practices. *United Va. Bank v. Air-Lift Assocs.*, — N.C. App. —, 339 S.E.2d 90 (1986).

This chapter is applicable to commercial transactions which are also regulated by the UCC. *United Va. Bank v. Air-Lift Assocs.*, — N.C. App. —, 339 S.E.2d 90 (1986).

Antitrust Matters. — This section is a comprehensive law designed to include within its reach the federal antitrust laws. *L.C. Williams Oil Co. v. Exxon Corp.*, 625 F. Supp. 477 (M.D.N.C. 1985).

The Petroleum Marketing Practices Act, 15 U.S.C. § 2806(a), did not preempt this section or § 25-1-102(3) or the common law duty of good faith dealing as they arose in litigation involving wrongful termination of a franchise. *L.C. Williams Oil Co. v. Exxon Corp.*, 627 F. Supp. 864 (M.D.N.C. 1985).

The common law provides some guidance in unfair competition cases, but the Unfair Trade Practice Act was enacted in part because common law remedies had often proved ineffective. *Pinehurst, Inc. v. O'Leary Bros. Realty*, — N.C. App. —, 338 S.E.2d 918 (1986).

Common Law Defenses Are Not Relevant. — An action for unfair deceptive acts or practices is sui generis. Therefore, traditional common law defenses such as contributory negligence or good faith are not relevant; what is relevant is the effect of the actor's conduct on the consuming public. *Concrete Serv. Corp. Investors Group, Inc.*, — N.C. App. —, 340 S.E.2d 755 (1986).

When the same course of conduct supports claims for fraud and for an unfair or deceptive trade practice under this chapter, recovery can be had on either claim, but not on both. *Wilder v. Hodges*, — N.C. App. —, 342 S.E.2d 57 (1986).

Under this section, intent of the defendant and good faith are irrelevant. *Chastain v. Wall*, 78 N.C. App. 350, 337 S.E.2d 150 (1985).

Securities transactions are beyond the scope of this section. *Skinner v. E.F. Hutton & Co.*, 314 N.C. 267, 333 S.E.2d 236 (1985).

A violation of either or both §§ 95-47.6(2) and (9) as a matter of law constitutes an unfair or deceptive trade practice in violation of this section. *Winston Realty Co. v. G.H.G., Inc.* 314 N.C. 267, 331 S.E.2d 677 (1985).

Who Are Protected. — This section does not protect only individual consumers, but serves to protect businesspersons as well. *Concrete Serv. Corp. v. Investors Group, Inc.*, — N.C. App. —, 340 S.E.2d 755 (1986).

Injury Must Be Proven. — As an essential element of a cause of action under § 75-16, plaintiff must prove not only that defendants violated this section, but also, that plaintiff has suffered actual injury as a proximate result of defendants' misrepresentations. *Bailey v. LeBeau*, — N.C. App. —, 339 S.E.2d 460 (1986).

Cited in *Childers v. Hayes*, 77 N.C. App. 792, 336 S.E.2d 146 (1985); *Davidson v. Volkswagenwerk*, 78 N.C. App. 193, 336 S.E.2d 714 (1985); *Uzzell v. Integon Life Ins. Corp.*, 78 N.C. App. 458, 337 S.E.2d 639 (1985); *John Lemmon Films, Inc. v. Atlantic Releasing Corp.*, 617 F. Supp. 992 (W.D.N.C. 1985); *Weft, Inc. v. G.C. Inv. Assocs.*, 630 F. Supp. 1138 (E.D.N.C. 1986).

II. TRADE OR COMMERCE.

The rental of commercial property, etc. —

The leasing of just one commercial lot satisfies the requirement of being in or affecting commerce. *Wilder v. Hodges*, — N.C. App. —, 342 S.E.2d 57 (1986).

The leasing of a piece of real estate for use as a restaurant parking lot is a business activity. *Wilder v. Hodges*, — N.C. App. —, 342 S.E.2d 57 (1986).

III. UNFAIR AND DECEPTIVE ACTS.

A. In General.

No precise definition, etc. —

In accord with main volume. See *Concrete Serv. Corp. v. Investors Group, Inc.*, — N.C. App. —, 340 S.E.2d 755 (1986).

Determination of Unfairness of Conduct. —

In accord with 1st paragraph in the main volume. See *General United Co. v. American Honda Motor Co.*, 618 F. Supp. 1452 (W.D.N.C. 1985).

Unfair competition is that which a court of equity would consider unfair. *Pinehurst, Inc. v. O'Leary Bros. Realty*, — N.C. App. —, 338 S.E.2d 918 (1986).

Proof of actual deception is not necessary; it is enough that the statements had the capacity to deceive. *Pinehurst, Inc. v. O'Leary Bros. Realty*, — N.C. App. —, 338 S.E.2d 918 (1986).

An act is deceptive if it has the capacity or tendency to deceive, but proof of actual deception is not required. *Bailey v. LeBeau*, — N.C. App. —, 339 S.E.2d 460 (1986).

Factors Determining Unfairness, etc. —

In order to succeed under this section, it is not necessary for the plaintiff to show fraud, bad faith, deliberate or knowing acts of deception, or actual deception; plaintiff must, nevertheless, show that the acts complained of possessed the tendency or capacity to mislead, or created the likelihood of deception. *Chastain v. Wall*, 78 N.C. App. 350, 337 S.E.2d 150 (1985).

In accord with 1st paragraph in main volume. See *Concrete Serv. Corp. v. Investors Group, Inc.*, — N.C. App. —, 340 S.E.2d 755 (1986).

A practice is unfair when, etc. —

In accord with main volume. See *General United Co. v. American Honda Motor Co.*, 618 F. Supp. 1452 (W.D.N.C. 1985); *Bailey v. LeBeau*, — N.C. App. —, 339 S.E.2d 460 (1986).

The existence of unfair acts and practices must be determined from the circumstances of each case. *Goodrich v. Rice*, 75 N.C. App. 530, 331 S.E.2d 195 (1985).

Intent and Good Faith, etc. —

It is not necessary to prove bad faith to show an unfair or deceptive trade practice. *F. Ray Moore Oil Co. v. State*, — N.C. App. —, 341 S.E.2d 371 (1986).

Exclusive dealing arrangements and territorial restrictions may constitute unfair trade practices. *L.C. Williams Oil Co. v. Exxon Corp.*, 625 F. Supp. 477 (M.D.N.C. 1985).

Price discrimination among those similarly situated constitutes a clear violation of North Carolina's unfair trade practice laws. *L.C. Williams Oil Co. v. Exxon Corp.*, 625 F. Supp. 477 (M.D.N.C. 1985), finding no price discrimination to be shown in the case at issue.

Limiting the growth of supply sold to distributors, while not illegal per se, may be illegal if it is used in a discriminatory manner as a means to an improper end. *L.C. Williams Oil Co. v. Exxon Corp.*, 625 F. Supp. 477 (M.D.N.C. 1985).

While a "no growth" designation, used

punitively by supplier against distributor to freeze his allocation, could have some effect on a distributor's inclinations toward expanding either its territory or its suppliers, plaintiff distributor had the burden of showing an ability to prove at trial the "substantial" effect on the market necessary for a violation of the anti-trust laws incorporated into North Carolina's Unfair Trade Practices Act. *L.C. Williams Oil Co. v. Exxon Corp.*, 625 F. Supp. 477 (M.D.N.C. 1985).

Vertical Restraints. — Normally when a supplier establishes territorial lines, it constitutes a vertical restraint of trade. Because there are legitimate and even beneficial policy reasons for vertical territorial restraints, they are not per se illegal, but instead are examined under a rule of reason analysis. *L.C. Williams Oil Co. v. Exxon Corp.*, 625 F. Supp. 477 (M.D.N.C. 1985).

Horizontal Restraints. — Situation in which competitors at the same market level decide to divide up various territories in order to minimize competition constitutes a "horizontal" restraint, which is per se illegal, even if the supplier actually is the one to implement the territorial plan, if done at the horizontal competitors' insistence. *L.C. Williams Oil Co. v. Exxon Corp.*, 625 F. Supp. 477 (M.D.N.C. 1985).

B. Illustrative Cases.

Plaintiff's allegations that lessee intentionally caused the burning of a building which he leased from plaintiff failed to state a claim for relief under this section, since the alleged acts of the lessee did not constitute unfair and deceptive trade practices within the intended purpose of the statute. *Threatt v. Hiers*, 76 N.C. App. 521, 333 S.E.2d 772 (1985), cert. denied, 315 N.C. 397, 338 S.E.2d 887.

The institution of a lawsuit may be the basis for an unfair trade practices claim if the lawsuit is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor. *United States v. Ward*, 618 F. Supp. 884 (E.D.N.C. 1985).

The average consumer would not have understood the below-quoted statement, included in a letter written by an employee of an insurer in response to an inquiry by an agent of the insured as to the extent of the insured's coverage while he was in military service, to mean that the remaining exception to coverage, including an "air craft except," set out in the "accidental death rider" would no longer be applied: "However, in addition to the basic policy, this accidental death rider would also be payable should his death occur while in the Armed Forces but not as a result of an act of war." *Pearce v. American Defender Life Ins.*

Co., 74 N.C. App. 620, 330 S.E.2d 9, cert. granted, 314 N.C. 542, 335 S.E.2d 20 (1985).

Construction of Pond. — This section was inapplicable under the following circumstances: (1) agents for a landowner and a contractor made an oral agreement for the construction of a pond, under which the contractor would receive no funds until the job was complete, unless he experienced cash flow problems, in which case he would ask for an advance for work already performed; (2) after excavating the pond site, the contractor asked for \$2,000 to complete repairs on equipment, which was so advanced; (3) no additional work was performed; and (4) the contractor testified that the payment was for work already performed, to which he believed he was entitled. *Goodrich v. Rice*, 75 N.C. App. 530, 331 S.E.2d 195 (1985).

A misunderstanding between an insured and an insurance agent regarding collision insurance coverage for the insured did not constitute a deceptive representation in violation of this section. *Cockman v. White*, 76 N.C. App. 387, 333 S.E.2d 54 (1985).

Actions Intended to Deceive Creditors into Extending Credit. — Trial court's conclusion that defendant engaged in actions intended to deceive creditors into extending credit to an individual who was not creditworthy and that these practices were forbidden by this section was amply supported by the findings of fact and the evidence. *Concrete Serv. Corp. v. Investors Group, Inc.*, — N.C. App. —, 340 S.E.2d 755 (1986).

Debt Collection. — Although in the area of debt collection, unfair or deceptive acts in commerce are limited to those acts set out in Article 2 of this Chapter, those specific practices delineated as prohibited are examples of unfair practices within the broader scope of this section. *Talbert v. Mauney*, — N.C. App. —, 343 S.E.2d 5 (1986).

A violation of § 58-54.4 as a matter of law constitutes an unfair or deceptive trade practice in violation of this section. *Pearce v. American Defender Life Ins. Co.*, — N.C. —, 343 S.E.2d 174 (1986).

Where plaintiff represented to the State that he had a certain supplier when in fact he was purchasing a large part of his fuel supply from other suppliers at a lower price than the posted price of that supplier, and the State relied on this representation in paying for fuel, there was a misrepresentation upon which the State relied which constituted an unfair and deceptive trade practice. *F. Ray Moore Oil Co. v. State*, — N.C. App. —, 341 S.E.2d 371 (1986).

Plaintiffs' allegations of wrongful and intentional harm to their credit rating and business prospects occurring less than four

years before the filing date of their complaint were of a character clearly meant to be proscribed by the act and were therefore sufficient to state a claim for which relief could be granted under this section. *Talbert v. Mauney*, — N.C. App. —, 343 S.E.2d 5 (1986).

Failure to Show Injury. — Where although there was evidence in the record that defendants misrepresented that engine parts had been replaced within six months prior to sale of automobile, there was no evidence that plaintiff suffered an "injury" because of such representation, the court erred in trebling any damages and awarding attorney's fees. *Bailey v. LeBeau*, — N.C. App. —, 339 S.E.2d 460 (1986).

Conduct Not Amounting to Unfair Trade Practice. —

While a territorial restraint at least conceivably could be implied from economic factors, it could not be implied from market factors of plaintiff's own creation. Thus, where additional expenses which plaintiff distributor faced were caused by his decision to expand into an area in which he would not have access to a nearby supply terminal, and where even if supplier would have preferred that distributor stayed within his original territorial confines there was no evidence that it retaliated against him for not doing so, summary judgment for supplier was appropriate on distributor's Unfair Trade Practices claim. *L.C. Williams Oil Co. v. Exxon Corp.*, 625 F. Supp. 477 (M.D.N.C. 1985).

Claim Not Cognizable under Virginia Law. — In action in which defendants argued that plaintiff committed an unfair trade practice by representing to defendants that they had a buyer who would pay \$150,000 for plane upon delivery to Norfolk, Virginia, where the plane was sold in Richmond, Virginia for the sum of \$55,000, not \$150,000, the last act giving rise to the defendants' claim under this section occurred in Virginia, and the substantive law of Virginia would apply to defendants' counterclaim. Moreover, as a statutory basis for defendants' injury could not be found in Virginia law, defendants' claim would fail. *United Va. Bank v. Air-Lift Assocs.*, — N.C. App. —, 339 S.E.2d 90 (1986).

IV. PLEADING AND PRACTICE.

Under this section the only question of fact is whether defendant did what was alleged; the words "unfair" and "deceptive" need never be mentioned to the jury. *L.C. Williams Oil Co. v. Exxon*, 625 F. Supp. 477 (M.D.N.C. 1985).

Jury Decides Facts. —

In cases under this section and § 75-16 the jury finds facts, and based on the jury's findings, the court then determines as a matter of

law whether the defendant's conduct violated this section. *Chastain v. Wall*, 78 N.C. App. 350, 337 S.E.2d 150 (1985).

And Court Determines Whether Practice Violates Section. —

In accord with 1st paragraph in main volume. See *Pearce v. American Defender Life Ins. Co.*, 74 N.C. App. 620, 330 S.E.2d 9, cert. granted, 314 N.C. 542, 335 S.E.2d 20 (1985); *General United Co. v. American Honda Motor Co.*, 618 F. Supp. 1452 (W.D.N.C. 1985).

Propriety of Arbitration. — An unfair and deceptive practices claim pursuant to this section is proper for arbitration. *Rodgers Bldrs., Inc. v. McQueen*, 76 N.C. App. 16, 331 S.E.2d 726 (1985).

Question of Law. —

In accord with main volume. See *L.C. Williams Oil Co. v. Exxon Corp.*, 625 F. Supp. 477 (M.D.N.C. 1985); *Concrete Serv. Corp. v. Investors Group, Inc.*, — N.C. App. —, 340 S.E.2d 755 (1986).

In action brought under this section, while the trial judge erred in submitting the issues of whether defendant's conduct was in commerce or affected commerce to the jury, because it is a part of the court's finding that the acts or conduct proven do or do not constitute an unfair or

deceptive act within the meaning of this section, the error was harmless. *Chastain v. Wall*, 78 N.C. App. 350, 337 S.E.2d 150 (1985).

While a court generally determines whether a practice is an unfair or deceptive act or practice based on the jury's findings, if the facts are not disputed the court should determine whether the defendant's conduct constitutes an unfair trade practice. *L.C. Williams Oil Co. v. Exxon Corp.*, 625 F. Supp. 477 (M.D.N.C. 1985).

What Law Governs. — The law of the State where the last act occurred giving rise to defendant's injury governs defendant's action under this section. *United Va. Bank v. Air-Lift Assocs.*, — N.C. App. —, 339 S.E.2d 90 (1986).

Trebling of Damages. — Damages assessed pursuant to this section are trebled automatically. *Pinehurst, Inc. v. O'Leary Bros. Realty*, — N.C. App. —, 338 S.E.2d 918 (1986).

Punitive Damages. — Because this section is in derogation of the common law causes of action for unfair or deceptive trade practices and § 75-16 imposes a penalty, strict construction is in order. Thus, absent explicit legislative inclusion, punitive damages should be excluded. *Pinehurst, Inc. v. O'Leary Bros. Realty*, — N.C. App. —, 338 S.E.2d 918 (1986).

§ 75-2. Any restraint in violation of common law included.

Cited in *Cooper v. Forsyth County Hosp. Auth.*, 789 F.2d 278 (4th Cir. 1986).

§ 75-4. Contracts to be in writing.

CASE NOTES

Cited in *Sharpe v. Park Newspapers of Lumberton, Inc.*, 78 N.C. App. 275, 337 S.E.2d 174 (1985); *Varnell v. Henry M. Milgrom, Inc.*, 78 N.C. App. 451, 337 S.E.2d 616 (1985).

§ 75-5. Particular acts prohibited.

CASE NOTES

I. GENERAL CONSIDERATION.

Charging Wholesale Prices While Fixing Retail Prices. — Evidence presented by plaintiff, to the effect that defendant wholesaler was charging its wholesale prices to plaintiff and at the same time setting plaintiff's retail prices, thus putting plaintiff at a competitive disadvantage,

when viewed in the light most favorable to plaintiff, was sufficient to establish per se violations of both subdivisions (b)(2) and (b)(7) of this section. *Baynard v. Service Distrib. Co.*, 78 N.C. App. 796, 338 S.E.2d 622 (1986).

Cited in *L.C. Williams Oil Co. v. Exxon Corp.*, 625 F. Supp. 477 (M.D.N.C. 1985).

§ 75-9. Duty of Attorney General to investigate.

Legal Periodicals. —

For comment, "Time Sharing: The North Carolina General Assembly's Response to

Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

§ 75-15. Actions prosecuted by Attorney General.

CASE NOTES

Quoted in *State v. Felts*, — N.C. App. —, 339 S.E.2d 99 (1986).

§ 75-15.1. Restoration of property and cancellation of contract.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assem-

bly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

§ 75-16. Civil action by person injured; treble damages.

Legal Periodicals. —

For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

For article discussing pendent claims for damages in actions under the Federal Racketeer Influenced and Corrupt Organizations Act, see 7 Campbell L. Rev. 299 (1985).

CASE NOTES

Legislative Intent. —

The legislature's intent in enacting this section was to create a new, private cause of action for aggrieved consumers, since traditional common-law remedies were often deficient. *Winston Realty Co. v. G.H.G., Inc.* 314 N.C. 90, 331 S.E.2d 677 (1985).

The North Carolina Legislature must have intended that substantial aggravating circumstances be present before any practice is deemed unfair under § 75-1.1, since it provided that any damages suffered by the victim are to be trebled. *General United Co. v. American Honda Motor Co.*, 618 F. Supp. 1452 (W.D.N.C. 1985).

Purpose. — The purpose of the statutory provisions for treble money damages and attorney's fees in this section and § 75-16.1 was to encourage private enforcement in the marketplace and to make the bringing of such suit more economically feasible. *Winston Realty Co. v. G.H.G., Inc.*, 314 N.C. 90, 331 S.E.2d 677 (1985).

The State is not a person, firm or corporation that can be sued under this section. *F. Ray Moore Oil Co. v. State*, — N.C. App. —, 341 S.E.2d 371 (1986).

But the State as Consumer Can Take Advantage of this Section. — There is no reason why the State as a consumer cannot take advantage of this section if it is the victim of an unfair or deceptive trade practice. *F. Ray Moore Oil Co. v. State*, — N.C. App. —, 341 S.E.2d 371 (1986).

Accrual of Cause of Action. — Any breach of contract by a trademark licensor first occurred when the third party's interim injunction based on its assertion of a superior registration effectively caused a cessation of performance of the licensor's contractual obligation, which was to continuously provide the trademark for the licensee's use. Any claim for fraud or unfair trade practices also accrued no later than the date of the interim injunction. *Rothmans Tobacco Co. v. Liggett Group, Inc.*, 770 F.2d 1246 (4th Cir. 1985).

Damages assessed pursuant to § 75-1.1 are trebled automatically. *Pinehurst, Inc. v. O'Leary Bros. Realty*, — N.C. App. —, 338 S.E.2d 918 (1986).

Actual Injury Must Be Proved. —

In accord with main volume. See *Bailey v. LeBeau*, — N.C. App. —, 339 S.E.2d 460 (1986).

Where although there was evidence in the record that defendants misrepresented that engine parts had been replaced within six months prior to sale of automobile, there was no evidence that plaintiff suffered an "injury" because of such representation, the court erred in trebling any damages and awarding attorney's fees. *Bailey v. LeBeau*, — N.C. App. —, 339 S.E.2d 460 (1986).

Punitive Damages, etc. —

Because § 75-1.1 is in derogation of the common law causes of action for unfair or deceptive trade practices and this section imposes a penalty, strict construction is in order. Thus, absent explicit legislative inclusion, punitive damages should be excluded. *Pinehurst, Inc. v. O'Leary Bros. Realty*, — N.C. App. —, 338 S.E.2d 918 (1986).

Determination of Facts and Law. — In cases under § 75-1.1 and this section the jury

finds facts, and based on the jury's findings, the court then determines as a matter of law whether the defendant's conduct violated § 75-1.1. *Chastain v. Wall*, 78 N.C. App. 350, 337 S.E.2d 150 (1985).

Applied in *Rodgers Bldrs., Inc. v. McQueen*, 76 N.C. App. 16, 331 S.E.2d 726 (1985); *Bunting v. Perdue, Inc.*, 611 F. Supp. 682 (E.D.N.C. 1985).

Stated in *Pearce v. American Defender Life Ins. Co.*, — N.C. —, 343 S.E.2d 174 (1986).

Cited in *Baker v. Log Systems*, 75 N.C. App. 347, 330 S.E.2d 632 (1985); *Skinner v. E.F. Hutton & Co.*, 314 N.C. 267, 333 S.E.2d 236 (1985); *L.C. Williams Oil Co. v. Exxon Corp.*, 625 F. Supp. 477 (M.D.N.C. 1985); *United Va. Bank v. Air-Lift Assocs.*, — N.C. App. —, 339 S.E.2d 90 (1986); *Ehlenbeck v. Patton*, 58 Bankr. 149 (W.D.N.C. 1986).

§ 75-16.1. Attorney fee.

Legal Periodicals. —

For comment, "Time Sharing: The North Carolina General Assembly's Response to

Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

CASE NOTES

Purpose. — The purpose of the statutory provisions for treble money damages and attorney's fees, this section and § 75-16, were to encourage private enforcement in the marketplace and to make the bringing of such suit more economically feasible. *Winston Realty Co. v. G.H.G., Inc.*, 314 N.C. 90, 331 S.E.2d 677 (1985).

When Attorney's Fees May Be Awarded. — Attorney's fees may be awarded upon findings that defendant willfully engaged in unlawful acts or practices proscribed by this chapter, that there was an unwarranted refusal to fully resolve the matters, and that complainant showed some actual injury resulting from the violation. *Concrete Serv. Corp. v. Investors Group, Inc.*, — N.C. App. —, 340 S.E.2d 755 (1986).

Discretion of Trial Judge. —

In accord with main volume. See *Varnell v. Henry M. Milgrom, Inc.*, 78 N.C. App. 451, 337 S.E.2d 616 (1985); *Concrete Serv. Corp. v. Investors Group, Inc.*, — N.C. App. —, 340 S.E.2d 755 (1986).

Failure to Show Injury. — Where although there was evidence in the record that

defendants misrepresented that engine parts had been replaced within six months prior to sale of automobile, there was no evidence that plaintiff suffered an "injury" because of such representation, the court erred in trebling any damages and awarding attorney's fees. *Bailey v. LeBeau*, — N.C. App. —, 339 S.E.2d 460 (1986).

Award of attorney's fees to plaintiff would be upheld where the trial court made findings that defendant specifically intended to deceive creditors, that his refusal to pay was unwarranted, and that as a result of defendants' actions, plaintiff supplied materials and received no payment in return. *Concrete Serv. Corp. v. Investors Group, Inc.*, — N.C. App. —, 340 S.E.2d 755 (1986).

Applied in *Goodrich v. Rice*, 75 N.C. App. 530, 331 S.E.2d 195 (1985); *Pinehurst, Inc. v. O'Leary Bros. Realty*, — N.C. App. —, 338 S.E.2d 918 (1986).

Stated in *Weft, Inc. v. G.C. Inv. Assocs.*, 630 F. Supp. 1138 (E.D.N.C. 1986).

Cited in *Skinner v. E.F. Hutton & Co.*, 314 N.C. 267, 333 S.E.2d 236 (1985); *Wilder v. Hodges*, — N.C. App. —, 342 S.E.2d 57 (1986).

§ 75-16.2. Limitation of actions.

CASE NOTES

Accrual of Cause of Action. — Any breach of contract by a trademark licensor first occurred when the third party's interim injunction based on its assertion of a superior registration effectively caused a cessation of performance of the licensor's contractual obligation, which was to continuously provide the trademark for the licensee's use. On comparable reasoning, any claim for fraud or unfair trade practices also accrued no later than the date of the interim injunction. *Rothmans Tobacco Co.*

v. Liggett Group, Inc., 770 F.2d 1246 (4th Cir. 1985).

A cause of action "accrues" under this statute when the alleged violation occurs. *United States v. Ward*, 618 F. Supp. 884 (E.D.N.C. 1985).

Applied in *Bunting v. Perdue, Inc.*, 611 F. Supp. 682 (E.D.N.C. 1985).

Cited in *Talbert v. Mauney*, — N.C. App. —, 343 S.E.2d 5 (1986).

ARTICLE 2.

Prohibited Acts by Debt Collectors.

§ 75-51. Threats and coercion.

CASE NOTES

Unfair Practices. — Although in the area of debt collection, unfair or deceptive acts in commerce are limited to those acts set out in this article, those specific practices delineated as prohibited are examples of unfair practices within the broader scope of § 75-1.1. *Talbert v. Mauney*, — N.C. App. —, 343 S.E.2d 5 (1986).

Plaintiffs' allegations of wrongful and in-

tentional harm to their credit rating and business prospects occurring less than four years before the filing date of their complaint were of a character clearly meant to be proscribed by the act and were therefore sufficient to state a claim for which relief could be granted under § 75-1.1. *Talbert v. Mauney*, — N.C. App. —, 343 S.E.2d 5 (1986).

§ 75-56. Application.

The specific and general provisions of this Article shall exclusively constitute the unfair or deceptive acts or practices proscribed by G.S. 75-1.1 in the area of commerce regulated by this Article. Notwithstanding the provisions of G.S. 75-15.2 and 75-16, in private actions or actions instituted by the Attorney General, civil penalties in excess of one thousand dollars (\$1,000) shall not be imposed, nor shall damages be trebled for any violation under this Article. (1977, c. 747, s. 4; 1983, c. 417, s. 1; 1985 (Reg. Sess., 1986), c. 802.)

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective June 26, 1986, inserted "in private actions or actions in-

stituted by the Attorney General," in the second sentence.

CASE NOTES

Unfair Practices. — Although in the area of debt collection, unfair or deceptive acts in commerce are limited to those acts set out in this article, those specific practices delineated as prohibited are examples of unfair practices within the broader scope of § 75-1.1. *Talbert v. Mauney*, — N.C. App. —, 343 S.E.2d 5 (1986).

Plaintiffs' allegations of wrongful and intentional harm to their credit rating and business prospects occurring less than four years before the filing date of their complaint were of a character clearly meant to be proscribed by the act and were therefore sufficient

to state a claim for which relief could be granted under § 75-1.1. *Talbert v. Mauney*, — N.C. App. —, 343 S.E.2d 5 (1986).

§§ 75-57 to 75-79: Reserved for future codification purposes.

ARTICLE 3.

Motor Fuel Marketing Act.

§ 75-80. Title.

This Article shall be known and may be cited as the "Motor Fuel Marketing Act". (1985 (Reg. Sess., 1986), c. 972, s. 1.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 972, s. 2 makes this Article effective September 1, 1986.

§ 75-81. Definitions.

The following terms shall have the meanings ascribed to them in this section unless otherwise stated and unless the context or subject matter clearly indicates otherwise:

- (1) "Person" shall mean any person, firm, association, organization, partnership, business trust, joint stock company, company, corporation or legal entity.
- (2) "Sale" shall mean selling, offering for sale or advertising for sale.
- (3) "Motor Fuel" shall mean a refined or blended petroleum product used for the propulsion of self-propelled motor vehicles; "motor fuel" shall also include the same meaning as defined by G.S. 105-430(1) and fuel as defined by G.S. 105-449.2(3).
- (4) "Cost" or "Costs" shall mean as follows:
 - (a) For a refiner or terminal supplier, costs shall be presumed to be the refiner's or terminal supplier's prevailing price to the wholesale class of trade at the terminal used by the refiner or terminal supplier to obtain the motor fuel in question or the lowest prevailing price within 10 days prior to a sale alleged to be in violation of G.S. 75-82 hereof plus all transportation expenses including freight expenses (incurred and not otherwise included in the cost of the motor fuel), and motor fuel taxes. If a refiner or terminal supplier does not regularly sell to the wholesale class of trade at the terminal in question, then such refiner or terminal supplier shall use as the prevailing price either (i) the lowest price to the wholesale class of trade of those other refiners or terminal suppliers at the same terminal who regularly sell to the wholesaler class or (ii) a price determined by using standard functional accounting procedures.
 - (b) For all other sellers, cost includes the invoice or replacement cost, whichever is less, of the grade, brand or blend, of motor fuel within 10 days prior to the date of sale, in the quantity or quantities last purchased, less all rebates and discounts received including prompt payment discounts and plus all applicable State, federal and local taxes, and transportation expenses including

freight expenses, incurred and not otherwise included in the cost of the motor fuel.

- (5) "Prompt Payment Discounts" shall mean any allowance for payment within a specified time, but shall not include discounts for cash made to the motoring public at motor fuel outlets.
- (6) "Affiliate" shall mean any person who (other than by means of a franchise) controls, is controlled by or is under common control with, any other person.
- (7) "Motor Fuel Merchant" is any person selling motor fuel to the public.
- (8) "Motor Fuel Outlet" is any retail facility selling motor fuel to the motoring public.
- (9) "New Retail Outlet" shall mean a new retail facility constructed from the ground or an existing retail facility that is offering motor fuel to the motoring public for the first time.
- (10) "Refiner" shall mean any person engaged in the production or refining or motor fuel, whether such production or refining occurs in this State or elsewhere, and includes any affiliate of such person or firm.
- (11) "Terminal Supplier" shall mean any person engaged in selling or brokering motor fuel to wholesalers or retailers from a storage facility of more than 2,000,000 gallons capacity and such person has an ownership interest in or control of the storage facility. (1985 (Reg. Sess., 1986), c. 972, s. 1.)

§ 75-82. Unlawful below-cost selling; exceptions.

(a) It shall be unlawful where the intent is to injure competition for any motor fuel merchant or the affiliate of any motor fuel merchant to sell with such frequency as to indicate a general business practice of selling at a motor fuel outlet any grade, brand or blend of motor fuel for less than the cost of that grade, brand or blend of motor fuel except where (i) the price is established in good faith to meet or compete with the lower price of a competitor in the same market area on the same level of distribution selling the same or comparable product of like quality, (ii) the price remains in effect for no more than 10 days after the first sale of that grade, brand or blend by the merchant at a new retail outlet, (iii) the sale is made in good faith to dispose of a grade, brand or blend of motor fuel for the purpose of discontinuing sales of that product, or (iv) the sale is made pursuant to the order or authority of any court or governmental agency.

(b) For purposes of this Article, motor fuel cost shall be computed separately for each grade, brand or blend of each motor fuel at each location where said motor fuel is offered for sale; however, nothing in this subsection shall prevent a motor fuel merchant from using a weighted average motor fuel cost for comparable grade, brand or blend when such motor fuel merchant is supplied by more than one refiner or terminal supplier at one or more terminals.

(c) This Article shall apply only to retail sales of motor fuel at motor fuel outlets. (1985 (Reg. Sess., 1986), c. 972, s. 1.)

§ 75-83. Unlawful inducement; civil penalty.

It shall be unlawful to knowingly induce, or to knowingly attempt to induce, a violation of this Article, whether by otherwise lawful or unlawful means. In any action initiated by the Attorney General, anyone found to have violated this provision shall be subject to the civil penalty applicable to the sales made in violation of this Article; or, if no sales were made, to a civil penalty of one thousand dollars (\$1,000). (1985 (Reg. Sess., 1986), c. 972, s. 1.)

§ 75-84. Separate offenses; injunctions.

Each act of establishing a price in violation of this Article shall constitute a separate offense by the seller and the civil penalty for each offense shall be not more than one thousand dollars (\$1,000). Upon a proper showing by the Attorney General or his delegate, further violations may be temporarily or permanently enjoined. (1985 (Reg. Sess., 1986), c. 972, s. 1.)

§ 75-85. Investigations by Attorney General.

The Attorney General is authorized to investigate any allegation of a violation of this Article made by a motor fuel merchant or by an association or group of motor fuel merchants. If an investigation discloses a violation, the Attorney General may exercise the authority under this Article to seek an injunction and he may also seek civil penalties. (1985 (Reg. Sess., 1986), c. 972, s. 1.)

§ 75-86. Private actions.

Any person, corporation, or other business entity which is engaged in the sale of motor fuel for resale or consumption and which is directly or indirectly injured by a violation of this Article may bring an action in the judicial district where the violation is alleged to have occurred to recover actual damages, exemplary damages, costs and reasonable attorneys' fees. The court shall also grant such equitable relief as is proper, including a declaratory judgment and injunctive relief. Any action under this Article must be brought within one year of the alleged violation. (1985 (Reg. Sess., 1986), c. 972, s. 1.)

§ 75-87. Private action presumptions.

(a) In any private action brought under this Article, a violation shall be presumed to have occurred if: (i) the prevailing price under G.S. 75-81(4)(a) for any grade, brand or blend of a motor fuel sold by a refiner or terminal supplier to a wholesaler or retailer is greater than the price of the same grade, brand or blend of motor fuel sold by such refiner or terminal supplier directly through its own motor fuel outlet or through the outlet of an affiliate of said refiner or terminal supplier; or (ii) if the product price of any grade, brand or blend of a motor fuel sold by a wholesaler to a retailer is greater than the retail price of the same grade, brand or blend of motor fuel sold by such wholesaler through its own motor fuel outlet or the outlet of an affiliate of said wholesaler, provided the method of delivery and quantities of each delivery of motor fuel to the retailer and to the wholesaler's outlet or affiliate's outlet are the same or comparable.

(b) A party may rebut the presumption created by this section by presenting evidence to establish his cost of the grade, brand or blend of motor fuel in

question, or by qualifying for an exception under G.S. 75-82. (1985 (Reg. Sess., 1986), c. 972, s. 1.)

§ 75-88. Public disclosure.

Any refiner or terminal supplier computing prevailing price under the provisions of G.S. 75-81(4)(a)(i) or (ii) shall be required to publicly disclose said price. (1985 (Reg. Sess., 1986), c. 972, s. 1.)

§ 75-89. Powers and remedies supplementary.

The powers and remedies provided by this Article shall be cumulative and supplementary to all powers and remedies otherwise provided by law. (1985 (Reg. Sess., 1986), c. 972, s. 1.)

Chapter 75D.

Racketeer Influenced and Corrupt Organizations.

Sec.

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§ 75D-1. Short title.

This Chapter shall be known and may be cited as the North Carolina Racketeer Influenced and Corrupt Organizations Act (RICO). (1985 (Reg. Sess., 1986), c. 999, s. 1.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 999, s. 3 provides that this Chapter shall become effective October 1, 1986, and shall expire October 1, 1989.

Section 2 of Session Laws 1985 (Reg. Sess., 1986), c. 999 is a severability clause.

§ 75D-2. Findings and intent of General Assembly.

(a) The General Assembly finds that a severe problem is posed in this State by the increasing organization among certain unlawful elements and the increasing extent to which organized unlawful activities and funds acquired as a result of organized unlawful activity are being directed to and against the legitimate economy of the State.

(b) The General Assembly declares that the purpose and intent of this Chapter is: to deter organized unlawful activity by imposing civil equitable sanctions against this subversion of the economy by organized unlawful elements; to prevent the unjust enrichment of those engaged in organized unlawful activity; to restore the general economy of the State all of the proceeds, money, profits, and property, both real and personal of every kind and description which is owned, used or acquired through organized unlawful activity by any person or association of persons whether natural, incorporated or unincorporated in this State; and to provide compensation to private persons injured by organized unlawful activity. It is not the intent of the General Assembly to in any way interfere with the attorney-client relationship.

(c) It is not the intent of the General Assembly that this Chapter apply to isolated and unrelated incidents of unlawful conduct but only to an interrelated pattern of organized unlawful activity, the purpose or effect of which is to derive pecuniary gain. Further, it is not the intent of the General Assembly that legitimate business organizations doing business in this State, having no connection to, or any relationship or involvement with organized unlawful elements, groups or activities be subject to suit under the provisions of this Chapter. (1985 (Reg. Sess., 1986), c. 999, s. 1.)

§ 75D-3. Definitions.

As used in this Chapter, the term:

- (a) "Enterprise" means any person, sole proprietorship, partnership, corporation, business trust, union chartered under the laws of this State, or other legal entity; or any unchartered union, association, or group of individuals associated in fact although not a legal entity; and it includes illicit as well as licit enterprises and governmental as well as other entities.
- (b) "Pattern of racketeering activity" means engaging in at least two incidents of racketeering activity that have the same or similar purposes, results, accomplices, victims, or methods of commission or otherwise are interrelated by distinguishing characteristics and are not isolated and unrelated incidents, provided at least one of such incidents occurred after October 1, 1986, and that at least one other of such incidents occurred within a four-year period of time of the other, excluding any periods of imprisonment, after the commission of a prior incident of racketeering activity.
- (c)
 - (1) "Racketeering activity" means to commit, to attempt to commit, or to solicit, coerce, or intimidate another person to commit an act or acts which would be chargeable by indictment if such act or acts were accompanied by the necessary mens rea or criminal intent under the following laws of this State:
 - a. Article 5 of Chapter 90 of the General Statutes of North Carolina relating to controlled substances and counterfeit controlled substances;
 - b. Chapter 14 of the General Statutes of North Carolina except Articles 9, 22A, 38, 40, 43, 46, 47, 59 thereof; and further excepting G.S. Sections 14-78.1, 14-82, 14-86, 14-145, 14-146, 14-147, 14-177, 14-178, 14-179, 14-183, 14-184, 14-186, 14-190.9, 14-195, 14-197, 14-201, 14-202, 14-247, 14-248, 14-313 thereof.
 - c. Any conduct involved in a "money laundering" activity; and
 - (2) "Racketeering activity" also includes the description in Title 18, United States Code, Section 1961(1).
- (d) "Documentary material" means any book, paper, document, writing, drawing, graph, chart, photograph, phonocord, magnetic tape, computer printout, other data compilation from which information can be obtained or from which information can be translated into useable form, or other tangible item.
- (e) "RICO lien notice" means the notice described in G.S. 75D-13.
- (f) "Attorney General" means the Attorney General of North Carolina or any employee of the Department of Justice designated by him in writing. Any district attorney of this State, with his consent, may be designated in writing by the Attorney General to enforce the provisions of this Chapter.
- (g)
 - (1) "Beneficial interest" means either of the following:
 - a. The interest of a person as a beneficiary under any other trust arrangement pursuant to which a trustee holds legal or record title to real property for the benefit of such person; or
 - b. The interest of a person under any other form of express fiduciary arrangement pursuant to which any other person holds legal or record title to real property for the benefit of such person.

- (2) "Beneficial interest" does not include the interest of a stockholder in a corporation or the interest of a partner in either a general partnership or limited partnership. A beneficial interest shall be deemed to be located where the real property owned by the trustee is located.
- (h) "Real property" means any real property situated in this State or any interest in such real property, including, but not limited to, any lease of or mortgage upon such real property.
- (i)
 - (1) "Trustee" means either of the following:
 - a. Any person who holds legal or record title to real property for which any other person has a beneficial interest; or
 - b. Any successor trustee or trustees to any of the foregoing persons.
 - (2) "Trustee" does not include the following:
 - a. Any person appointed or acting as a personal representative under Chapter 33 of the General Statutes relating to guardian and ward, or under Chapter 28A of the General Statutes relating to the administration of estates; or
 - b. Any person appointed or acting as a trustee of any testamentary trust or as trustee of any indenture of trust under which any bonds are to be issued.
- (j) "Criminal proceeding" means any criminal action commenced by the State for a violation of any provision of those criminal laws referred to in G.S. 75D-3(c).
- (k) "Civil proceeding" means any civil proceeding commenced by the Attorney General or an injured person under any provision of this Chapter. (1985 (Reg. Sess., 1986), c. 999, s. 1.)

§ 75D-4. Prohibited activities.

- (a) No person shall:
 - (1) engage in a pattern of racketeering activity or, through a pattern of racketeering activities or through proceeds derived therefrom, acquire or maintain, directly or indirectly, any interest in or control of any enterprise, real property, or personal property of any nature, including money; or
 - (2) conduct or participate in, directly or indirectly, any enterprise through a pattern of racketeering activity whether indirectly, or employed by or associated with such enterprise; or
 - (3) conspire with another or attempt to violate any of the provisions of subdivision (1) or (2) of this subsection.
- (b) Violation of this section is inequitable and constitutes a civil offense only and is not a crime, therefore a mens rea or criminal intent is not an essential element of any of the civil offenses set forth in this section. (1985 (Reg. Sess., 1986), c. 999, s. 1.)

§ 75D-5. RICO civil forfeiture proceedings.

(a) All property of every kind used or intended for use in the course of, derived from, or realized through a racketeering activity or pattern of racketeering activity is subject to forfeiture to the State. Forfeiture shall be had by a civil procedure known as a RICO forfeiture proceeding.

(b) A RICO forfeiture proceeding shall be governed by Chapter 1A of the General Statutes of North Carolina except to the extent that special rules of procedure are stated in this Chapter.

(c) A RICO forfeiture proceeding shall be an in rem proceeding against the property.

(d) A RICO forfeiture proceeding shall be instituted by complaint and prosecuted only by the Attorney General of North Carolina or his designated representative. The proceeding may be commenced and a final judgment rendered thereon before or after seizure of the property and before or after any criminal conviction of any person for violation of those laws set forth in G.S. 75D-3(c).

(e) If the complaint is filed before seizure, it shall state what property is sought to be forfeited, that the property is within the jurisdiction of the court, the grounds for forfeiture, and the names of all persons known to have or claim an interest in the property. The court shall determine ex parte whether there is reasonable ground to believe that the property is subject to forfeiture and, if the State so alleges, whether notice to those persons having or claiming an interest in the property prior to seizure would cause the loss or destruction of the property. If the court finds:

- (1) that reasonable ground does not exist to believe that the property is subject to forfeiture, it shall dismiss the complaint; or
- (2) that reasonable ground does exist to believe the property is subject to forfeiture but there is not reasonable ground to believe that prior notice would result in loss or destruction, it shall order service on all persons known to have or claim an interest in the property prior to a further hearing on whether a writ of seizure should issue; or
- (3) that there is reasonable ground to believe that the property is subject to forfeiture and to believe that prior notice would cause loss or destruction, it shall without any further hearing or notice, issue a writ of seizure directing the sheriff of or any other law enforcement officer in the county where the property is found to seize it.

(f) Seizure may be effected by a law enforcement officer authorized to enforce the penal laws of this State prior to the filing of the complaint and without a writ of seizure if the seizure is incident to a lawful arrest, search, or inspection and the officer has probable cause to believe the property is subject to forfeiture and will be lost or destroyed if not seized. Within 24 hours of the time of seizure, the seizure shall be reported by the officer to the district attorney of the judicial district in which the seizure is effected who shall immediately report such seizure to the Attorney General. The Attorney General shall, within 30 days after receiving notice of seizure, examine the evidence surrounding such seizure, and if he believes reasonable ground exists for forfeiture under this Chapter, shall file a complaint for forfeiture. The complaint shall state, in addition to the information required in subsection (e) of this section, the date and place of seizure.

(g) After the complaint is filed or the seizure effected, whichever is later, every person known to have or claim an interest in the property, or in the property or enterprise of which the subject property is a part or represents any interest, shall be served, if not previously served, with a copy of the complaint and a notice of seizure in the manner provided by Chapter 1A of the General Statutes of North Carolina. Service by publication may be ordered upon any

party whose whereabouts cannot be determined with reasonable diligence within 30 days of filing of the complaint.

(h)

- (1) Any person claiming an interest in the property, may become a party to the action at any time prior to judgment whether named in the complaint or not. Any party claiming a substantial interest in the property, upon motion may be allowed by the court to take possession of the property upon posting bond with good and sufficient security in double the amount of the property's value conditioned to pay the value of any interest in the property found to be subject to forfeiture or the value of any interest of another not subject to forfeiture.
- (2) The court, upon such terms and conditions as it may prescribe, may order that the property be sold by an innocent party who holds a lien on or security interest in the property at anytime during the proceedings. Any proceeds from such sale over and above the amount necessary to satisfy the lien or security interest shall be paid into court pending final judgment in the forfeiture proceeding. No such sale shall be ordered, however, unless the obligation upon which the lien or security interest is based is in default.
- (3) Pending final judgment in the forfeiture proceeding, the court may make any other disposition of the property necessary to protect it or in the interest of substantial justice, and which adequately protects the interests of innocent parties.

(i) The interest of an innocent party in the property shall not be subject to forfeiture. An innocent party is one who did not have actual or constructive knowledge that the property was subject to forfeiture. An attorney who is paid a fee for representing any person subject to this act, shall be rebuttably presumed to be an innocent party as to that fee transaction.

(j) Subject to the requirement of protecting the interest of all innocent parties, the court may, after judgment of forfeiture, make any of the following orders for disposition of the property:

- (1) Destruction of the property or contraband, the possession of, or use of, which is illegal;
- (2) Retention for official use by a law enforcement agency, the State or any political subdivision thereof. When such agency or political subdivision no longer has use for such property, it shall be disposed of by judicial sale as provided in Article 29A of Chapter 1 of the General Statutes of North Carolina, and the proceeds shall be paid to the State Treasurer;
- (3) Transfer to the Department of Archives and History of property useful for historical or instructional purposes;
- (4) Retention of the property by any innocent party having an interest therein, including the right to restrict sale of an interest to outsiders, such as a right of first refusal, upon payment or approval of a plan for payment into court of the value of any forfeited interest in the property. The plan may include, in the case of an innocent party who holds an interest in the property through an estate by the entirety, or an undivided interest in the property, or a lien on or security interest in the property, the sale of the property by the innocent party under such terms and conditions as may be prescribed by the court and the payment into court of any proceeds from such sale over and above the amount necessary to satisfy the divided ownership value of the innocent party's interest or the lien or security interest. Proceeds paid into the court must then be paid to the State Treasurer;
- (5) Judicial sale of the property as provided in Article 29A of Chapter 1 of the General Statutes of North Carolina, with the proceeds being paid to the State Treasurer;

- (6) Transfer of the property to any innocent party having an interest therein equal to or greater than the value of the property; or
- (7) Any other disposition of the property which is in the interest of substantial justice and adequately protects innocent parties, with any proceeds being paid to the State Treasurer.
- (k) In addition to the provisions of subsections (c) through (g) relating to in rem actions, the State may bring an in personam action for the forfeiture of any property subject to forfeiture under subsection (a) of this section.
- (l) Upon the entry of a final civil judgment of forfeiture in favor of the State:

(1) The title of the State to the forfeited property shall:

- a. In the case of real property or beneficial interest, relate back to the date of filing of the RICO lien notice in the official record of the county where the real property or beneficial interest is located and, if no RICO lien notice is filed, then to the date of the filing of any notice of lis pendens in the official records of the county where the real property or beneficial interest is located and, if no RICO lien notice or notice of lis pendens is so filed, then to the date of recording of the final judgment of forfeiture in the official records of the county where the real property or beneficial interest is located; and
 - b. In the case of personal property, relate back to the date the personal property was seized pursuant to the provisions of this Chapter.
- (2) If property subject to forfeiture is conveyed, alienated, disposed of, or otherwise rendered unavailable for forfeiture after the filing of a RICO lien notice or after the filing of a RICO civil proceeding whichever is earlier, the Attorney General may, on behalf of the State, institute in action in an appropriate court against the person named in the RICO lien notice or the defendant in the civil proceeding and the court shall enter final judgment against the person named in the RICO lien notice or the defendant in the civil proceeding in an amount equal to the fair market value of the property, together with investigative costs and attorney's fees incurred by the Attorney General in the action. (1985 (Reg. Sess., 1986), c. 999, s. 1.)

§ 75D-6. Power to compel examination.

Whenever the Attorney General has reason to believe that any person or enterprise may have information or may be in possession, custody or control of any documentary materials relevant to an activity prohibited under G.S. 75D-4, he may issue in writing, and cause to be served upon such person or upon the appropriate officers, agents, and employees of any such enterprise (other than one employed as an attorney by such person or enterprise), a notice requiring such person or enterprise to submit themselves to examination by him, and produce for his inspection any documentary material relevant to an investigation of activities prohibited by G.S. 75D-4.

The notice shall be served either personally or by registered or certified mail return receipt requested. The notice shall specify the general purpose of the examination, a general description of the documentary material to be produced, and the time and place where such examination will take place. The witness shall be placed under oath or affirmation to testify truthfully. The examination shall be recorded and the witness has the right to a copy upon payment of its cost. The witness has the right to have legal counsel present during the examination.

The Attorney General shall also have the right to apply to any judge of the superior court division, after five days' prior notice of such application served in the same manner as the notice of examination described in this section, for an order requiring such person or enterprise to appear and subject himself or itself to examination, and disobedience of such order shall constitute contempt, and shall be punishable as in other cases of disobedience of a proper order of such court.

No such demand or order of a court shall contain any requirement which would be held to be unreasonable if contained in a civil discovery request or court order issued pursuant to G.S. 1A-1, Rules of Civil Procedure 26-36. Any person or enterprise upon whom a demand is served and who objects to complying with such demand in whole or in part, shall, within five days of service of the demand, serve a written reply upon the Attorney General specifying the nature of the objection.

Such examination shall be held in camera and no one, except the person or enterprise being examined, may release information obtained from the examination prior to a proceeding being instituted under this Chapter by the Attorney General. Such information may be used in any proceeding instituted under this Chapter by the Attorney General. Any person violating the provisions of this paragraph shall be guilty of a misdemeanor and fined not less than two hundred dollars (\$200.00) nor more than one thousand dollars (\$1,000) or imprisoned, or both. If such offending person is a public officer or employee, he shall also be dismissed from such office or employment and shall not hold any public office or employment in this State for a period of five years after conviction. This paragraph does not prohibit disclosure of this information to other employees of the Department of Justice, or to district attorneys designated in writing by the Attorney General as authorized to receive this information. (1985 (Reg. Sess., 1986), c. 999, s. 1.)

§ 75D-7. False testimony.

False testimony as to any material fact by any person examined under the provisions of this Chapter shall constitute perjury and a conviction shall be punishable as in other cases of perjury as a Class "H" felony. (1985 (Reg. Sess., 1986), c. 999, s. 1.)

§ 75D-8. Available RICO civil remedies.

(a) As part of a final judgment of forfeiture, any judge of the superior court may, after giving reasonable notice to potential innocent claimants, enjoin violations of G.S. 75D-4, by issuing appropriate orders and judgments:

- (1) Ordering any defendant to divest himself of any interest in any enterprise, real property, or personal property including property held by the entirety. Where property is held by the entirety and one of the spouses is an innocent person as defined in G.S. 75D-5(i), upon entry of a final judgment of forfeiture of entirety property, the judgment operates, to convert the entirety to a tenancy in common, and only the one-half undivided interest of the offending spouse shall be forfeited according to the provisions of this Chapter;
- (2) Imposing reasonable restrictions upon the future activities or investments of any defendant in the same or similar type of endeavor as the enterprise in which he was engaged in violation of G.S. 75D-4;
- (3) Ordering the dissolution or reorganization of any enterprise;

- (4) Ordering the suspension or revocation of any license, permit, or prior approval granted to any enterprise by any agency of the State;
- (5) Ordering the forfeiture of the charter of a corporation organized under the laws of this State or the revocation of a certificate authorizing a foreign corporation to conduct business within this State upon a finding that the board of directors or a managerial agent acting on behalf of the corporation, in conducting affairs of the corporation, has authorized or engaged in conduct in violation of G.S. 75D-4, and that, for the prevention of future unlawful activity, the public interest requires that the charter of the corporation be dissolved or the certificate be revoked;
- (6) Appointment of a receiver pursuant to the provisions of Article 38 of Chapter 1 of the General Statutes of North Carolina, to collect, conserve and dispose of all the proceeds, money, profits and property, both real and personal, subject to the provisions of this Chapter in accordance with the provisions hereof as directed by the final judgment of the superior court having jurisdiction over the parties or subject matter of the action; or
- (7) Any other equitable remedy appropriate to effect complete forfeiture of property subject to forfeiture, or to prevent future violations of this Chapter.

(b) The State through the Attorney General may institute a proceeding under G.S. 75D-5. In such proceeding, relief shall be granted in conformity with the principles that govern the granting of injunctive relief from threatened loss or damage in other civil cases, provided that no showing of special or irreparable damage to the person shall have to be made and provided further that the State shall not be required to execute any bond before or after obtaining temporary restraining orders or preliminary injunctions.

(c) Any innocent person who is injured or damaged in his business or property by reason of any violation of G.S. 75D-4 involving a pattern of racketeering activity shall have a cause of action for three times the actual damages sustained and reasonable attorneys fees. For purposes of this subsection, "pattern of racketeering activity" shall require that at least one act of racketeering activity be an act of racketeering activity other than (i) an act indictable under 18 U.S.C. § 1341 or U.S.C. § 1343, or (ii) an act which is an offense involving fraud in the sale of securities. Any person filing a private action under this subsection must concurrently notify the Attorney General in writing of the commencement of the action. Thereafter, the Attorney General may file a motion for a protective order in the court where the private action is pending and shall be granted a stay of the private action for a reasonable time if the court finds either:

- (1) the bringing of a private action is likely to materially interfere with or impair a public forfeiture action; or
- (2) the public interest is so great as to require the Attorney General to investigate and bring a forfeiture action.

(d) Any injured innocent person shall have a right or claim to forfeited property or to the proceeds derived therefrom superior to any right or claim the State has in the same property or proceeds. To enforce such a claim the injured innocent person must intervene in the forfeiture proceeding prior to its final disposition.

(e) A final conviction in any criminal proceeding for a violation of those laws set forth in G.S. 75D-3(c), shall estop the defendant in any subsequent civil action or proceeding under this Chapter as to all matters proved in the criminal proceeding.

(f) A defendant in an action commenced by the State pursuant to this Chapter whose convictions of two or more criminal offenses of those criminal stat-

utes as set forth in G.S. 75D-3(c) have become final, which offenses have occurred within a four-year period of each other as set forth in G.S. 75D-3(b) shall be deemed to have, per se violated the provisions of G.S. 75D-4(a)(1) or (2) as of the date of the second conviction.

(g) Any party is entitled to a jury trial in any action brought under this Chapter. (1985 (Reg. Sess., 1986), c. 999, s. 1.)

§ 75D-9. Period of limitations as to civil proceedings under this Chapter.

Notwithstanding any other provision of law, a civil action or proceeding under this Chapter may be commenced within five years after the conduct in violation of a provision of this Chapter terminates or the claim for relief accrues, whichever is later. If a civil action is brought by the State for forfeiture or to prevent any violation of the Chapter, then the running of this period of limitations with respect to any innocent person's claim for relief which is based upon any matter complained of in such action by the State, shall be suspended during the pendency of the action by the State and for two years thereafter. (1985 (Reg. Sess., 1986), c. 999, s. 1.)

§ 75D-10. Civil remedies are supplemental and not mutually exclusive.

The application of one civil remedy under this Chapter shall not preclude the application of any other remedy under this Chapter or any other provision of law. Civil remedies under this Chapter are cumulative, supplemental and not exclusive, and are in addition to the fines, penalties and forfeitures set forth in a final judgment of conviction of a violation of the criminal laws of this State as punishment for violation of the penal laws of this State. (1985 (Reg. Sess., 1986), c. 999, s. 1.)

§ 75D-11. Reciprocal agreements with other states.

The Attorney General is authorized to enter into reciprocal agreements with any United States attorney or the attorney general or chief prosecuting attorney of any other state having a civil forfeiture law substantially similar to this Chapter so as to further the purpose of this Chapter. (1985 (Reg. Sess., 1986), c. 999, s. 1.)

§ 75D-12. Venue.

In any forfeiture action brought pursuant to this Chapter, the claim for relief shall be considered to have arisen in any county in which an incident of racketeering occurred or in which an interest or control of an enterprise or real or personal property is acquired or maintained. Venue in any private action shall be as provided in Article 7, Chapter 1, of the General Statutes of North Carolina. (1985 (Reg. Sess., 1986), c. 999, s. 1.)

§ 75D-13. Filing and attachment of RICO lien notice.

(a) Upon the institution of any proceeding under this Chapter, the Attorney General then or at any time during the pendency of the proceeding may file in the official records of any one or more counties a RICO lien notice. No filing fee or other charge shall be required as a condition for filing the RICO lien notice. The clerk of the superior court shall, upon the presentation of a RICO lien notice, immediately record it in the official records.

(b) The RICO lien shall be signed by the Attorney General or his designee or by a designated district attorney. The notice shall be in such form as the Attorney General prescribes and, in addition to a description of the particular property sought to be forfeited, shall set forth the following information:

- (1) If brought in the name of a person, the name of the person against whom the civil proceeding has been brought. In his discretion, the Attorney General may also name in the RICO lien notice any other aliases, names or fictitious names under which the person may be known;
- (2) If known to the Attorney General the present residence and business addresses of the person named in the RICO lien notice and of the other names set forth in the RICO lien notice;
- (3) A reference to the civil proceeding stating that a proceeding under this Chapter has been brought against the person named in the RICO lien notice, the name of the county or counties where the proceeding has been brought, and, if known to the Attorney General at the time of filing the RICO lien notice, the case number of the proceeding;
- (4) A statement that the notice is being filed pursuant to this Chapter; and
- (5) The name and address of the person in the Attorney General's office filing the RICO lien notice and the name of the individual signing the RICO lien notice.

(c) A RICO lien notice shall apply only to one person and, to the extent applicable, any aliases, fictitious names, or other names, including names of corporations, partnerships, or other entities, to the extent permitted in paragraph (1) of subsection (b) of this section. A separate RICO lien notice shall be filed for any other person against whom the Attorney General desires to file a RICO lien notice under this section.

(d) The Attorney General shall, as soon as practicable after the filing of each RICO lien notice, serve, by any method provided for by G.S. 1A-1, Rule 4, upon the person named in the notice and any other person who holds an interest of record, either a copy of the recorded notice or a copy of the notice with a notation thereon of the county or counties in which the notice has been recorded.

(e) The filing of a RICO lien notice creates, from the time of its filing, a lien in favor of the State on the following property of the person named in the notice and against any other names sets forth in the notice:

- (1) Any real property situated in the county where the notice is filed then or thereafter owned by the person or under any of the names; and
- (2) Any beneficial interest situated in the county where the notice is filed then or thereafter owned by the person or under any of the names.

(f) The lien shall commence and attach as of the time of filing of the RICO lien notice and shall continue thereafter until expiration, termination, or release pursuant to G.S. 75D-14. The lien created in favor of the State shall be superior and prior to the interest of any other person in the real property or beneficial interests if the interest is acquired subsequent to the filing of the notice.

(g) In conjunction with any proceedings pursuant to this Chapter:

- (1) The Attorney General may file without prior court order in any county a lis pendens and, in such case, any person acquiring an interest in the subject real property or beneficial interest subsequent to the filing of lis pendens, shall take the interest subject to the civil proceeding and any subsequent judgment of forfeiture; and
 - (2) If a RICO lien notice has been filed, the Attorney General may name as defendants, in addition to the person named in the notice, any persons acquiring an interest in the real property or beneficial interest subsequent to the filing of the notice. If a judgment of forfeiture is entered in the proceeding in favor of the State, the interest of any person in the property that was acquired subsequent to the filing of the notice shall be subject to the notice and judgment of forfeiture.
- (h)
- (1) A trustee upon whom a RICO lien notice or a RICO civil proceeding has been served shall immediately furnish to the Attorney General the following:
 - a. The name and addresses, as known to the trustee, of all persons for whose benefit the trustee holds title to the real property; and
 - b. If requested by the Attorney General's office, a copy of the trust agreement or other instrument pursuant to which the trustee holds legal or record title to the real property.
 - (2) Any trustee who fails to comply with the provisions of this subsection shall be removed by court order and a substitute trustee shall be named in lieu of the trustee so removed.
- (i) The filing of a RICO lien notice shall not affect the use to which real property or a beneficial interest owned by the person named in the RICO lien notice may be put or in the right of the person to receive any avails, rents, or other proceeds resulting from the use and ownership, but not the sale, of the property until a judgment of forfeiture is entered.
- (j) All forfeitures or dispositions under this section shall be made with due provision for the rights of innocent persons. (1985 (Reg. Sess., 1986), c. 999, s. 1.)

§ 75D-14. Release of lien notice.

The Attorney General filing the RICO lien notice, or the court for good cause shown at anytime, may release in whole or in part any RICO lien notice or may release any specific property or beneficial interest from the RICO lien notice upon such terms and conditions as he may determine. Any release of a RICO lien notice executed by the Attorney General or ordered by the court may be filed in the official records of any county. No charge or fee shall be imposed for the filing of any release of a RICO lien notice. (1985 (Reg. Sess., 1986), c. 999, s. 1.)

Chapter 76.

Navigation.

ARTICLE 5.

General Provisions.

§ 76-40. Navigable waters; certain practices regulated.

CASE NOTES

Stated in *In re Mason*, ex rel. Huber, 78
N.C. App. 16, 337 S.E.2d 99 (1985).

Chapter 78A.
North Carolina Securities Act.

ARTICLE 1.

Title and Definitions.

§ 78A-1. Title.

CASE NOTES

Cited in *Mastrom, Inc. v. Continental Cas. Co.*, 78 N.C. App. 483, 337 S.E.2d 162 (1985).

ARTICLE 2.

Fraudulent and Other Prohibited Practices.

§ 78A-8. Sales and purchases.

CASE NOTES

Cited in *Weft, Inc. v. G.C. Inv. Assocs.*, 630 F. Supp. 1138 (E.D.N.C. 1986).

ARTICLE 7.

Civil Liabilities and Criminal Penalties.

§ 78A-56. Civil liabilities.

Legal Periodicals. —
For article discussing applicable statute of limitations in actions under the Federal Rack-

eteer Influenced and Corrupt Organizations Act, see 7 Campbell L. Rev. 299 (1985).

CASE NOTES

Cited in *Weft, Inc. v. G.C. Inv. Assocs.*, 630 F. Supp. 1138 (E.D.N.C. 1986).

Chapter 84.

Attorneys-at-Law.

Article 1.

Qualifications of Attorney; Unauthorized Practice of Law.

Sec.

84-4.1. Limited practice of out-of-state attorneys.

ARTICLE 1.

Qualifications of Attorney; Unauthorized Practice of Law.

§ 84-2.1. "Practice law" defined.

CASE NOTES

A licensed attorney who is a full-time employee of an insurance company may not ethically represent one of the company's insureds as counsel of record in an action brought by a third party for a claim covered by

the terms of the insurance policy or appear as counsel of record for the insured in the prosecution of a subrogation claim for property damage. *Gardner v. North Carolina State Bar*, — N.C. —, 341 S.E.2d 517 (1986).

§ 84-4.1. Limited practice of out-of-state attorneys.

Any attorney regularly admitted to practice in the courts of record of another state and in good standing therein, having been retained as attorney for any party to a legal proceeding, civil or criminal, pending in the General Court of Justice of North Carolina, or the North Carolina Utilities Commission or the North Carolina Industrial Commission or the Office of Administrative Hearings of North Carolina may, on motion, be admitted to practice in the General Court of Justice or North Carolina Utilities Commission or the North Carolina Industrial Commission or the Office of Administrative Hearings of North Carolina for the sole purpose of appearing for his client in said litigation, but only upon compliance with the following conditions precedent:

(1967, c. 1199, s. 1; 1971, c. 550, s. 1; 1975, c. 582, ss. 1, 2; 1977, c. 430; 1985 (Reg. Sess., 1986), c. 1022, s. 8.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, only the introductory paragraph is set out.

Effect of Amendments. — The 1985 (Reg.

Sess., 1986) amendment, effective July 15, 1986, inserted "or the Office of Administrative Hearings of North Carolina" following "or the North Carolina Industrial Commission" in the introductory paragraph.

§ 84-5. Prohibition as to practice of law by corporation.

CASE NOTES

A licensed attorney who is a full-time employee of an insurance company may not ethically represent one of the company's insureds as counsel of record in an action brought by a third party for a claim covered by

the terms of the insurance policy or appear as counsel of record for the insured in the prosecution of a subrogation claim for property damage. *Gardner v. North Carolina State Bar*, — N.C. —, 341 S.E.2d 517 (1986).

ARTICLE 2.

Relation to Client.

§ 84-13. Fraudulent practice, attorney liable in double damages.

CASE NOTES

Presumption of Fraud. —

When an attorney mishandles client funds, there is a presumption of fraud as a matter of law, and this section applies. *Ehlenbeck v. Patton*, 58 Bankr. 149 (W.D.N.C. 1986).

In a bankruptcy proceeding in which client of bankrupt attorney filed a proof of

claim relating to attorney's embezzlement of money delivered to him in trust, the bankruptcy judge did not err in finding client's actual damages, then doubling the damages pursuant to this section, and finding the entire amount nondischargeable. *Ehlenbeck v. Patton*, 58 Bankr. 149 (W.D.N.C. 1986).

ARTICLE 3.

Arguments.

§ 84-14. Court's control of argument.

Legal Periodicals. —

For article, "Rummaging Through a Wilderness of Verbiage: The Charge Conference, Jury

Argument and Instructions," see 8 Campbell L. Rev. 269 (1986).

CASE NOTES

II. SCOPE OF ARGUMENT.

A. In General.

Counsel May Argue Both Law and Fact. —

The right to argue "the whole case as well of law as of fact" to the jury arises regardless of whether the trial court's jury instructions will also relate the law on the issue. *State v. Gardner*, — N.C. —, 342 S.E.2d 872 (1986).

Reading and Commenting on Reported Cases. —

This section grants counsel the right to argue the law to the jury, which includes the

authority to read and comment on reported cases and statutes. There are, however, limitations on what portions of these cases counsel may relate. *State v. Gardner*, — N.C. —, 342 S.E.2d 872 (1986).

Counsel may only read statements of the law in the case which are relevant to the issues before the jury. *State v. Gardner*, — N.C. —, 342 S.E.2d 872 (1986).

Reading Facts in Reported Cases. — Counsel may not read the facts contained in a published opinion together with the result to imply that the jury in his case should return a favorable verdict for his client. *State v. Gardner*, — N.C. —, 342 S.E.2d 872 (1986).

Reading Excerpts from Treatises in Reported Cases. — It would be an improper interpretation of this section to allow counsel to avoid the rule prohibiting counsel from reading from medical books or writings of a scientific nature to the jury except when an expert has given an opinion and cited a treatise as his authority on the basis that he read the material from an appellate reporter rather than from the magazine or book itself, especially where it was contained in an opinion that had been reversed by the Supreme Court. *State v. Gardner*, — N.C. —, 342 S.E.2d 872 (1986).

Reading Dissenting Opinion, etc. —

Counsel may not read from a dissenting opinion in a reported case. *State v. Gardner*, — N.C. —, 342 S.E.2d 872 (1986).

V. CAPITAL CASES.

This section places two restraints on a trial court's ability to limit jury arguments in capital felonies. First, the statute prohibits the trial court from limiting the number of addresses which can be made to the jury. Second, although the court may limit the number of

attorneys who may address the jury to not less than three on each side, the statute prevents the trial court from imposing a limit on the length of the arguments. *State v. Gladden*, — N.C. —, 340 S.E.2d 673 (1986).

Final Closing Argument Where Defendant Presents Evidence. — This section means that although the trial court in a capital case may limit to three the number of counsel on each side who may address the jury, those three (or however many actually argue) may argue for as long as they wish, and each may address the jury as many times as he desires. However, if defendant presents evidence, all such addresses must be made prior to the prosecution's closing argument. *State v. Gladden*, — N.C. —, 340 S.E.2d 673 (1986).

Where defendant in a capital case presented evidence, the State had the right to give the final closing argument pursuant to Rule 10 of the General Rules of Practice for the Superior and District Courts. This section did not give defendant the right to respond to the State's argument. *State v. Gladden*, — N.C. —, 340 S.E.2d 673 (1986).

ARTICLE 4.

North Carolina State Bar.

§ 84-15. Creation of North Carolina State Bar as an agency of the State.

CASE NOTES

Effect of Proceedings Before State Bar.

— Where the status of plaintiff's license as an attorney was at issue and was finally adjudicated in proceedings before the State Bar and the Bar Council, and plaintiff did not appeal the Bar's order of disbarment, that judgment was conclusive as to those matters which were

at issue and determined in those proceedings, and plaintiff could not relitigate the identical issue considered and finally determined in the proceedings before the State Bar. *Vann v. North Carolina State Bar*, — N.C. App. —, 339 S.E.2d 95 (1986).

§ 84-28. Discipline and disbarment.

CASE NOTES

I. GENERAL CONSIDERATION.

Loss of Right to Claim Negligence of Attorney by Pursuing Initial Claim. — Where wife had a claim for permanent alimony which was lost by the negligence of her attorney, she then retained another attorney who filed a counterclaim for alimony, and the alimony agreement negotiated by the first attorney was rescinded and a second alimony agreement was

signed, by pursuing her claim for alimony against her husband the wife lost her right to make a claim against the first attorney for his negligence in representing the plaintiff in her original alimony claim. *Stewart v. Herring*, — N.C. App. —, 342 S.E.2d 566 (1986).

II. SANCTIONS.

Sanctions Authorized by Statute Not

Subject to Review. — Where an attorney's sanction, a one-year suspension, was by her own admission authorized by statute, it was not subject to review. *North Carolina State Bar v. Wilson*, 74 N.C. App. 777, 330 S.E.2d 280 (1985).

III. APPEALS.

"Whole Record" Test. — The test for deter-

mining whether the findings of the disciplinary committee are supported by the evidence is the "whole record" test. Under this test there must be substantial evidence, based on a review of the record, to support the committee's findings, conclusions and results. *North Carolina State Bar v. Wilson*, 74 N.C. App. 777, 330 S.E.2d 280 (1985).

§ 84-36. Inherent powers of courts unaffected.

CASE NOTES

Concurrent Power of Supreme Court and Bar to Regulate Conduct of Attorneys. — While questions of propriety and ethics are ordinarily for the consideration of the bar, because that organization was expressly created by the legislature to deal with such questions, nevertheless the power to regulate the conduct

of attorneys is held concurrently by the bar and the Supreme Court. Therefore, in a proper case, the Court may rule on questions concerning the conduct of attorneys. *Gardner v. North Carolina State Bar*, — N.C. —, 341 S.E.2d 517 (1986).

Chapter 87.

Contractors.

ARTICLE 1.

General Contractors.

§ 87-1. "General contractor" defined; exceptions.

Legal Periodicals. —

For comment, "Application of North Carolina's Contractor Licensing Statute to Parallel

Prime Contractors," see 20 Wake Forest L. Rev. 717 (1984).

CASE NOTES

I. GENERAL CONSIDERATION.

The purpose of this Article, etc. —

The purpose of this Article is to deter unlicensed persons from engaging in the construction business. *Spears v. Walker*, 75 N.C. App. 169, 330 S.E.2d 38 (1985).

Applicability of this Article, etc. —

A person is a general contractor if the cost of the undertaking exceeds the statutory limit. *Spears v. Walker*, 75 N.C. App. 169, 330 S.E.2d 38 (1985).

A contractor engages in construction when he undertakes to build an entire building or improve an already existing building. *Reliable Properties, Inc. v. McAllister*, 77 N.C. App. 783, 336 S.E.2d 108 (1985).

Cost of Undertaking Where Contractor Controls Purchases. — Builder, although not licensed as a general contractor, met the threshold criteria of this section, in that he exercised a substantial degree of control by his supervision of construction, his purchase of material, and his selection of material suppliers. And where his purchase of materials alone totalled over \$29,000.00, and the fee for his services and supervision was \$16,785.57, the threshold amount of \$30,000.00 was well exceeded. *Spears v. Walker*, 75 N.C. App. 169, 330 S.E.2d 38 (1985), upholding summary judgment in defendants' favor on grounds that plaintiff was barred from recovery as a matter of law.

II. UNLICENSED CONTRACTORS.

Recovery on Quantum Meruit Precluded. — The same rule which prevented an unlicensed contractor from recovering for breach of a construction contract also denied its recovery on the theory of quantum meruit. *Joe Newton, Inc. v. Tull*, 75 N.C. App. 325, 330 S.E.2d 664 (1985).

Where plaintiff engaged in renovation including the installation of new roofing, correction of dry rot, installation of new storm doors and windows, and the complete renovation of all apartment interiors, the renovation improved already existing buildings and constituted construction within the meaning of this section. And as plaintiff undertook to "superintend or manage" this construction without complying with the licensing requirements of § 87-10, plaintiff was not entitled to recover from defendant on the contract or in quantum meruit. *Reliable Properties, Inc. v. McAllister*, 77 N.C. App. 783, 336 S.E.2d 108 (1985).

Corporation could not enforce its contract on the basis of the individual license of its president and sole shareholder. *Joe Newton, Inc. v. Tull*, 75 N.C. App. 325, 330 S.E.2d 664 (1985).

Cited in *Turner v. Nicholson Properties, Inc.*, — N.C. App. —, 341 S.E.2d 42 (1986).

§ 87-2. Licensing Board; organization.

Legal Periodicals. —

For comment, "Application of North Carolina's Contractor Licensing Statute to Parallel

Prime Contractors," see 20 Wake Forest L. Rev. 717 (1984).

§ 87-8. Records; roster of licensed contractors.

Legal Periodicals. — For comment, "Application of North Carolina's Contractor Licens-

ing Statute to Parallel Prime Contractors," see 20 Wake Forest L. Rev. 717 (1984).

§ 87-10. Application for license; examination; certificate; renewal.

Legal Periodicals. —

For comment, "Application of North Carolina's Contractor Licensing Statute to Parallel

Prime Contractors," see 20 Wake Forest L. Rev. 717 (1984).

CASE NOTES

Purpose. —

The purpose of this section, the North Carolina licensing statute, is to guarantee skill, training and ability to accomplish construction in a safe and workmanlike fashion. *Reliable Properties, Inc. v. McAllister*, 77 N.C. App. 783, 336 S.E.2d 108 (1985).

Unlicensed Party May Not Maintain Action. —

Where plaintiff engaged in renovation including the installation of new roofing, correction of dry rot, installation of new storm doors and windows, and the complete renovation of

all apartment interiors, the renovation improved already existing buildings and constituted construction within the meaning of § 87-1. And as plaintiff undertook to "superintend or manage" this construction without complying with the licensing requirements of this section, plaintiff was not entitled to recover from defendant on the contract or in quantum meruit. *Reliable Properties, Inc. v. McAllister*, 77 N.C. App. 783, 336 S.E.2d 108 (1985).

Applied in *Sartin v. Carter*, 76 N.C. App. 278, 332 S.E.2d 521 (1985).

§ 87-13. Unauthorized practice of contracting; impersonating contractor; false certificate; giving false evidence to Board; penalties.

Legal Periodicals. —

For comment, "Application of North Carolina's Contractor Licensing Statute to Parallel

Prime Contractors," see 20 Wake Forest L. Rev. 717 (1984).

CASE NOTES

Applied in *Sartin v. Carter*, 76 N.C. App. 278, 332 S.E.2d 521 (1985).

Chapter 88.

Cosmetic Art.

Sec.

88-1. Practice of cosmetology regulated; per-

mits for operation of cosmetic art shops.

§ 88-1. Practice of cosmetology regulated; permits for operation of cosmetic art shops.

On and after June 30, 1933, no person or combination of persons shall, for pay or reward, either directly or indirectly, practice or attempt to practice cosmetic art as hereinafter defined in the State of North Carolina without a certificate of registration, either as a registered apprentice or as a registered "cosmetologist," issued pursuant to the provisions of this Chapter by the State Board of Cosmetic Art Examiners hereinafter established and, except as provided in G.S. 88-7.1; the practice of cosmetic art shall not be performed outside of a licensed and regularly inspected beauty establishment.

The operator of a cosmetic art shop, beauty parlor or hairdressing establishment may employ unlicensed personnel to do shampooing only, where the shampooing is done under the supervision of a registered cosmetologist. As used in this paragraph, "shampooing" includes only the application of shampoo to hair and the removal of the shampoo from the hair, and does not include any arranging, dressing, waving, marcelling or other treatment of hair. This paragraph does not apply to barbershops. This paragraph shall not apply to the following counties: Duplin, Guilford, Jones, Lenoir, Mecklenburg, Onslow, Richmond, Sampson.

On and after February 1, 1976, any person, firm or corporation, before establishing or opening a cosmetic art shop not heretofore licensed by the State Board of Cosmetic Art, shall make application to the Board, on forms to be furnished by the Board, for a permit to operate a cosmetic art shop. The shop of such applicant shall be inspected and approved by the State Board of Cosmetic Art by an agent designated for such purpose by the Board before such cosmetic art shop shall be opened for business. It shall be unlawful to open a new cosmetic art shop for the practice of cosmetology until such shop has been inspected, as heretofore required, and determined by the Board to be in compliance with the requirements set forth in this Chapter. Upon the determination by the Board that the applicant has complied with the requirements of this Chapter, the Board shall issue to such applicant a permit to operate a cosmetic art shop. A fee of twenty-five dollars (\$25.00) shall be paid to the Board for the inspection of a cosmetic art shop. Such fee must accompany the application for a permit to operate a cosmetic art shop at the time such application is filed with the Board.

All cosmetic art shops in operation as of February 1, 1976, shall be required to make application to the Board of Cosmetic Art, on forms supplied by the Board, for a permit to operate. The fee required for such permit shall be three dollars (\$3.00) per active booth in said shop.

Thereafter, all permits shall be renewed as of the first day of February of each and every year, and the fee for annual renewal of cosmetic art shop permits shall be as set forth in G.S. 88-21. No permit or certificate shall be transferable from one location to another or from one owner to another at the same location. Each cosmetic art shop permit shall be conspicuously posted within such cosmetic art shop for which same is issued. (1933, c. 179, s. 1; 1973, c. 1481, ss. 1, 2; 1975, c. 7; c. 857, s. 1; 1977, cc. 155, 472; 1981, c. 615, ss.

1, 2; 1983 (Reg. Sess., 1984), c. 990; 1985, c. 125; 1985 (Reg. Sess., 1986), c. 833.)

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective September 1, 1986, deleted a reference to Randolph

County from the last sentence of the second paragraph.

Chapter 89C.

Engineering and Land Surveying.

Sec.

89C-10. (For effective date and applicability date see Editor's note) Board powers.

Sec.

89C-13. (For effective date and applicability date see Editor's note) General requirements for registration.

§ 89C-4. State Board of Registration; appointment; terms.

CASE NOTES

Stated in North Carolina State Bd. of Registration for Professional Eng'rs & Land Sur-

veyors v. FTC, 615 F. Supp. 1155 (E.D.N.C. 1985).

§ 89C-10. (For effective date and applicability date see Editor's note) Board powers.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 977, s. 16 amends this section, but s. 17 of c. 977 provides:

"This act shall become effective October 1, 1986, and shall apply to those candidates sitting for the land surveyors examinations after September 1, 1992. The changes made by this act shall not apply to persons currently holding land surveyor certificates on the effective date of this act."

The amendment by Session Laws 1985 (Reg. Sess., 1986), c. 977, s. 16, inserts a second sentence in subsection (g). As amended by c. 977, s. 16, subsection (g) reads as follows:

"(g) The Board is authorized and empowered to use its funds to establish and conduct instructional programs for persons who are currently registered to practice engineering or land surveying, as well as refresher courses for persons interested in obtaining adequate instruction or programs of study to qualify them for registration to practice engineering or land surveying. The Board may expend its funds for these purposes and is authorized and empow-

ered not only to conduct, sponsor, and arrange for instructional programs, but also to carry out such programs through extension courses or other media, and the Board may enter into plans or agreements with community colleges, institutions of higher learning, both public and private, State and county boards of education, or with the governing authority of any industrial education center for the purpose of planning, scheduling or arranging such courses, instruction, extension courses, or in assisting in obtaining courses of study or programs in the field of engineering and land surveying. The Board shall make every effort practical to encourage the educational institutions in this State to offer courses necessary to complete the educational requirements of this Chapter. For the purpose of carrying out these objectives, the Board is authorized to make and promulgate such rules and regulations as may be necessary for such educational programs, instruction, extension services, or for entering into plans or contracts with persons or educational and industrial institutions."

§ 89C-13. (For effective date and applicability date see Editor's note) General requirements for registration.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 977, ss. 1 to 15 amends this section, but s. 17 of c. 977 provides:

"This act shall become effective October 1, 1986, and shall apply to those candidates sitting for the land surveyors examinations after September 1, 1992. The changes made by this

act shall not apply to persons currently holding land surveyor certificates on the effective date of this act."

The amendment by Session Laws 1985 (Reg. Sess., 1986), c. 977, ss. 1 to 15, inserts "(shall meet one):" at the end of the introductory language of subdivisions (a)(1), (a)(2), (b)(1) and

§ 89C-10 has a delayed effective date. See notes for date.

§ 89C-13 has a delayed effective date. See notes for date.

(b)(2); adds three sentences at the end of paragraph (b)(1)a; rewrites paragraph (b)(1)b; in paragraph (b)(1)d substitutes "seven years" for "six years" and "six years" for "four years"; deletes paragraph (b)(1)e, relating to the submission of exhibits, drawings, etc.; inserts a comma following the word "event" in the second sentence of paragraph (b)(1)f; adds "and the two four-hour examinations on the fundamentals of land surveying" at the end of the first sentence of paragraph (b)(1)g; adds a sentence at the end of subdivision (b)(1), following paragraphs a through h; rewrites paragraph (b)(2)a; deletes the comma following "equivalent curricula in surveying" and substitutes "examinations" for "examination" in paragraph (b)(2)b; rewrites paragraph (b)(2)c; and adds a sentence at the end of subdivision (b)(2), following paragraphs a through c. As amended by c. 977, ss. 1 to 15, the section reads as follows:

"§ 89C-13. General requirements for registration.

"(a) Engineer Applicant. — To be eligible for admission to examination for professional engineer an applicant must be of good character and reputation. An applicant desiring to take the examination in the fundamentals of engineering only must submit three character references. An applicant desiring to take the examination in the principles and practice of engineering must submit five references, two of whom shall be professional engineers having personal knowledge of his engineering experiences.

"The following shall be considered as minimum evidence satisfactory to the Board that the applicant is qualified for registration:

"(1) As a professional engineer (shall meet one):

"a. Registration by Comity or Endorsement. — A person holding a certificate of registration to engage in the practice of engineering, on the basis of comparable qualifications, issued to him by a proper authority of a state, territory, or possession of the United States, the District of Columbia, or of Canada, who in the opinion of the Board, meets the requirements of this Chapter, based on verified evidence may, upon application, be registered without further examination.

"A person holding a certificate of qualification issued by the Committee on National Engineering Certification of the National Council of Engineering Examiners, whose qualifications meet the requirements of this Chapter,

may upon application, be registered without further examination.

"b. E.I.T. Certificate, Experience, and Examination. — A holder of a certificate of engineer-in-training issued by the Board, and with a specific record of an additional four years or more of progressive experience on engineering projects of a grade and character which indicates to the Board that the applicant may be competent to practice engineering, shall be admitted to an eight-hour examination in the principles and practices of engineering. Upon passing such examination, the applicant shall be granted a certificate of registration to practice professional engineering in this State, provided he is otherwise qualified.

"c. Graduation, Experience, and Examination. — A graduate of an engineering curriculum of four years or more approved by the Board as being of satisfactory standing, and with a specific record of an additional four years or more of progressive experience on engineering projects of a grade and character which indicates to the Board that the applicant may be competent to practice engineering, shall be admitted to an eight-hour written examination in the fundamentals of engineering, and an eight-hour written examination in the principles and practices of engineering. Upon passing such examinations, the applicant shall be granted a certificate of registration to practice professional engineering in this State, provided he is otherwise qualified.

"d. Graduation, Experience, and Examination. — A graduate of an engineering or related science curriculum of four years or more, other than the ones approved by the Board as being of satisfactory standing or with an equivalent education and engineering experience satisfactory to the Board and with a specific record of eight years or more of progressive experience on engineering projects of a grade and character which indicates to the Board that the applicant may be competent in the fundamentals of engineering, shall

be admitted to an eight-hour written examination in the fundamentals of engineering, and an eight-hour written examination in the principles and practices of engineering. Upon passing such examinations, the applicant shall be granted a certificate of registration to practice professional engineering in this State, provided he is otherwise qualified.

- "e. Long-Established Practice. — An individual with a specific record of 20 years of more of progressive experience on engineering projects of a grade and character which indicates to the Board that the applicant may be competent to practice engineering shall be admitted to an eight-hour written examination in the principles and practice of engineering. Upon passing such examination, the applicant shall be granted a certificate of registration to practice professional engineering in this State, provided he is otherwise qualified.

"At its discretion the Board may require an applicant to submit exhibits, drawings, designs, or other tangible evidence of engineering work executed by him and which he personally accomplished or supervised.

"The following shall be considered as minimum evidence that the applicant is qualified for certification:

- "(2) As an engineer-in-training (shall meet one):

"a. Graduation and Examination. — A graduate of an engineering curriculum or related science curriculum of four years or more, approved by the Board as being of satisfactory standing, shall be admitted to an eight-hour written examination in the fundamentals of engineering. The applicant shall be notified if the examination was passed or not passed and if passed he shall be certified as an engineer-in-training, if he is otherwise qualified.

"b. Graduation, Experience, and Examination. — A graduate of an engineering or related science curriculum of four years or more, other than the ones approved by the Board as being of satisfactory standing, or with equivalent education and engineering experience satisfactory to the Board and with a specific record of four or

more years of progressive experience on engineering projects of a grade and character satisfactory to the Board, shall be admitted to an eight-hour written examination in the fundamentals of engineering. The applicant shall be notified if the examination was passed or not passed and if passed he shall be certified as an engineer-in-training if he is otherwise qualified.

"(b) Land Surveyor Applicant. — To be eligible for admission to examination for land surveyor-in-training, or registered land surveyor, an applicant must be of good character and reputation and shall submit five references with his application for registration as a land surveyor, two of which references shall be registered land surveyors having personal knowledge of his land surveying experience, or in the case of an application for certification as a land surveyor-in-training by three references, one of which shall be a registered land surveyor having personal knowledge of the applicant's land surveying experience.

"The evaluation of a land surveyor applicant's qualifications shall involve a consideration of his education, technical and land surveying experience, exhibits of land surveying projects with which he has been associated, recommendations by references, and reviewing of these categories during an oral examination. The land surveyor applicant's qualifications may be reviewed at an interview if the Board deems it necessary. Educational credit for institute courses, correspondence courses, etc., shall be determined by the Board.

"The following shall be considered a minimum evidence satisfactory to the Board that the applicant is qualified for registration as a land surveyor or for certification as a land surveyor-in-training, respectively:

- "(1) As a registered land surveyor (shall meet one):

"a. Rightful possession of a B.S. degree in surveying or other equivalent curricula, all approved by the Board and a record satisfactory to the Board of one year or more of progressive practical experience one year of which shall have been under a practicing registered land surveyor and satisfactorily passing such oral and written examination, taken in the presence of and required by the Board, all of which shall determine and indicate that the candidate is competent to practice land surveying. The applicant may elect to take the first examination (Surveying

Fundamentals) immediately after obtaining the B.S. degree at the first regularly scheduled examination thereafter. Upon passing the first examination and successful completion of the experience required by this subdivision, the applicant may take the second examination (Principles and Practices of Land Surveying). An applicant who passes both examinations and completes the educational and experience requirements of this subdivision shall be granted registration as a land surveyor.

- "b. Rightful possession of an associate degree in surveying technology approved by the Board and a record satisfactory to the Board of three years of progressive practical experience, two years of which shall have been under a practicing registered land surveyor, and satisfactorily passing such written and oral examination taken in the presence of and as required by the Board, all of which shall determine and indicate that the candidate is competent to practice land surveying. The applicant may elect to take the first examination (Surveying Fundamentals) immediately after obtaining the associate degree at the first regularly scheduled examination thereafter. Upon passing the first examination and successfully completing two years of progressive practical experience under a practicing registered land surveyor, the applicant may elect to take the second examination (Principles and Practices of Land Surveying) prior to, during, or after completion of the additional experience required by this subdivision. An applicant who passes both examinations and successfully completes the educational and experience requirements of this subdivision shall be granted registration as a land surveyor.
- "c. Land Surveyor-in-Training Certificate, Experience, and Examination. — A holder of a certificate of land surveyor-in-training issued by the Board, and with a specific record of an additional two years or more of progressive surveying experience, one year of which shall have been under a practicing

registered land surveyor, of a grade and character which indicates to the Board that the applicant may be competent to practice land surveying, shall be admitted to two four-hour examinations. Upon passing such examinations, the applicant shall be granted a certificate of registration to practice land surveying in this State, provided he is otherwise qualified.

- "d. Graduation from a high school or the completion of a high school equivalency certificate and a record satisfactory to the Board of seven years of progressive practical experience, six years of which shall have been under a practicing registered land surveyor, and satisfactorily passing such oral and written examination written in the presence of and required by the Board, all of which shall determine and indicate that the candidate is competent to practice land surveying.
- "e. Repealed by Session Laws 1985 (Reg. Sess., 1986), c. 977, s. 7.
- "f. Registration by Comity or Endorsement. — A person holding a certificate of registration to engage in the practice of land surveying issued on comparable qualifications from a state, territory, or possession of the United States will be given comity considerations. However, he may be asked to take such examinations as the Board deems necessary to determine his qualifications, but in any event, he shall be required to pass a written examination of not less than four hours' duration, which shall include questions on laws, procedures, and practices pertaining to the practice of land surveying in North Carolina.
- "g. A licensed professional engineer who can satisfactorily demonstrate to the Board that his formal academic training in acquiring a degree and field experience in engineering includes land surveying, to the extent necessary to reasonably qualify the applicant in the practice of land surveying, may apply for and may be granted permission to take the two four-hour examinations on the principles and practices of land surveying and the two four-hour exami-

nations on the fundamentals of land surveying. Upon satisfactorily passing the examinations, the applicant will be granted a license to practice land surveying in the State of North Carolina.

- "h. Professional Engineers in Land Surveying. — Any person presently licensed to practice professional engineering under this Chapter shall upon his application be licensed to practice land surveying, providing his written application is filed with the Board within one year next after June 19, 1975.

"The Board shall require an applicant to submit exhibits, drawings, plats or other tangible evidence of land surveying work executed by him under proper supervision and which he has personally accomplished or supervised.

- "(2) As a land surveyor-in-training (shall meet one):

- "a. Rightful possession of an associate degree in surveying technology approved by the Board and satisfactorily passing a written or oral examination taken in the pres-

ence of and as required by the Board.

- "b. Rightful possession of a B.S. degree in surveying or other equivalent curricula in surveying all approved by the Board and satisfactorily passing such oral and written examinations written in the presence of and required by the Board.

- "c. Graduation from high school or the completion of a high school equivalency certificate and a record satisfactory to the Board of five years of progressive, practical experience, four years of which shall have been under a practicing registered land surveyor and satisfactorily passing oral and written examinations taken in the presence of and as required by the Board.

"The Board shall require an applicant to submit exhibits, drawings, plats, or other tangible evidence of land surveying work executed by him under proper supervision and which he has personally accomplished or supervised."

§ 89C-20. Rules of professional conduct.

CASE NOTES

Stated in North Carolina State Bd. of Registration for Professional Eng'rs & Land Sur-

veyors v. FTC, 615 F. Supp. 1155 (E.D.N.C. 1985).

Chapter 90.

Medicine and Allied Occupations.

Article 1A.

Treatment of Minors.

Sec.

90-21.5. Minor's consent sufficient for certain medical health services.

ARTICLE 1.

Practice of Medicine.

§ 90-18. Practicing without license; practicing defined; penalties.

CASE NOTES

IV. Naturopaths.

I. GENERAL CONSIDERATION.

Lack of Criminal Intent Not a Defense. — The burden rested upon defendants to know whether their conduct was prohibited by this section, and because a lack of criminal intent does not constitute a valid defense, the court was under no duty to instruct the jury on the defendants' intent. *State v. Howard*, 78 N.C. App. 262, 337 S.E.2d 598 (1985).

Unorthodox Treatment of Terminally Ill. — This section is not unconstitutional on the grounds that the terminally ill have a fundamental right to choose unorthodox medical treatment unconstitutionally infringes upon this fundamental right. *State v. Howard*, 78 N.C. App. 262, 337 S.E.2d 598 (1985).

Burden of Proving Exception. — Once the State produces evidence of one committing acts that satisfy the definition of "practicing medicine or surgery" within the meaning of this section, it is incumbent upon defendant to in-

troduce evidence that his actions fell within one of the exceptions thereto. *State v. Howard*, 78 N.C. App. 262, 337 S.E.2d 598 (1985).

Instruction that Defendant Did Not Fall within Exception. — If the defendant fails to produce evidence that his actions fell within one of the exceptions, the jury need not consider the exceptions to the statute and a jury instruction to that effect is a correct statement of the law. *State v. Howard*, 78 N.C. App. 262, 337 S.E.2d 598 (1985).

IV. NATUROPATHS.

Prosecution Not Unconstitutionally Selective. — State's prosecution against defendants, who held themselves out as naturopathic practitioners and treated cancers, did not constitute selective prosecution in violation of their rights to equal protection under the Fourteenth Amendment. *State v. Howard*, 78 N.C. App. 262, 337 S.E.2d 598 (1985).

ARTICLE 1A.

Treatment of Minors.

§ 90-21.5. Minor's consent sufficient for certain medical health services.

(a) Any minor may give effective consent to a physician licensed to practice

medicine in North Carolina for medical health services for the prevention, diagnosis and treatment of (i) venereal disease and other diseases reportable under G.S. 130A-135, (ii) pregnancy, (iii) abuse of controlled substances or alcohol, and (iv) emotional disturbance. This section does not authorize the inducing of an abortion, performance of a sterilization operation, or admission to a 24-hour facility licensed under Article 2 of Chapter 122C of the General Statutes except as provided in G.S. 122C-222. This section does not prohibit the admission of a minor to a treatment facility upon his own written application in an emergency situation as authorized by G.S. 122C-222.

(1971, c. 35; 1977, c. 582, s. 2; 1983, c. 302, s. 2; 1985, c. 589, s. 31; 1985 (Reg. Sess., 1986), c. 863, s. 4.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective August 1, 1986, substituted "or admission to a 24-hour facility licensed under Article

2 of Chapter 122C of the General Statutes except as provided in G.S. 122C-222" for "commitment to a mental institution or hospital for confinement or treatment of a mental condition" at the end of the second sentence of subsection (a).

CASE NOTES

A state can not require a minor to obtain parental consent for an abortion unless it provides an alternative procedure whereby authorization can be obtained for the abortion. North Carolina has no such alternative procedure. *Wilkie v. Hoke*, 609 F. Supp. 241 (W.D.N.C. 1985).

Minor plaintiff's common law ability to void agreement to arbitrate, one of the provisions of an informed consent form which she signed in consenting to an abortion, was not changed by statute and did not deprive her of her constitutional right to an abortion. *Wilkie v. Hoke*, 609 F. Supp. 241 (W.D.N.C. 1985).

ARTICLE 1B.

Medical Malpractice Actions.

§ 90-21.11. Definition.

Legal Periodicals. —

For 1984 survey, "North Carolina Court of Appeals Recognizes Wrongful Birth and Wrongful Life Claims," see 63 N.C.L. Rev. 1327 (1985).

For note suggesting the need for a new tort of breach of confidence, in light of *Watts v. Cumberland County Hospital System*, 75 N.C. App. 1, 330 S.E.2d 242 (1985), see 8 Campbell L. Rev. 145 (1985).

CASE NOTES

The unauthorized disclosure of a patient's confidences, such as communications of the patient's case with other doctors, by a health care provider such as a certified marital and family therapist, constituted medical mal-

practice. *Watts v. Cumberland County Hosp. Sys.*, 75 N.C. App. 1, 330 S.E.2d 242, cert. denied as to additional issues, 314 N.C. 548, 335 S.E.2d 27 (1985).

§ 90-21.12. Standard of health care.

Legal Periodicals. —
For 1984 survey, "North Carolina Court of Appeals Recognizes Wrongful Birth and Wrongful Life Claims," see 63 N.C.L. Rev. 1327 (1985).
For note suggesting the need for a new tort of breach of confidence, in light of *Watts v.*

Cumberland County Hospital System, 75 N.C. App. 1, 330 S.E.2d 242 (1985), see 8 Campbell L. Rev. 145 (1985).
For article, "The American Medical Association vs. The American Tort System," see 8 Campbell L. Rev. 241 (1986).

CASE NOTES

What Is Malpractice. — Malpractice consists of any professional misconduct, unreasonable lack of skill or fidelity in professional or fiduciary duties, evil practice, or illegal or immoral conduct. *Watts v. Cumberland County Hosp. Sys.*, 75 N.C. App. 1, 330 S.E.2d 242, cert. denied as to additional issues, 314 N.C. 548, 335 S.E.2d 27 (1985).
Showing required. —
In any medical malpractice action, the plaintiff must show, by the greater weight of the evidence, that the defendant health care provider had a duty to conform to a certain standard of conduct and that a breach of that duty proximately caused an injury. *Watts v. Cumberland County Hosp. Sys.*, 75 N.C. App. 1, 330 S.E.2d 242, cert. denied as to additional issues, 314 N.C. 548, 335 S.E.2d 27 (1985).
Standard Must be Established, etc. —
In accord with 1st paragraph in 1985 Cum. Supp. See *Watts v. Cumberland County Hosp. Sys.*, 75 N.C. App. 1, 330 S.E.2d 242, cert. denied as to additional issues, 314 N.C. 548, 335 S.E.2d 27 (1985).
As to application of res ipsa loquitur in medical malpractice actions, see *Schaffner v. Cumberland County Hosp. Sys.*, — N.C. App. —, 336 S.E.2d 116 (1985).

A physician's assistant is not subject to the same standard of practice as a medical doctor. *Paris v. Kreitz*, 75 N.C. App. 265, 331 S.E.2d 234, cert. denied, 315 N.C. 185, 337 S.E.2d 858 (1985).
Testimony of Priest as to Standard of Care for Family and Marital Therapists. —
In a medical malpractice action against a certified family and marital therapist, the court acted under a misapprehension of law in concluding that an expert witness, who was also a priest, was not qualified to testify about the relevant standard of care simply because he was not certified as a family and marital therapist. The court should have determined the witness' qualifications by ascertaining whether, based on his education and experience, he had adequate knowledge of the standards of practice among pastoral, marital and family therapists in the same community during the same period of time to be of help to the jury. *Watts v. Cumberland County Hosp. Sys.*, 75 N.C. App. 1, 330 S.E.2d 242, cert. denied as to additional issues, 314 N.C. 548, 335 S.E.2d 27 (1985).

§ 90-21.13. Informed consent to health care treatment or procedure.

Legal Periodicals. —
For note suggesting the need for a new tort of breach of confidence, in light of *Watts v. Cumberland County Hospital System*, 75 N.C. App. 1, 330 S.E.2d 242 (1985), see 8 Campbell L. Rev. 145 (1985).

For article, "The American Medical Association vs. The American Tort System," see 8 Campbell L. Rev. 241 (1986).

§ 90-21.14. First aid or emergency treatment; liability limitation.

Legal Periodicals. —

For 1984 survey, "North Carolina Court of Appeals Recognizes Wrongful Birth and

Wrongful Life Claims," see 63 N.C.L. Rev. 1327 (1985).

ARTICLE 1C.

Physicians and Hospital Reports.

§ 90-21.20. Reporting by physicians and hospitals of wounds, injuries and illnesses.

Editor's Note. — This Article, as enacted by Session Laws 1971, c. 4, and amended by Session Laws 1971, c. 594, was applicable to New Hanover and Alamance Counties only, and was therefore not codified. The 1971 act was amended by Session Laws 1977, c. 31, and by Session Laws 1977, c. 843, s. 1, effective July 1, 1977, and is now applicable to thirty counties. The 1977 acts having rendered the 1971 act general within the definition adopted for the General Statutes, this Article is now codified.

Session Laws 1971, c. 4, s. 2, as amended by Session Laws 1971, c. 594; 1977, c. 31, s. 1; and 1977, c. 843, s. 1, now provides: "This act shall apply only to Alamance, Avery, Beaufort, Buncombe, Craven, Davidson, Davie, Durham, Forsyth, Gaston, Guilford, Hertford, Hyde, Iredell, Martin, Mecklenburg, Montgomery, New Hanover, Onslow, Polk, Randolph, Robeson, Rockingham, Rowan, Stanly, Stokes, Surry, Union, Wake and Wayne Counties."

ARTICLE 5.

North Carolina Controlled Substances Act.

§ 90-86. Title of Article.

CASE NOTES

Cited in *State v. Muncy*, — N.C. App. —, 339 S.E.2d 466 (1986).

§ 90-87. Definitions.

CASE NOTES

I. GENERAL CONSIDERATION.

Applied in *State v. Johnson*, 78 N.C. App. 68, 337 S.E.2d 81 (1985).

II. "DELIVER" OR "DELIVERY."

"Deliver" means actual, constructive, or attempted transfer from one person to another of a controlled substance. *State v. Thrift*, 78 N.C. App. 199, 336 S.E.2d 861 (1985).

Evidence of Constructive Delivery Held Sufficient. — Evidence that defendant al-

lowed agent to pick up a bag of cocaine from scales and place it under bed "for security purposes," from where the agent later retrieved it, was sufficient evidence of constructive delivery to get to the jury for its evaluation and determination as to whether defendant knowingly delivered 400 grams or more of a mixture containing cocaine. *State v. Thrift*, 78 N.C. App. 199, 336 S.E.2d 861 (1985).

Remuneration Need Not Be Shown. — To prove delivery, the State is not required to prove that defendant received remuneration

for the transfer. *State v. Thrift*, 78 N.C. App. 199, 336 S.E.2d 861 (1985).

III. "MANUFACTURE."

"Processing" is to subject the controlled substance to a particular method, system, technique of preparation or treatment to bring about a desired result. *State v. Muncy*, — N.C. App. —, 339 S.E.2d 466 (1986).

When Intent to Distribute Is Necessary Element. — Intent to distribute is not a necessary element of the offense of manufacturing a controlled substance unless the manufacturing activity is preparation or compounding. *State v. Muncy*, — N.C. App. —, 339 S.E.2d 466 (1986).

In those cases where production, propagation, conversion or processing of a controlled substance is involved, the intent of the defendant, either to distribute or consume personally, will be irrelevant and does not form an element of the offense. *State v. Muncy*, — N.C. App. —, 339 S.E.2d 466 (1986).

The intent to distribute was not necessary for a violation of subdivision (15) of this section, where defendant was indicted for the cutting of cocaine (dilution of a controlled substance). *State v. Muncy*, — N.C. App. —, 339 S.E.2d 466 (1986).

Evidence Sufficient to Show Manufacture of Heroin. — Evidence held ample to give rise to a reasonable inference that defendant manufactured heroin by packing controlled substance. *State v. Perry*, — N.C. —, 340 S.E.2d 450 (1986).

IV. "MARIJUANA."

Failure of Defendant to Show Material Was Not "Marijuana". — Trial court did not err in permitting case in which 12,410 pounds of marijuana plants, including stalks, and plastic pipes, was seized, where defendant failed to show that enough of the material seized did not qualify as marijuana. *State v. Grainger*, 78 N.C. App. 123, 337 S.E.2d 77, supersedeas granted, 315 N.C. 186, 338 S.E.2d 107 (1985).

§ 90-89. Schedule I controlled substances.

CASE NOTES

Cited in *State v. Pulliam*, 78 N.C. App. 129, 336 S.E.2d 649 (1985).

§ 90-94. Schedule VI controlled substances.

CASE NOTES

Cited in *State v. Damon*, 78 N.C. App. 421, 337 S.E.2d 170 (1985).

§ 90-95. Violations; penalties.

CASE NOTES

I. GENERAL CONSIDERATION.

Section Is Constitutional. —

Subsection (h)(4) of this section is not unconstitutional under North Carolina Const., Art. I, § 6, the separation of power clauses, or under Art. I, § 19, the law of the land provision. *State v. Perry*, — N.C. —, 340 S.E.2d 450 (1986).

The imposition of harsher penalties for the possession of a mixture of controlled substances with a larger mixture of lawful materials has a rational relation to a valid state objective, that is, the deterrence of large scale distribution of drugs. *State v. Perry*, — N.C. —, 340 S.E.2d 450 (1986).

Purpose. — One of the purposes of the Controlled Substances Act is to deter dealers in illicit drugs. *State v. Horton*, 75 N.C. App. 632, 331 S.E.2d 215, cert. denied, 314 N.C. 672, 335 S.E.2d 497 (1985).

Possession, manufacturing, and transporting heroin are separate and distinct offenses. Further, when a person commits any one of these offenses which involves four grams or more of heroin, he is guilty of trafficking. *State v. Perry*, — N.C. —, 340 S.E.2d 450 (1986).

Where there existed only one plot or plan, scheme or conspiracy, covering both possessing marijuana and manufacturing mar-

ijuana, the defendant could only be sentenced for one count of conspiracy. *Sanderson v. Rice*, 777 F.2d 902 (4th Cir. 1985).

Possession and Sale of Heroin and Cocaine. — Although defendant possessed both heroin and cocaine at the same time and place, and sold both substances in the same transaction, he could be lawfully convicted of two possessing offenses and two selling offenses. *State v. Horton*, 75 N.C. App. 632, 331 S.E.2d 215, cert. denied, 314 N.C. 672, 335 S.E.2d 497 (1985).

Failure of Defendant to Show Material Was Not "Marijuana". — Trial court did not err in permitting case in which 12,410 pounds of marijuana plants, including stalks, and plastic pipes, was seized, where defendant failed to show that enough of the material seized did not qualify as marijuana. *State v. Grainger*, 78 N.C. App. 123, 337 S.E.2d 77, supersedeas granted, 315 N.C. 186, 338 S.E.2d 107 (1985).

Evidence of Other Drug Violations. —

Where evidence of defendant's bad character related in part to his activities in the illegal drug trade, it bore a reasonable relationship to the purposes of sentencing for offenses under this section by demonstrating his increased culpability and was a proper aggravating factor. *State v. Perry*, — N.C. —, 340 S.E.2d 450 (1986).

Intent to Sell as Aggravating Factor. —

Intent to sell is not an element of manufacturing, transporting, or possessing 28 grams or more of heroin, the reason a person possesses, manufactures, or transports the heroin being irrelevant; therefore, the trial judge properly found as an aggravating factor that defendant had the specific intent to sell the heroin that he possessed. *State v. Perry*, — N.C. —, 340 S.E.2d 450 (1986).

Sentence Greater Than Presumptive Term. —

In cases in which a statute mandates that an offender be punished as a felon of one of the classifications of § 15A-1340.4(f), but sets a minimum sentence greater than the presumptive sentence established for the appropriate class of felony therein, the minimum sentence set out in the criminal statute becomes the presumptive sentence for purposes of sentencing under the Fair Sentencing Act. Therefore, in order to impose a sentence in excess of the minimum prescribed by paragraph (h)(4)c of this section (45 years and \$500,000), it is necessary that the trial judge make proper findings of factors in aggravation and mitigation and find that the aggravating factors outweigh any mitigating factors. *State v. Perry*, — N.C. —, 340 S.E.2d 450 (1986).

Applied in *State v. Ruiz*, 77 N.C. App. 425, 335 S.E.2d 32 (1985); *State v. Diaz*, 78 N.C. App. 488, 337 S.E.2d 147 (1985); *State v. Damon*, 78 N.C. App. 421, 337 S.E.2d 170

(1985); *State v. Stallings*, — N.C. —, 342 S.E.2d 519 (1986).

Cited in *State v. Norman*, 76 N.C. App. 623, 334 S.E.2d 247 (1985); *State v. Seagroves*, 78 N.C. App. 49, 336 S.E.2d 684 (1985); *State v. Sessoms*, — N.C. App. —, 339 S.E.2d 458 (1986).

II. MANUFACTURE.

When Intent to Distribute, etc. —

In those cases where production, propagation, conversion or processing of a controlled substance are involved, the intent of the defendant, either to distribute or consume personally, will be irrelevant and does not form an element of the offense. *State v. Muncy*, — N.C. App. —, 339 S.E.2d 466 (1986).

Intent to distribute is not a necessary element of the offense of manufacturing a controlled substance unless the manufacturing activity is preparation or compounding. *State v. Muncy*, — N.C. App. —, 339 S.E.2d 466 (1986).

Possession of controlled substance with intent to manufacture it is separate and distinct offense from possession of such substance with the intent to transfer it. *State v. Johnson*, — N.C. App. —, 337 S.E.2d 81 (1985).

Evidence Sufficient, etc. —

Evidence held ample to give rise to a reasonable inference that defendant manufactured heroin by packing controlled substance. *State v. Perry*, — N.C. —, 340 S.E.2d 450 (1986).

III. SALE OR DELIVERY.

Sale and delivery of narcotics are separate offenses. *State v. Thrift*, 78 N.C. App. 199, 336 S.E.2d 861 (1985).

Indictment for sale and/or delivery of a controlled substance must name the person to whom the defendant allegedly sold or delivered. *State v. Pulliam*, 78 N.C. App. 129, 336 S.E.2d 649 (1985).

Verdict finding that defendant "feloniously did sell or deliver" cocaine was fatally defective and ambiguous. *State v. McLamb*, 313 N.C. 572, 330 S.E.2d 476 (1985).

Verdict in disjunctive for "sale or delivery" of LSD was ambiguous and fatally defective, and would require a new trial. *State v. Pulliam*, 78 N.C. App. 129, 336 S.E.2d 649 (1985).

IV. POSSESSION.

A. In General.

Types of Possession. —

In accord with main volume. See *State v. Weldon*, 314 N.C. 701, 333 S.E.2d 701 (1985); *State v. Anderson*, 76 N.C. App. 434, 333 S.E.2d 762 (1985).

Possession may be in a single individual or in combination with another. *State v. An-*

derson, 76 N.C. App. 434, 333 S.E.2d 762 (1985).

Elements of Felonious Possession. — Felonious possession of a controlled substance has two essential elements. The substance must be possessed, and the substance must be knowingly possessed. *State v. Weldon*, 314 N.C. 701, 333 S.E.2d 701 (1985).

Establishing Possession. —

In accord with first paragraph in main volume. See *State v. Weldon*, 314 N.C. 701, 333 S.E.2d 701 (1985); *State v. Anderson*, 76 N.C. App. 434, 333 S.E.2d 762 (1985).

In accord with second paragraph in main volume. See *State v. Weldon*, 314 N.C. 701, 333 S.E.2d 701 (1985).

In accord with third paragraph in main volume. See *State v. Weldon*, 314 N.C. 701, 333 S.E.2d 701 (1985).

In a prosecution for possession of contraband materials, the prosecution is not required to prove actual physical possession of the materials. Proof of constructive possession is sufficient, and that possession need not always be exclusive. *State v. Perry*, — N.C. —, 340 S.E.2d 450 (1986).

Evidence of Possession Held Insufficient in View of Distance from House. — Evidence was not sufficient to convict defendant of manufacturing marijuana on grounds of his supposed constructive possession where the distance from the barn in which marijuana was drying and marijuana patches to defendant's mother's house ranged from 75 yards (225 feet) to 300 yards (900 feet), there was no evidence that defendant owned the land upon which the barn or the marijuana patches were located and positive evidence was introduced that someone other than defendant or his mother owned the land, there was no evidence of defendant's ownership or constructive possession of the main building from which an inference of constructive possession of the barn and marijuana fields could be made, no evidence placed defendant in the barn, the marijuana patches or their environs at any time near his arrest, and paths leading from the house to the barn and patches were not the exclusive means by which these places could be reached. *State v. Beaver*, 77 N.C. App. 734, 336 S.E.2d 112, supersedeas denied, 315 N.C. 185, 337 S.E.2d 854 (1985).

Evidence Sufficient. —

Evidence that defendants were found at house in which marijuana was found, that their fingerprints were found on items within the house, that one defendant had in his possession a key that fit the gate and the door to the house and that his truck, which was present on the premises, contained twine identical to the twine used to tie marijuana plants to stakes and to twine found within the house,

and that the other defendant admitted that he looked after the place was sufficient to permit the jury to find that each of the defendants had constructive possession of the marijuana. *State v. Moore*, — N.C. App. —, 340 S.E.2d 771 (1986).

When the State offered evidence that there was a large quantity of marijuana in house, over which defendants had constructive possession, and there was a field of marijuana 1,400 feet down a path from the house, the jury could conclude that the defendants controlled the field and were bringing marijuana from the field to the house. *State v. Moore*, — N.C. App. —, 340 S.E.2d 771 (1986).

Evidence of defendant's control of apartment where heroin and implements of manufacturing of heroin were found, when considered with evidence of transportation of 82.9 grams of heroin mixture, was ample evidence of such actual and constructive possession as to support a reasonable inference that defendant had the power and intent to control the disposition and use of the contraband and that he possessed and transported heroin in violation of subsection (h)(4)(c) of this section. *State v. Perry*, — N.C. —, 340 S.E.2d 450 (1986).

B. Possession with Intent to Sell or Deliver.

Verdict Form Upheld. — The verdict form finding the defendant guilty of possession with intent to sell or deliver cocaine was not fatally ambiguous. *State v. McLamb*, 313 N.C. 572, 330 S.E.2d 476 (1985).

Elements of possession of LSD with intent to sell or deliver are (i) the unlawful (ii) possession (iii) of a controlled substance (iv) with the intent to sell or deliver it. *State v. Pulliam*, 78 N.C. App. 129, 336 S.E.2d 649 (1985).

V. TRAFFICKING.

Trafficking by possession and trafficking by manufacture are separate offenses under subsection (h) of this section; thus, convictions for both offenses do not violate the Double Jeopardy Clause of the U.S. Constitution. *Sanderson v. Rice*, 777 F.2d 902 (4th Cir. 1985).

The court did not err in entering judgment and sentencing defendant for both trafficking by possession and trafficking by delivery based on the same transaction. *State v. Thrift*, 78 N.C. App. 199, 336 S.E.2d 861 (1985).

Defendant could properly be convicted and punished separately for trafficking in heroin by possessing 28 grams or more of heroin, trafficking in heroin by manufacturing 28 grams or more of heroin, and trafficking in heroin by transporting 28 grams or more of heroin, even when the contraband material in

each separate offense was the same heroin. Thus the trial judge did not err in denying defendant's motion that he direct the State to elect between prosecuting defendant for trafficking in heroin and the offenses of possession, manufacturing and transporting heroin. *State v. Perry*, — N.C. —, 340 S.E.2d 450 (1986).

Amendment by Session Laws 1983, c. 294, s. 6, inserting "cocoa" into subdivision (h) (3) rather than "coca" appears to be a typographical error. *State v. Thrift*, 78 N.C. App. 199, 336 S.E.2d 861 (1985).

Indictment Referring to "Cocoa" Rather than "Coca" Not Defective. — Indictment which alleged trafficking in "a compound obtained from cocoa leaves," which is not a controlled substance, was not so defective as to deprive the trial court of subject matter jurisdiction, where the trial evidence showed over 637 grams of a 35% cocaine mixture, as at no time could defendant realistically have thought that he was charged with trafficking in chocolate. *State v. Thrift*, 78 N.C. App. 199, 336 S.E.2d 861 (1985).

Quantity of Mixture under Paragraph (h)(4)(a). — The evidence presented — that defendant possessed and sold six tinfoil packets to an undercover agent, which, when all their contents were dumped together, weighed 6.65 grams, with one measure of heroin to about 20 measures of sugar — was sufficient to support a conviction under paragraph (h)(4)a of this section, despite defendant's contention that all of the heroin could have been in just one packet, the contents of which weighed no more than one gram and a fraction. *State v. Horton*, 75 N.C. App. 632, 331 S.E.2d 215, cert. denied, 314 N.C. 672, 335 S.E.2d 497 (1985).

Subdivision (h)(5) is permissive, not mandatory, and defendant has no right to a lesser sentence even if he does provide what he believes to be substantial assistance. *State v. Perkerol*, 77 N.C. App. 292, 335 S.E.2d 60 (1985).

Language "has rendered such substantial assistance" in subdivision (h)(5) of this section commonsensically sets no time limit on when such assistance must be rendered. *State v. Perkerol*, 77 N.C. App. 292, 335 S.E.2d 60 (1985).

State's Acceptance of Defendant's Offer Not Prerequisite. — Subdivision (h)(5) of this section does not make the state's acceptance of a defendant's offer a prerequisite to finding substantial assistance. *State v. Perkerol*, 77 N.C. App. 292, 335 S.E.2d 60 (1985).

Visual Inspection with Chemical Testing of Random Sample. — The evidence was sufficient to convict defendant of trafficking by either possession or sale although only three of

the 14 packets of powder involved were chemically analyzed, where the total weight of all 14 packets was in excess of six grams and a State Bureau of Investigation forensic chemist with over 14 years experience visually analyzed all packets in question, chemically tested a random sample, and testified that in his opinion the plastic packet "all contain[ed] similar material which would contain heroin." *State v. Anderson*, 76 N.C. App. 434, 333 S.E.2d 762 (1985).

Inference of Contents from Testing of Part. — Trial court did not err by permitting the offenses of trafficking in heroin to be submitted to the jury, on grounds that there was no evidence that there was heroin mixture in each of 390 separate glassine packets contained in foil-wrapped package so as to raise a reasonable inference that defendant was guilty of trafficking, as an expert chemist may give his opinion as to the whole when only a part of the whole has been tested, and testimony of expert witness, when considered in conjunction with the State's evidence as to possession, manufacturing and transporting, was more than ample to support a reasonable inference of trafficking and that defendant engaged in trafficking more than 28 grams of heroin. *State v. Perry*, — N.C. —, 340 S.E.2d 450 (1986).

The quantity of the entire mixture containing cocaine may be sufficient to constitute a violation of subdivision (h)(3) of this section. *State v. Muncy*, — N.C. App. —, 339 S.E.2d 466 (1986).

Evidence Relative to Other Occasions. — In a prosecution for trafficking in heroin, evidence of the discovery of other controlled substances on other occasions on defendant's premises was admissible to show her guilty knowledge. *State v. Weldon*, 314 N.C. 401, 333 S.E.2d 701 (1985).

Reputation of Defendant's House. — The trial court erred in admitting, at defendant's trial for trafficking in heroin, evidence that defendant's house had a reputation as a place where illegal drugs could be bought and sold. However, the error was not such as to warrant a new trial. *State v. Weldon*, 314 N.C. 401, 333 S.E.2d 701 (1985).

Verdict in Disjunctive Held Ambiguous. — Conviction on the charge of "trafficking in heroin by selling and delivering," where the verdict form read "Guilty of trafficking . . . by selling or delivering in excess of four grams of a mixture containing heroin," could not stand, because use of the disjunctive "or" in the verdict form rendered the verdict inherently ambiguous and deprived defendant of the right to an unanimous verdict. *State v. Anderson*, 76 N.C. App. 434, 333 S.E.2d 762 (1985).

§ 90-95.3. Restitution to law-enforcement agencies for undercover purchases.

CASE NOTES

Restitution of Amount Paid by State Agent for Drug Purchase. — Where defendant was convicted of possession and delivery of cocaine, and the trial court offered him the option of serving a three-year active sentence or serving six months and paying \$600.00 restitution, and where the amount ordered was patently relevant to the pecuniary injury

inflicted upon the State by defendant's criminal activities, in that \$600.00 was paid by an agent of the State for the purchase of cocaine, the restitution ordered was reasonably related to the rehabilitative objectives of probation, and the condition was reasonable and just under the circumstances of the case. *State v. Stallings*, — N.C. —, 342 S.E.2d 519 (1986).

§ 90-98. Attempt and conspiracy; penalties.

CASE NOTES

Number of Agreements Dictates Number of Conspiracies. — The number of agreements, not the number of substantive crimes nor the number of overt acts, dictates the number of conspiracies. *Sanderson v. Rice*, 777 F.2d 902 (4th Cir. 1985).

Where there existed only one plot or plan, scheme or conspiracy, covering both possessing marijuana and manufacturing marijuana, the defendant could only be sentenced for one count of conspiracy. *Sanderson v. Rice*, 777 F.2d 902 (4th Cir. 1985).

Conspiracy to Sell or Deliver. — Although the sale and delivery of controlled substances are separate offenses, where indictment charged defendant with only one offense, namely, conspiracy to sell or deliver, i.e., transfer, cocaine, and it was clear by its verdict that the jury found the defendant guilty of this single offense, the verdict was sufficient to support the judgment. *State v. McLamb*, 313 N.C. 572, 330 S.E.2d 476 (1985).

§ 90-108. Prohibited acts; penalties.

CASE NOTES

Section 14-120 is distinguishable from subdivision (a)(10) of this section, as § 14-120 specifically states that the person violates the statute if he publishes or utters a forged instrument "knowing the same to be falsely forged or counterfeited," and no such language appears in subdivision (a)(10). *State v. Baynard*, — N.C. —, 339 S.E.2d 810 (1986).

Intentional Act. — A person acts intentionally if he desires to cause the consequences of his act or believes that the consequences are substantially certain to result. *State v. Bright*, 78 N.C. App. 239, 337 S.E.2d 87 (1985).

Knowledge of Activity. — A person knows of an activity if he is aware of a high probability of its existence. *State v. Bright*, 78 N.C. App. 239, 337 S.E.2d 87 (1985).

Knowledge that a prescription is false or forged is an essential element of the offense under subdivision (a)(10) of this section. *State*

v. Baynard, — N.C. App. —, 339 S.E.2d 810 (1986).

Maintaining Vehicle Known to Be Used in Drug Offenses. — Under this section, maintaining a vehicle with knowledge that it is resorted to by persons for the use, keeping or selling of controlled substances is a misdemeanor, and maintaining a vehicle with the intent that it be so used is a Class I felony. *State v. Bright*, 78 N.C. App. 239, 337 S.E.2d 87 (1985).

Indictment Held Sufficient. — Where indictment charging an offense under subdivision (a)(10) of this section alleged that the offense was done "intentionally" and used terms implying a specific intent to deceive, it did not need to specifically allege that the defendant presented the false prescription knowing it was false. *State v. Baynard*, — N.C. App. —, 339 S.E.2d 810 (1986).

§ 90-112. Forfeitures.

CASE NOTES

Cited in *State v. Reid*, 76 N.C. App. 668, 334 S.E.2d 235 (1985).

ARTICLE 5B.

Drug Paraphernalia.

§ 90-113.22. Possession of drug paraphernalia.

CASE NOTES

Cited in *State v. Muncy*, — N.C. App. —, 339 S.E.2d 466 (1986).

ARTICLE 6.

Optometry.

§ 90-117.4. Judicial powers; additional data for records.

CASE NOTES

Subpoena Power of Board. — This section clearly gives the board the power, in a proper case, to issue subpoenas requiring the attendance of persons and the production of papers and records. The subpoena authority of the board is limited to any hearing, investigation or proceeding conducted by it. *Bullington v.*

North Carolina State Bd. of Exmrs., — N.C. App. —, 340 S.E.2d 770 (1986).

The authority of the board to enforce its subpoena power necessarily must be decided on a case-by-case basis. *Bullington v. North Carolina State Bd. of Exmrs.*, — N.C. App. —, 340 S.E.2d 770 (1986).

ARTICLE 8.

Chiropractic.

§ 90-154. Grounds for professional discipline.

CASE NOTES

The phrase "unethical conduct" in this section constitutes a sufficiently definite standard so that the Board of Chiropractic Examiners may set policies within it without exercising a legislative function. *Farlow v. North Carolina State Bd. of Chiropractic Exmrs.*, 76 N.C. App. 202, 332 S.E.2d 696, cert. denied and appeal dismissed, 314 N.C. 664, 336 S.E.2d 621, — N.C. —, 337 S.E.2d 582 (1985).

Prescription of Unnecessary Course of Conduct. — "Unethical conduct," which this

section authorizes the Board of Chiropractic Examiners to penalize, includes "dishonorable conduct" in prescribing a course of treatment for patients which is not justified by the injuries they have received but is done to inflate insurance claims. *Farlow v. North Carolina State Bd. of Chiropractic Exmrs.*, 76 N.C. App. 202, 332 S.E.2d 696, cert. denied and appeal dismissed, 314 N.C. 664, 336 S.E.2d 621, — N.C. —, 337 S.E.2d 582 (1985).

ARTICLE 12A.

Podiatrists.

§ 90-202.2. "Podiatry" defined.

CASE NOTES

Cited in *Cooper v. Forsyth County Hosp.*
Auth., 789 F.2d 278 (4th Cir. 1986).

ARTICLE 18A.

Practicing Psychologists.

§ 90-270.16. Prohibited acts.

CASE NOTES

Unwittingly Employing Unlicensed Psychologist. — Provision in insurance contract between plaintiff psychologist and defendant insurer that the policy did not apply to any criminal, fraudulent or malicious act or omission of the insured, along with subsection (c) of this section and § 90-270.17, making it a misdemeanor for a psychologist to employ another psychologist who does not possess a valid license, created an insurmountable bar to plain-

tiff's claim for reimbursement of moneys refunded by him to the Department of Human Resources for services rendered by unlicensed psychologist employed by him, and his asserted lack of knowledge that the psychologist in question was not licensed was not relevant, as there is no such requirement of knowledge explicit or implicit in this section. *Swisher v. American Home Assurance Co.*, — N.C. App. —, 343 S.E.2d 288 (1986).

§ 90-270.17. Violations and penalties.

CASE NOTES

Unwittingly Employing Unlicensed Psychologist. — Provision in insurance contract between plaintiff psychologist and defendant insurer that the policy did not apply to any criminal, fraudulent or malicious act or omission of the insured, along with § 90-270.16(c) and this section, making it a misdemeanor for a psychologist to employ another psychologist who does not possess a valid license, created an insurmountable bar to plaintiff's claim for re-

imbursement of moneys refunded by him to the Department of Human Resources for services rendered by unlicensed psychologist employed by him, and his asserted lack of knowledge that the psychologist in question was not licensed was not relevant, as there is no such requirement of knowledge explicit or implicit in § 90-270.16. *Swisher v. American Home Assurance Co.*, — N.C. App. —, 343 S.E.2d 288 (1986).

ARTICLE 18C.

Marital and Family Therapy Certification Act.

§ 90-270.45. Title of Article.

CASE NOTES

The unauthorized disclosure of a patient's confidences, such as communication of the patient's case with other doctors, by a health care provider such as a certified marital and family therapist, constitutes medical mal-

practice. *Watts v. Cumberland County Hosp. Sys.*, 75 N.C. App. 1, 330 S.E.2d 242, cert. denied as to additional issues, 314 N.C. 548, 335 S.E.2d 27 (1985).

§ 90-270.46. Policy and purpose.

Legal Periodicals. — For note suggesting the need for a new tort of breach of confidence, in light of *Watts v. Cumberland County Hospi-*

tal System, 75 N.C. App. 1, 330 S.E.2d 242 (1985), see 8 *Campbell L. Rev.* 145 (1985).

§ 90-270.47. Definitions.

CASE NOTES

Testimony of Priest as to Standard of Care of Family and Marital Therapists. — In a medical malpractice action against a certified family and marital therapist, the court acted under a misapprehension of law in concluding that an expert witness who was also a priest was not qualified to testify about the relevant standard of care simply because he was not certified as a family and marital therapist. The court should have determined the witness'

qualifications by ascertaining whether, based on his education and experience, he had adequate knowledge of the standards of practice among pastoral, marital and family therapists in the same community during the same period of time to be of help to the jury. *Watts v. Cumberland County Hosp. Sys.*, 75 N.C. App. 1, 330 S.E.2d 242, cert. denied as to additional issues, 314 N.C. 548, 335 S.E.2d 27 (1985).

ARTICLE 22.

Licensure Act for Speech and Language Pathologists and Audiologists.

§ 90-292. Declaration of policy.

CASE NOTES

Speech and language pathology and audiology are two separate and distinct fields. *North Carolina Bd. of Exmrs. v. North Carolina State Bd. of Educ.*, 77 N.C. App. 159, 334 S.E.2d 503 (1985).

Practice of Audiology Where Certified Only in Pathology Not Permitted. — The General Assembly did not intend for one certified by the Department of Public Instruction in

speech and language pathology to practice audiology, as the hearing impaired child would not be receiving the highest possible quality audiological services. It would thus defeat the Legislature's intent if one licensed in one field only were allowed to practice in the other field. *North Carolina Bd. of Exmrs. v. North Carolina State Bd. of Educ.*, 77 N.C. App. 159, 334 S.E.2d 503 (1985).

§ 90-293. Definitions.

CASE NOTES

Speech and language pathology and audiology are two separate and distinct fields. North Carolina Bd. of Exmrs. v. North

Carolina State Bd. of Educ., 77 N.C. App. 159, 334 S.E.2d 503 (1985).

§ 90-294. License required; Article not applicable to certain activities.

CASE NOTES

Speech and language pathology and audiology are two separate and distinct fields. North Carolina Bd. of Exmrs. v. North Carolina State Bd. of Educ., 77 N.C. App. 159, 334 S.E.2d 503 (1985).

Practice of Audiology Where Certified Only in Pathology Not Permitted. — The General Assembly did not intend for one certified by the Department of Public Instruction in

speech and language pathology to practice audiology, as the hearing impaired child would not be receiving the highest possible quality audiological services. It would thus defeat the Legislature's intent if one licensed in one field only were allowed to practice in the other field. North Carolina Bd. of Exmrs. v. North Carolina State Bd. of Educ., 77 N.C. App. 159, 334 S.E.2d 503 (1985).

§ 90-295. Qualifications of applicants for licensure.

CASE NOTES

Speech and language pathology and audiology are two separate and distinct fields. North Carolina Bd. of Exmrs. v. North

Carolina State Bd. of Educ., 77 N.C. App. 159, 334 S.E.2d 503 (1985).

§ 90-297. Registration and issuance of licenses; licenses for persons licensed in other jurisdiction or engaged in practice on October 1, 1975.

CASE NOTES

Speech and language pathology and audiology are two separate and distinct fields. North Carolina Bd. of Exmrs. v. North

Carolina State Bd. of Educ., 77 N.C. App. 159, 334 S.E.2d 503 (1985).

§ 90-298. Temporary license.

CASE NOTES

Cited in North Carolina Bd. of Exmrs. v. North Carolina State Bd. of Educ., 77 N.C. App. 159, 334 S.E.2d 503 (1985).

§ 90-299. Licensee to notify Board of place of practice.**CASE NOTES**

Cited in North Carolina Bd. of Exmrs. v.
North Carolina State Bd. of Educ., 77 N.C.
App. 159, 334 S.E.2d 503 (1985).

§ 90-302. Prohibited acts and practices.**CASE NOTES**

Cited in North Carolina Bd. of Exmrs. v.
North Carolina State Bd. of Educ., 77 N.C.
App. 159, 334 S.E.2d 503 (1985).

Chapter 90C.

Therapeutic Recreation Personnel Certification Act.

(This Chapter is effective January 1, 1990.)

Sec.	Sec.
90C-1. (Effective January 1, 1990) Short title.	90C-11. (Effective January 1, 1990) Certificate renewal.
90C-2. (Effective January 1, 1990) Purpose.	90C-12. (Effective January 1, 1990) Reinstatement.
90C-3. (Effective January 1, 1990) General provisions.	90C-13. (Effective January 1, 1990) Inactive list.
90C-4. (Effective January 1, 1990) Definitions.	90C-14. (Effective January 1, 1990) Revocation, suspension, or denial of certification.
90C-5. (Effective January 1, 1990) State Board of Therapeutic Recreation Certification created.	90C-15. (Effective January 1, 1990) Reciprocity.
90C-6. (Effective January 1, 1990) Powers of the Board.	90C-16. (Effective January 1, 1990) Exemptions.
90C-7. (Effective January 1, 1990) Executive Director.	90C-17. (Effective January 1, 1990) Reports; immunity from suit.
90C-8. (Effective January 1, 1990) The Board may accept contributions, etc.	90C-18. (Effective January 1, 1990) Violations and penalties.
90C-9. (Effective January 1, 1990) Requirements for certification.	90C-19. (Effective January 1, 1990) Enjoining the illegal practices.
90C-10. (Effective January 1, 1990) Certification fees.	

§ 90C-1. (Effective January 1, 1990) Short title.

This Chapter shall be known as the "Therapeutic Recreation Personnel Certification Act". (1985 (Reg. Sess., 1986), c. 966, s. 1.)

Editor's Note. — Section 2 of Session Laws 1985 (Reg. Sess., 1986), c. 966, makes this Chapter effective January 1, 1990.

§ 90C-2. (Effective January 1, 1990) Purpose.

It is the purpose and intent of this Chapter to protect the public from misrepresentation of status by persons who hold themselves out to be "certified therapeutic recreation specialists" or "certified therapeutic recreation assistants". (1985 (Reg. Sess., 1986), c. 966, s. 1.)

Editor's Note. — Section 2 of Session Laws 1985 (Reg. Sess., 1986), c. 966, makes this Chapter effective January 1, 1990.

§ 90C-3. (Effective January 1, 1990) General provisions.

After June 30, 1987, no person shall use the word "certified" with any derivation or combination of the words "Therapy", "Recreation", "Therapeutic Recreator", "Recreation Therapist", "Recreational Therapist", or the initials, "TRS", "TR", "TRA", or other words and/or initials tending to convey the impression that he is certified in the field of therapeutic recreation without first having been certified pursuant to this Chapter. Nor shall he by any verbal claim, advertisement, letterhead, practice, card, or through the use of

any other title represent himself or imply that he is certified. (1985 (Reg. Sess., 1986), c. 966, s. 1.)

Editor's Note. — Section 2 of Session Laws 1985 (Reg. Sess., 1986), c. 966, makes this Chapter effective January 1, 1990.

§ 90C-4. (Effective January 1, 1990) Definitions.

In this Chapter, unless the context otherwise requires, the following definitions shall apply:

- (a) "Board" shall mean the State Board of Therapeutic Recreation Certification.
- (b) "Certified Therapeutic Recreation Assistant" means a person who holds a certificate pursuant to this Chapter as a therapeutic recreation assistant to act under the general supervision of or with consultation from a Certified Therapeutic Recreation Specialist.
- (c) "Certified Therapeutic Recreation Specialist" means a person who holds a certificate pursuant to this Chapter as a therapeutic recreation specialist.
- (d) "Person" means any individual, corporation, partnership, association, unit of government, or other legal entity.
- (e) "Scope of Therapeutic Recreation" includes all direct client services of consultation, research, planning, design, and implementation of specific programs for either individuals or groups that require specific therapeutic recreation education, training, and experience as defined in this Chapter.
- (f) "Therapeutic Recreation" is the use of recreation services that improve, develop, and/or maintain physical, psychological, emotional, and/or social behaviors that assist individuals in establishing and expressing an independent lifestyle.

Comprehensive therapeutic recreation services involve a continuum of care, including:

- (1) Therapy which uses recreation services or opportunities designed as treatment;
- (2) Leisure education which provides opportunities for acquisition of leisure skills, attitudes, and values; and/or
- (3) Recreation which provides opportunities for voluntary participation in leisure activities.

Persons certified under this Chapter may practice in clinical, residential or community settings and may:

- (1) Assess and record the client's individual needs, interests, and abilities;
- (2) Design and implement appropriate therapeutic recreation services for the client; and
- (3) Evaluate, record, and report the client's response to the therapeutic recreation services rendered. (1985 (Reg. Sess., 1986), c. 966, s. 1.)

Editor's Note. — Section 2 of Session Laws 1985 (Reg. Sess., 1986), c. 966, makes this Chapter effective January 1, 1990.

§ 90C-5. (Effective January 1, 1990) State Board of Therapeutic Recreation Certification created.

(a) The North Carolina State Board of Therapeutic Recreation Certification is created.

(b) Composition. — The Board shall consist of seven members appointed as follows:

- (1) Three practicing therapeutic recreation specialists, one each appointed by the Governor, the General Assembly upon the recommendation of the President of the Senate, and the General Assembly upon the recommendation of the Speaker of the House of Representatives;
- (2) One therapeutic recreation specialist who is engaged primarily in providing training for therapeutic recreation specialists or therapeutic recreation assistants and one therapeutic recreation assistant, each appointed by the Governor; and
- (3) Two public members, one appointed by the General Assembly upon the recommendation of the President of the Senate and one appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives.

The Governor shall make his initial appointments after consultation with the North Carolina Recreation and Park Society and other interested persons and thereafter shall make his appointments after consultation with the Board.

(c) Qualifications. — The nonpublic members of the Board shall hold a current certificate. Each nonpublic member of the Board, at the time of his appointment and for at least two years before, shall have been actively engaged in North Carolina in the practice of therapeutic recreation, or in the education and training of graduate or undergraduate students of therapeutic recreation, or in therapeutic recreation research. The first nonpublic members of this Board shall immediately become certified by complying with the provisions of this Chapter.

A public member shall not be a licensed health care professional or an agent or employee of any health care institution, health care insurer, health care professional school, or a member of any allied health profession. For purposes of this subsection, a person enrolled in a program to prepare him to be a licensed health care professional or an allied health professional shall not be eligible to serve as a public member of the Board. The spouse of any person who would be prohibited by this subsection from serving on the Board as a public member shall not serve as a public member of the Board. Public members shall reasonably reflect the population of this State.

(d) Term. — Each member shall be appointed for a term of three years and shall serve until a successor is appointed. Of the members initially appointed, one practicing therapeutic recreation specialist appointed by the Governor, and one public member appointed by the General Assembly upon the recommendation of the President of the Senate shall continue in office for one year; one therapeutic recreation specialist appointed by the General Assembly upon the recommendation of the President of the Senate, one therapeutic recreation assistant appointed by the Governor, and one public member appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives shall continue in office for two years; and one therapeutic recreation specialist appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives and one therapeutic recreation specialist engaged primarily in the education of therapeutic recreation specialists or therapeutic recreation assistants appointed by the Governor shall continue in office for three years. The terms of all initial appointments shall commence on June 30, 1987. No member shall serve more than two consecutive full terms.

(e) Vacancies. — The Governor shall fill vacancies to the Board positions for which he is the appointing authority within 30 days after a position is vacated. The General Assembly shall fill vacancies for which it is the appointing authority in accordance with G.S. 120-122. Appointees shall serve the remainder of the unexpired term and until their successors have been appointed and qualified.

(f) Removal. — The Board may remove any of its members for gross neglect of duty, incompetence, or unprofessional conduct. A member subject to disciplinary proceedings shall be disqualified from Board business until the charges are resolved. The Governor may also remove any member for gross neglect of duty, incompetence, or unprofessional conduct.

(g) Compensation. — Each member of the Board shall receive such per diem compensation and reimbursement for travel and subsistence as shall be set for licensing Board members generally, as provided in G.S. 93B-5.

(h) Officers. — The officers of the Board shall be a chairman, a vice-chairman and other officers deemed necessary by the Board to carry out the purposes of this Chapter. All officers shall be elected annually by the Board for one-year terms and shall serve until their successors are elected and qualified.

(i) Meetings. — The Board shall hold at least two meetings each year to conduct business, and shall adopt rules governing the calling, holding, and conducting of regular and special meetings. A majority of the Board members shall constitute a quorum.

(j) Employees. — The Board may employ necessary personnel for the performance of its functions, and fix their compensation, within the limits of the funds available to the Board.

(k) The total expense of the administration of this Chapter shall not exceed the total income from fees collected pursuant to this Chapter. None of the expenses of the Board, or the compensation or expenses of any officer or any employee of the Board shall be paid or payable out of the general fund. Neither the Board nor any of its officers or employees may incur any expense, debt, or other financial obligation binding upon the State. (1985 (Reg. Sess., 1986), c. 966, s. 1.)

Editor's Note. — Section 2 of Session Laws 1985 (Reg. Sess., 1986), c. 966, makes this Chapter effective January 1, 1990.

§ 90C-6. (Effective January 1, 1990) Powers of the Board.

- (a) The Board shall have the following general powers and duties:
- (1) To administer this Chapter;
 - (2) To issue interpretations of this Chapter;
 - (3) To adopt, amend, or repeal rules and regulations in the manner prescribed by Chapter 150B of the General Statutes, as may be necessary to carry out the provisions of this Chapter;
 - (4) To establish qualifications of, employ, and set the compensation of the Executive Director who shall not be a member of the Board;
 - (5) To employ and fix the compensation of the personnel that the Board determines are necessary to carry out the provisions of this Chapter and to incur other expenses necessary to effectuate this Chapter;
 - (6) To determine the qualifications of persons who are certified pursuant to this Chapter;
 - (7) To issue, renew, deny, suspend, or revoke certificates and carry out any of the other actions authorized by this Chapter;

- (8) To conduct investigations for the purpose of determining whether violations of this Chapter or grounds for decertifying persons who hold certificates pursuant to this Chapter exist;
- (9) To maintain a record of all proceedings and make available to persons who hold a certificate and other concerned parties an annual report of all Board action;
- (10) To set fees for certification, certificate renewal, and other services deemed necessary to carry out the purpose of this Chapter; and
- (11) To adopt a seal containing the name of the Board to be used on certificates and official reports it issues.

(b) The powers and duties enumerated above are granted for the purpose of enabling the Board to protect the public from misrepresentation of certified status as provided in this Chapter and shall be liberally construed to accomplish this objective. (1985 (Reg. Sess., 1986), c. 966, s. 1.)

Editor's Note. — Section 2 of Session Laws 1985 (Reg. Sess., 1986), c. 966, makes this Chapter effective January 1, 1990.

§ 90C-7. (Effective January 1, 1990) Executive Director.

The Executive Director shall deposit all fees payable to the Board in financial institutions designated by the Board as official depositories. The funds shall be deposited in the name of the Board and shall be used to pay all expenses incurred by the Board in carrying out the purposes of this Chapter. The Board shall be audited annually by the State Auditor. (1985 (Reg. Sess., 1986), c. 966, s. 1.)

Editor's Note. — Section 2 of Session Laws 1985 (Reg. Sess., 1986), c. 966, makes this Chapter effective January 1, 1990.

§ 90C-8. (Effective January 1, 1990) The Board may accept contributions, etc.

The Board may accept grants, contributions, devises, bequests, and gifts that shall be kept in a separate fund and shall be used by it to publicize the certification program and its protective benefits to the public. (1985 (Reg. Sess., 1986), c. 966, s. 1.)

Editor's Note. — Section 2 of Session Laws 1985 (Reg. Sess., 1986), c. 966, makes this Chapter effective January 1, 1990.

§ 90C-9. (Effective January 1, 1990) Requirements for certification.

(a) An applicant shall be certified upon satisfactorily showing to the Board that he is competent and knowledgeable about the practice of therapeutic recreation as provided by rules and regulations of the Board.

(b) The Board shall certify any person as a "therapeutic recreation specialist" who meets the following education and experience requirements:

- (1) A baccalaureate degree or higher from an accredited college or university with a major in therapeutic recreation or a major in recre-

ation and an option in therapeutic recreation which includes a field placement requirement; or

- (2) A baccalaureate degree or higher from an accredited college or university with a major in recreation and two years of full-time experience in a clinical, residential, or community-based therapeutic recreation program; or
- (3) A baccalaureate degree or higher from an accredited college or university in one of the recreation-related or allied health fields and five years of full-time experience in a clinical, residential, or community-based therapeutic recreation program. Transcripts must show evidence of 18 semester hours or 27 quarter hours of upper division credits in therapeutic recreation/recreation course work and evidence of appropriate support courses; and

- (4) Passing the Board examination for certification in this classification.

For purposes of this section [subsection], "an option in therapeutic recreation" shall include:

- (1) A minimum of three courses dealing exclusively with therapeutic recreation content;
- (2) A minimum of three courses dealing exclusively with recreation content;
- (3) Completion of a 360-hour field placement experience in a clinical, residential, or community-based therapeutic recreation program under an agency supervisor who is certified by the Board; and
- (4) Completion of supportive course work to include a minimum of 18 semester or 27 quarter hours from four of these six areas: psychology, sociology, physical/biological science, special education, human services, and/or adapted physical education.

(c) The Board shall certify any person as a "therapeutic recreation assistant" who meets the following education and experience requirements:

- (1) An associate of arts degree from an accredited educational institution with a major in therapeutic recreation or a major in recreation and an option in therapeutic recreation which includes a field placement requirement; or
- (2) An associate or arts degree from an accredited educational institution with a major in recreation and one year of full-time experience in a clinical, residential, or community-based therapeutic recreation program; or
- (3) An associate of arts degree or higher from an accredited educational institution with a major in one of the skill areas (arts, dance, drama, music, physical education) and one year of full-time experience in a clinical, residential or community-based therapeutic recreation program; or
- (4) Completion of the National Therapeutic Recreation 750-Hour Training Program for therapeutic recreation personnel, with verification by an official certificate of completion; or
- (5) Four years of full-time experience in a clinical, residential, or community-based therapeutic recreation program; and
- (6) Passing the Board examination for certification in this classification.

For purposes of this subsection, "an option in therapeutic recreation" shall include:

- (1) A minimum of two courses dealing exclusively with therapeutic recreation content;
- (2) A minimum of two courses dealing exclusively with recreation content;
- (3) Completion of a 360-hour field placement experience in a clinical, residential, or community-based therapeutic recreation program under an agency supervisor who is certified by the Board; and

- (4) Completion of supportive course work to include a minimum of 12 semester or 18 quarter hours selected from psychology, sociology, physical/biological sciences, human services, and physical education activity classes.
- (d) The Board may certify any person as a "therapeutic recreation specialist (provisional)" any person who meets the educational requirements of subsection (b) of this section while he is acquiring the experience required for certification or recertification. This certificate may be issued for a period of two years and may not be renewed, except in extraordinary circumstances upon unanimous vote of the Board. (1985 (Reg. Sess., 1986), c. 966, s. 1.)

Editor's Note. — Section 2 of Session Laws 1985 (Reg. Sess., 1986), c. 966, makes this Chapter effective January 1, 1990.

The word "subsection" has been inserted in brackets in the introductory language of the second paragraph of subsection (b) at the direction of the Revisor of Statutes.

§ 90C-10. (Effective January 1, 1990) Certification fees.

Applications for certification shall be made on forms prescribed and furnished by the Board. The required fee for certification shall not exceed the following:

- | | |
|---|---------|
| (1) Application for certification as a therapeutic recreation specialist: | \$50.00 |
| (2) Application for certification as a therapeutic recreation assistant: | \$50.00 |
| (3) Certificate renewal: | \$25.00 |
| (4) Reinstatement of lapsed or expired certificate: | \$25.00 |
| (5) Replacement certificate: | \$10.00 |
- (1985 (Reg. Sess., 1986), c. 966, s. 1.)

Editor's Note. — Section 2 of Session Laws 1985 (Reg. Sess., 1986), c. 966, makes this Chapter effective January 1, 1990.

§ 90C-11. (Effective January 1, 1990) Certificate renewal.

Every certificate issued pursuant to this Chapter shall be renewable every two years. On or before the date, the current certificate expires, a person who desires to continue to represent himself as certified in the field of therapeutic recreation shall apply for certificate renewal to the Board on forms furnished by the Board, shall meet criteria for renewal established by the Board, and shall pay the required fee. Failure to renew the certificate within 30 days after the expiration date shall result in automatic forfeiture of any certification issued pursuant to this Chapter.

The Executive Director shall notify in writing every person at his last known address of the expiration of his certificate and the amount that is required for its two-year renewal. (1985 (Reg. Sess., 1986), c. 966, s. 1.)

Editor's Note. — Section 2 of Session Laws 1985 (Reg. Sess., 1986), c. 966, makes this Chapter effective January 1, 1990.

§ 90C-12. (Effective January 1, 1990) Reinstatement.

A person who has allowed his certificate to lapse by failure to renew it as provided may apply for reinstatement on a form provided by the Board. The Board shall require the applicant to return the completed application with the required fee and to furnish a statement of the reason for failure to apply for renewal prior to the deadline. If the certificate has lapsed for five years or more, the Board shall require the applicant to successfully complete a refresher course approved by the Board. If the Board determines that the certificate should be reinstated, it shall issue a certificate renewal to the applicant. (1985 (Reg. Sess., 1986), c. 966, s. 1.)

Editor's Note. — Section 2 of Session Laws 1985 (Reg. Sess., 1986), c. 966, makes this Chapter effective January 1, 1990.

§ 90C-13. (Effective January 1, 1990) Inactive list.

When a person certified by the Board submits a request for inactive status, the Board shall issue to the person a statement of inactive status and shall place the person's name on the inactive status list. While on that list, the person shall not hold himself out as certified pursuant to this Chapter. When that person desires to be removed from the inactive list and returned to an active list, an application shall be submitted to the Board on a form furnished by the Board and the fee shall be paid for certificate renewal. The Board shall require evidence of competency to resume practice before returning the applicant to the active status. (1985 (Reg. Sess., 1986), c. 966, s. 1.)

Editor's Note. — Section 2 of Session Laws 1985 (Reg. Sess., 1986), c. 966, makes this Chapter effective January 1, 1990.

§ 90C-14. (Effective January 1, 1990) Revocation, suspension, or denial of certification.

The Board may require remedial education, issue of a letter of reprimand, restrict, revoke, or suspend any certificate issued pursuant to this Chapter or deny any application for certification if the Board determines that the applicant:

- (1) Has given false information or has withheld material information from the Board in procuring or attempting to procure a certificate pursuant to this Chapter;
- (2) Has been convicted of, or pleaded guilty or nolo contendere to, any crime that indicates that the person is unfit or incompetent to be certified pursuant to this Chapter;
- (3) Has a mental or physical disability or uses any drugs to a degree that would endanger the public;
- (4) Engaged in conduct that endangers the public health;
- (5) Is unfit or incompetent to be certified pursuant to this Chapter by reason of deliberate or negligent acts or omissions regardless of whether active injury to the patient is established;
- (6) Engages in conduct that deceives, defrauds, or harms the public in the course of claiming certified status or providing therapeutic recreation services; or

- (7) Has willfully violated any provision of this Chapter or of regulations enacted by the Board.

The Board may reinstate a revoked certificate or remove certificate restrictions when it finds that the reasons for revocation or restriction no longer exist, and that the person can reasonably be expected to safely and properly practice therapeutic recreation. (1985 (Reg. Sess., 1986), c. 966, s. 1.)

Editor's Note. — Section 2 of Session Laws 1985 (Reg. Sess., 1986), c. 966, makes this Chapter effective January 1, 1990.

§ 90C-15. (Effective January 1, 1990) Reciprocity.

The Board may grant a certificate, without examination or by special examination to any person who, at the time of application, is certified, registered, or licensed as a recreational therapist by a similar board of another country, state, or territory whose certification, registration, or licensing standards are substantially equivalent to those required by this Chapter. The Board shall determine the substantial equivalence upon which reciprocity is based. (1985 (Reg. Sess., 1986), c. 966, s. 1.)

Editor's Note. — Section 2 of Session Laws 1985 (Reg. Sess., 1986), c. 966, makes this Chapter effective January 1, 1990.

§ 90C-16. (Effective January 1, 1990) Exemptions.

Any person working within the scope of therapeutic recreation, as defined in this Chapter, as a "Therapeutic Recreation Assistant" or as a "Therapeutic Recreation Specialist", prior to June 30, 1987, or the date of the final appointment of the initial membership of the Board, whichever occurs later, shall be exempt from all educational examination, and experience requirements for certification in the category in which he or she is working prior to the applicable date. In order to qualify for this exemption, an applicant must apply to the Board for certification before June 30, 1990, or before the expiration of a three-year period that begins with the final appointment of the Board's initial membership, whichever is later, and he or she must be working within the scope of therapeutic recreation, as defined in this Chapter, at the time of application.

The Board, within 90 days after the final appointment of its initial membership, shall attempt in good faith to notify the following of the availability of this exemption and the deadlines for qualifying and applying for certification under this section:

- (1) Each therapeutic recreation program conducted by the private sector and by cities, counties, the State of North Carolina, and the federal government;
- (2) Each individual practitioner working within the scope of therapeutic recreation before the applicable date above. (1985 (Reg. Sess., 1986), c. 966, s. 1.)

Editor's Note. — Section 2 of Session Laws 1985 (Reg. Sess., 1986), c. 966, makes this Chapter effective January 1, 1990.

§ 90C-17. (Effective January 1, 1990) Reports; immunity from suit.

Any person who has reasonable cause to suspect misconduct or incapacity of a person who is certified pursuant to this Chapter, or who has reasonable cause to suspect that any person is in violation of this Chapter, should report the relevant facts to the Board. Upon receipt of a charge or upon its own initiative, the Board may give notice of an administrative hearing pursuant to Chapter 150B of the General Statutes or may, after diligent investigation, dismiss unfounded charges. Any person making a report pursuant to this section shall be immune from criminal prosecution or civil liability based on that report unless the person knew the report was false or acted in reckless disregard of whether or not the report was false. (1985 (Reg. Sess., 1986), c. 966, s. 1.)

Editor's Note. — Section 2 of Session Laws 1985 (Reg. Sess., 1986), c. 966, makes this Chapter effective January 1, 1990.

§ 90C-18. (Effective January 1, 1990) Violations and penalties.

Any person who violates any provision of this Chapter shall be fined not to exceed five hundred dollars (\$500.00) and/or imprisoned for a term not to exceed 60 days. (1985 (Reg. Sess., 1986), c. 966, s. 1.)

Editor's Note. — Section 2 of Session Laws 1985 (Reg. Sess., 1986), c. 966, makes this Chapter effective January 1, 1990.

§ 90C-19. (Effective January 1, 1990) Enjoining the illegal practices.

(a) If the Board finds that any person is violating any of the provisions of this Chapter, it may apply in its own name to the superior court for temporary or permanent restraining order or injunction to prevent that person from continuing the illegal practices. The court is empowered to grant an injunction regardless of whether criminal prosecution or other action has been or may be instituted as a result of the violation. All actions by the Board shall be governed by the Rules of Civil Procedure.

(b) The venue for actions brought under this Chapter shall be in the county where the defendant resides, or the county where violation occurs. (1985 (Reg. Sess., 1986), c. 966, s. 1.)

Editor's Note. — Section 2 of Session Laws 1985 (Reg. Sess., 1986), c. 966, makes this Chapter effective January 1, 1990.

Chapter 93.

Public Accountants.

§ 93-1. Definitions; practice of law.

CASE NOTES

Promotion and Sale of Securities Not Covered by Accountant's Liability Coverage. — While certain "gray areas" exist, particularly with respect to tax law, where the professional services of accountants can become difficult to distinguish from other professional services, transactions which involved the promotion and sale of securities as a profit-

making venture unrelated to taxes did not involve the practice of accounting, and insurer who had issued defendants an accountant's professional liability policy was not obligated to defend insureds in damage actions involving such transactions. *Mastrom, Inc. v. Continental Cas. Co.*, 78 N.C. App. 483, 337 S.E.2d 162 (1985).

Chapter 93A.

Real Estate License Law.

ARTICLE 1.

Real Estate Brokers and Salesmen.

§ 93A-1. License required of real estate brokers and real estate salesmen.

CASE NOTES

Quoted in Hayman v. Stafford, 77 N.C. App. 154, 334 S.E.2d 438 (1985).

§ 93A-2. Definitions and exceptions.

Legal Periodicals. —
For comment, "Time Sharing: The North Carolina General Assembly's Response to

Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

CASE NOTES

Applied in Hayman v. Stafford, 77 N.C. App. 154, 334 S.E.2d 438 (1985).

§ 93A-4. Applications for licenses; fees; qualifications; examinations; bond; privilege licenses; renewal or reinstatement of license; power to enforce provisions.

Legal Periodicals. —
For comment, "Time Sharing: The North Carolina General Assembly's Response to

Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

§ 93A-5. Register of applicants; roster of brokers and salesmen; financial report to Secretary of State.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assem-

bly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

ARTICLE 4.

Time Shares.

§ 93A-39. Title.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).	For comment, "North Carolina's Time Share Act: Guidelines for Those Who Buy and Sell Time," see 20 Wake Forest L. Rev. 931 (1984).
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§ 93A-40. Registration required of time share projects; real estate salesmen license required.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assem-	bly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).
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§ 93A-41. Definitions.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assem-	bly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).
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§ 93A-42. Time shares deemed real estate.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assem-	bly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).
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§ 93A-43. Partition.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assem-	bly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).
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§ 93A-44. Public offering statement.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assem-	bly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).
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§ 93A-45. Purchaser's right to cancel; escrow; violation.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assem-	bly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).
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§ 93A-47. Time shares proxies.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assem-	bly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).
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§ 93A-48. Exchange programs.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

§ 93A-49. Service of process on exchange company.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

§ 93A-50. Securities laws apply.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

§ 93A-51. Rule-making authority.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

§ 93A-52. Application for registration of time share project; denial of registration; renewal; reinstatement; and termination of developer's interest.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

§ 93A-54. Disciplinary action by Commission.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

§ 93A-56. Penalty for violation of Article.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

§ 93A-57. Release of liens.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

Chapter 94.
Apprenticeship.

§ 94-6. Definition of an apprentice.

CASE NOTES

Cited in Varnell v. Henry M. Milgrom, Inc.,
78 N.C. App. 451, 337 S.E.2d 616 (1985).

Chapter 95.

Department of Labor and Labor Regulations.

Article 14.

Inspection Service Fees.

Sec.

95-109. [Repealed.]

95-110. [Reserved.]

Article 14A.

Elevator Safety Act of North Carolina.

- 95-110.1. Short title and legislative purpose.
- 95-110.2. Scope.
- 95-110.3. Definitions.
- 95-110.4. Elevator and Amusement Device Division established.
- 95-110.5. Powers and duties of Commissioner.
- 95-110.6. Noncomplying devices and equipment; appeal.
- 95-110.7. Operation without certificate; operation not in accordance with Article or rules and regulations; operation after refusal to issue or after revocation of certificate.
- 95-110.8. Operation of unsafe device or equipment.
- 95-110.9. Reports required.
- 95-110.10. Violations; civil penalties; appeals.
- 95-110.11. Violations; criminal penalties.
- 95-110.12. Legal representation.
- 95-110.13. Authorization for similar safety and health federal-State programs.
- 95-110.14. Confidentiality of trade secrets.
- 95-110.15. Construction of Article and rules and regulations and severability.
- 95-111. [Reserved.]

Article 14B.

Amusement Device Safety Act of North Carolina.

Sec.

- 95-111.1. Short title and legislative purpose.
- 95-111.2. Scope.
- 95-111.3. Definitions.
- 95-111.4. Powers and duties of Commissioner.
- 95-111.5. Pre-opening inspection and test; records; revocation of certificate of operation.
- 95-111.6. Noncomplying devices; appeal.
- 95-111.7. Operation without certificate; operation not in accordance with Article or rules and regulations; operation after refusal to issue or after revocation of certificate.
- 95-111.8. Location notice.
- 95-111.9. Operation of unsafe device.
- 95-111.10. Reports required.
- 95-111.11. Operators.
- 95-111.12. Liability insurance.
- 95-111.13. Violations; civil penalties; appeal.
- 95-111.14. Denial of permission to enter amusement device.
- 95-111.15. Legal representation.
- 95-111.16. Authorization for similar safety and health federal-State programs.
- 95-111.17. Confidentiality of trade secrets.
- 95-111.18. Construction of Article and rules and regulations and severability.
- 95-112 to 95-115. [Reserved.]

Article 16.

Occupational Safety and Health Act of North Carolina.

- 95-135. Safety and Health Review Board.

ARTICLE 1.

Department of Labor.

§ 95-1. Department of Labor established.

CASE NOTES

Unfair or Deceptive Trade Practices. — Although this Chapter is regulatory in nature, this fact does not prevent the finding of an unfair or deceptive trade practice (see Chapter

75) based on the conduct proscribed by this Chapter. *Winston Realty Co. v. G.H.G., Inc.*, 314 N.C. 90, 331 S.E.2d 677 (1985).

ARTICLE 2A.

Wage and Hour Act.

§ 95-25.1. Short title and legislative purpose.

CASE NOTES

This Article requires an employer to notify an employee in advance of the wages and hours which he will earn and the conditions which must be met to earn them, and to pay such wages and benefits as are due when the employee has actually performed the work required to earn them. Once the employee has earned wages and benefits under this statutory scheme, the employer is prevented from re-

scinding them, with the exception that for certain benefits such as commissions, bonuses and vacation pay, an employer may cause a loss or forfeiture of such pay if he has notified the employee of the conditions for loss or forfeiture in advance of the time when the pay is earned. *Narron v. Hardee's Food Systems*, 75 N.C. App. 579, 331 S.E.2d 205, cert. denied, 314 N.C. 542, 335 S.E.2d 316 (1985).

§ 95-25.2. Definitions.

CASE NOTES

Quoted in *Narron v. Hardee's Food Systems*, 75 N.C. App. 579, 331 S.E.2d 205 (1985).

§ 95-25.3. Minimum wage.

CASE NOTES

Stated in *Narron v. Hardee's Food Systems*, 75 N.C. App. 579, 331 S.E.2d 205 (1985).

§ 95-25.4. Overtime.

CASE NOTES

Stated in *Narron v. Hardee's Food Systems*, 75 N.C. App. 579, 331 S.E.2d 205 (1985).

§ 95-25.7. Payment to separated employees.

CASE NOTES

Section preempted by ERISA. — Regulation of severance pay under ERISA, the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq., preempts this section and any state cause of action under

common law insofar as such claim "relates to" an employee benefit plan covered by ERISA. *Holland v. Burlington Indus., Inc.*, 772 F.2d 1140 (4th Cir. 1985).

§ 95-25.12. Vacation pay.

CASE NOTES

This Article requires an employer to notify an employee in advance of the wages and hours which he will earn and the conditions which must be met to earn them, and to pay such wages and benefits as are due when the employee has actually performed the work required to earn them. Once the employee has earned the wages and benefits under this statutory scheme, the employer is prevented from rescinding them, with the exception that for certain benefits such as commissions, bonuses and vacation pay, an employer may cause a loss or forfeiture of such pay if he has notified the employee of the conditions for loss or forfeiture in advance of the time when the pay is earned. *Narron v. Hardee's Food Systems*, 75

N.C. App. 579, 331 S.E.2d 205, cert. denied, 314 N.C. 542, 335 S.E.2d 316 (1985).

The vacation pay due an employee at the termination of his employment is not controlled solely by the employer's vacation policy in effect at the time of termination. If the employee earned and accumulated vacation under a vacation policy which did not provide for forfeiture of unused vacation, this Article would dictate that he receive all vacation pay earned prior to the employer's change of personnel policy with regard thereto. *Narron v. Hardee's Food Systems*, 75 N.C. App. 579, 331 S.E.2d 205, cert. denied, 314 N.C. 542, 335 S.E.2d 316 (1985).

§ 95-25.13. Notification, posting, and records.

CASE NOTES

Stated in *Narron v. Hardee's Food Systems*, 75 N.C. App. 579, 331 S.E.2d 205 (1985).

§ 95-25.20. Complainants protected.

CASE NOTES

Cited in *Hogan v. Forsyth Country Club Co.*, — N.C. App. —, 340 S.E.2d 116 (1986).

ARTICLE 4A.

Voluntary Arbitration of Labor Disputes.

§ 95-36.9. Stay of proceedings.

CASE NOTES

Limitation of Action under Labor Management Relations Act. — In an action to vacate an arbitrator's award under § 301 of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. § 185, the most clearly analogous state statute of limitations was determined to be the 90-day limitation provided in § 1-567.13(b), for vacating an award, rather than the 10-day limitation set forth in subsec-

tion (c) of this section for a stay of proceedings, notwithstanding the provision in § 1-567.2 that the Uniform Arbitration Act shall not apply "to arbitration agreements between employers and employees or between their respective representatives," since § 1-567.13(b) was the statute of limitations most analogous for the determination of timeliness. *In re Gencorp, Inc.*, 622 F. Supp. 216 (W.D.N.C. 1985).

ARTICLE 5A.

Regulation of Private Personnel Services.

§ 95-47.6. Prohibited acts.

CASE NOTES

Unfair or Deceptive Trade Practices. — A violation of either or both subdivisions (2) and (9) of this section as a matter of law constitutes an unfair or deceptive trade practice in violation of § 75-1.1. *Winston Realty Co. v. G.H.G., Inc.*, 314 N.C. 90, 331 S.E.2d 677 (1985).

Proof of fraud necessarily constitutes a violation of the prohibition against unfair and deceptive acts. *Winston Realty Co. v. G.H.G., Inc.*, 314 N.C. 90, 331 S.E.2d 677 (1985).

ARTICLE 5B.

Regulation of Job Listing Services.

§ 95-47.25. Contracts; contents; approval.

CASE NOTES

Cited in *Varnell v. Henry M. Milgrom, Inc.*, 78 N.C. App. 451, 337 S.E.2d 616 (1985).

ARTICLE 10.

Declaration of Policy as to Labor Organizations.

§ 95-81. Nonmembership as condition of employment prohibited.

CASE NOTES

Cited in *Hogan v. Forsyth Country Club Co.*, — N.C. App. —, 340 S.E.2d 116 (1986).

§ 95-83. Recovery of damages by persons denied employment.

CASE NOTES

Cited in *Hogan v. Forsyth Country Club Co.*, — N.C. App. —, 340 S.E.2d 116 (1986).

ARTICLE 14.

Inspection Service Fees.

§ 95-109: Repealed by Session Laws 1985 (Reg. Sess., 1986), c. 990, s. 3, effective January 1, 1987.

§ 95-110: Reserved for future codification purposes.

ARTICLE 14A.

Elevator Safety Act of North Carolina.

§ 95-110.1. Short title and legislative purpose.

(a) This Article shall be known as the Elevator Safety Act of North Carolina.

(b) The General Assembly finds that the use of unsafe and defective lifting devices imposes a substantial probability of serious and preventable injury to employees and the public exposed to unsafe conditions and that prevention of these injuries and protection of employees and the public from unsafe conditions is in the best interests and welfare of the people of the State. (1985 (Reg. Sess., 1986), c. 990, s. 1.)

Editor's Note. — Section 4 of Session Laws 1985 (Reg. Sess., 1986), c. 990, makes this Article effective January 1, 1987.

Section 4 of Session Laws 1985 (Reg. Sess., 1986), c. 990 provides: "The Commissioner of

Labor may begin official rulemaking pursuant to this act immediately upon ratification [July 12, 1986] with such rules as he may adopt to become effective no earlier than January 1, 1987."

§ 95-110.2. Scope.

This Article shall govern the design, construction, installation, plans review, testing, inspection, certification, operation, use, maintenance, alteration, relocation and investigation of accidents involving:

- (1) Elevators, dumbwaiters, escalators, and moving walks;
- (2) Personnel hoists;
- (3) Inclined stairway chair lifts;
- (4) Inclined and vertical wheelchair lifts;
- (5) Manlifts; and
- (6) Special equipment.

This Article shall not apply to devices and equipment located and operated in a single family residence, to conveyors and related equipment within the scope of the American National Standard Safety Standard for Conveyors and Related Equipment (ANSI/ASME B20.1) constructed, installed and used exclusively for the movement of materials, or to mining equipment specifically covered by the Federal Mine Safety and Health Act or the Mine Safety and Health Act of North Carolina or the rules and regulations adopted pursuant thereto. (1985 (Reg. Sess., 1986), c. 990, s. 1.)

§ 95-110.3. Definitions.

(a) The term "Commissioner" shall mean the North Carolina Commissioner of Labor or his authorized representative.

(b) The term "Director" shall mean the Director of the Elevator and Amusement Device Division of the North Carolina Department of Labor.

(c) The term "dumbwaiter" shall mean a hoisting and lowering mechanism equipped with a car or platform which moves in guides in a substantially vertical direction, the floor area of which does not exceed nine square feet, the total inside height of which, whether or not provided with fixed or removable shelves, does not exceed four feet, the capacity of which does not exceed 500 pounds, and which is used exclusively for carrying materials.

(d) The term "elevator" shall mean a hoisting and lowering mechanism equipped with a car or platform which moves in guides, and which serves two or more floors of a building or structure.

(e) The term "escalator" shall mean a power driven, inclined continuous stairway used for raising and lowering passengers.

(f) The term "inclined stairway chair lift" shall mean a hoisting and lowering mechanism with one or more chairs or a platform for one or more wheelchairs installed on a stairway for the purpose of transporting a physically disabled person.

(g) The term "inclined or vertical wheelchair lift" shall mean a powered platform-elevating device used to transport a physically disabled person in a wheelchair.

(h) The term "manlift" shall mean platforms or brackets and accompanying handholds, mounted on, or attached to, an endless belt operating vertically in one direction only and being supported by, and driven through, pulleys at the top and bottom and intended primarily for the conveyance of persons.

(i) The term "moving walk" shall mean a type of passenger carrying device on which passengers stand or walk and in which the passenger carrying surface remains parallel to its direction of motion and is uninterrupted.

(j) The term "operator" shall mean any person having direct control over the operation of any covered device or equipment.

(k) The term "owner" shall mean any person or authorized agent of such person who owns a device or equipment subject to regulation under this Article, or in the event the device or equipment is leased, the lessee. The term "owner" also shall include the State of North Carolina or any political subdivision thereof or any unit of local government.

(l) The term "person" shall mean any individual, association, partnership, firm, corporation, private organization, or the State of North Carolina or any political subdivision thereof or any unit of local government.

(m) The term "personnel hoist" shall mean an elevator installed inside or outside of buildings during construction, alteration or demolition and used primarily to raise and lower workers and other persons connected with or related to the building project.

(n) The term "special equipment" shall mean any permanently or semi-permanently located device, manually or power-operated, used for moving or lifting person or persons and materials but not considered as an elevator, escalator, dumbwaiter, moving walk, personnel hoist, inclined stairway chair lift, inclined or vertical wheelchair lift, or manlift. Special equipment shall include, but not be limited to, manhoists, lift bridges, elevators which are used only for handling building materials and workmen during construction, and stage and orchestra lifts. (1985 (Reg. Sess., 1986), c. 990, s. 1.)

§ 95-110.4. Elevator and Amusement Device Division established.

There is hereby created an Elevator and Amusement Device Division within the Department of Labor. The Commissioner shall appoint a director of the Elevator and Amusement Device Division and such other employees as the Commissioner deems necessary to assist the director in administering the provisions of this Article. (1985 (Reg. Sess., 1986), c. 990, s. 1.)

§ 95-110.5. Powers and duties of Commissioner.

The Commissioner of Labor is hereby empowered:

- (1) To delegate to the Director of the Elevator and Amusement Device Division such powers, duties and responsibilities as the Commissioner determines will best serve the public interest in the safe operation of lifting devices and equipment;
- (2) To supervise the Director of the Elevator and Amusement Device Division;
- (3) To adopt, modify, or revoke such rules and regulations as are necessary for the purpose of carrying out the provisions of this Article including, but not limited to, those governing the design, construction, installation, plans review, testing, inspection, certification, operation, use, maintenance, alteration and relocation of devices and equipment subject to the provisions of this Article. The rules and regulations promulgated pursuant to this rulemaking authority shall conform with good engineering practice as evidenced generally by the most recent editions of the American National Standard Safety Code for Elevators, Dumbwaiters, Escalators and Moving Walks, the National Electrical Code, the American National Standard Safety Requirements for Personnel Hoists, the American National Standard Safety Code for Manlifts, the American National Standard Safety Standard for Conveyors and Related Equipment and similar codes promulgated by agencies engaged in research concerning strength of material, safe design, and other factors bearing upon the safe operation of the devices and equipment subject to the provisions of this Article. The rules and regulations may apply different standards to devices and equipment subject to this Article depending upon their date of installation. The rules and regulations for special equipment shall not adopt specifically any portion of the American National Standard Safety Code for Elevators, Dumbwaiters, Escalators and Moving Walks to inclined and vertical reciprocating conveyors;
- (4) To enforce rules and regulations adopted under authority of this Article;
- (5) To inspect and have tested for acceptance all new, altered or relocated devices or equipment subject to the provisions of this Article;
- (6) To make maintenance and periodic inspections and tests of all devices and equipment subject to the provisions of this Article as often as every six months;
- (7) To issue certificates of operation which certify for use such devices and equipment as are found to be in compliance with this Article and the rules and regulations promulgated thereunder;
- (8) To have free access, with or without notice, to the devices and equipment subject to the provisions of this Article, during reasonable hours, for purposes of inspection or testing;

- (9) To obtain an Administrative Search and Inspection Warrant in accordance with the provisions of Article 4A of Chapter 15 of the General Statutes;
- (10) To investigate accidents involving the devices and equipment subject to the provisions of this Article to determine the cause of such accident, and he shall have full subpoena powers in conducting such investigation;
- (11) To institute proceedings in the civil or criminal courts of this State, when a provision of this Article or the rules and regulations promulgated thereunder has been violated;
- (12) To issue a limited certificate of operation for any device or equipment subject to the provisions of this Article to allow the temporary or restricted use thereof;
- (13) To adopt, modify or revoke rules and regulations governing the qualifications of inspectors;
- (14) To grant exceptions from the requirements of the rules and regulations promulgated under authority of this Article and to permit the use of other devices when such exceptions and uses will not expose the public to an unsafe condition likely to result in serious personal injury or property damage;
- (15) To require that a construction permit must be obtained from the Commissioner before any device or equipment subject to the provisions of this Article is installed, altered or moved from one place to another and to require that the Commissioner must be supplied with whatever plans, diagrams or other data he deems necessary to determine whether or not the proposed construction is in compliance with the provisions of this Article and the rules and regulations promulgated thereunder;
- (16) To prohibit the use of any device or equipment subject to the provisions of this Article which is found upon inspection to expose the public to an unsafe condition likely to cause personal injury or property damage. Such device or equipment shall be made operational only upon the Commissioner's determination that such device or equipment has been made safe;
- (17) To order the payment of all civil penalties provided by this Article. Funds collected pursuant to a civil penalty order shall be deposited with the State Treasurer;
- (18) To require that any device or equipment subject to the provisions of this Article which has been out-of-service and not continuously maintained for one or more years shall not be returned to service without first complying with all rules and regulations governing new installations; and
- (19) To coordinate enforcement and inspection activity relative to equipment, devices and operations covered by this Article in order to minimize duplication of liability or regulatory responsibility on the part of the employer or owner. (1985 (Reg. Sess., 1986), c. 990, s. 1.)

Editor's Note. — Section 4 of Session Laws 1985 (Reg. Sess., 1986), c. 990 provides: "The Commissioner of Labor may begin official rule-making pursuant to this act immediately upon

ratification [July 12, 1986] with such rules as he may adopt to become effective no earlier than January 1, 1987."

§ 95-110.6. Noncomplying devices and equipment; appeal.

(a) Whenever the Commissioner determines that a device or equipment is subject to the provisions of this Article, and that the operation of such device or equipment is exposing the public to an unsafe condition likely to result in serious personal injury or property damage, he may immediately order in writing that the use of the device or equipment be stopped or limited until such time as he determines that the device or equipment has been made safe for use by the public.

(b) Whenever the Commissioner determines that the provisions of this Article or the rules and regulations promulgated thereunder have not been complied with, he may refuse to issue or renew or may revoke, suspend or amend a certificate of operation.

(c) Whenever action is taken under this section, the affected party shall be given notice of the availability of an administrative hearing and of judicial review in accordance with Chapter 150B of the General Statutes, the Administrative Procedure Act. (1985 (Reg. Sess., 1986), c. 990, s. 1.)

§ 95-110.7. Operation without certificate; operation not in accordance with Article or rules and regulations; operation after refusal to issue or after revocation of certificate.

(a) No person shall operate or permit to be operated or use any device or equipment subject to the provisions of this Article without a valid certificate of operation unless the absence of a valid certificate is the result of the Commissioner's failure to inspect such device.

(b) No person shall operate or permit to be operated or use any device or equipment subject to the provisions of this Article otherwise than in accordance with this Article and the rules and regulations promulgated thereunder.

(c) No person shall operate or permit to be operated or use any device or equipment subject to the provisions of this Article after the Commissioner has refused to issue or has revoked the certificate of operation for such device or equipment. (1985 (Reg. Sess., 1986), c. 990, s. 1.)

§ 95-110.8. Operation of unsafe device or equipment.

No person shall operate, permit to be operated or use any device or equipment subject to the provisions of this Article if such person knows or reasonably should know that such operation or use will expose the public to an unsafe condition which is likely to result in personal injury or property damage. (1985 (Reg. Sess., 1986), c. 990, s. 1.)

§ 95-110.9. Reports required.

(a) The owner of any device or equipment regulated under the provisions of this Article, or his authorized agent, shall within 24 hours notify the Commissioner of each and every occurrence involving such device or equipment when:

- (1) The occurrence results in death or injury requiring medical treatment, other than first aid, by a physician. First aid means the one time treatment or observation of scratches, cuts not requiring stitches, burns, splinters and contusions or a diagnostic procedure, including examination and x-rays, which does not ordinarily require medical treatment even though provided by a physician or other licensed personnel; or
- (2) The occurrence results in damage to the device indicating a substantial defect in design, mechanics, structure or equipment, affecting the future safe operation of the device. No reporting is required in the case of normal wear and tear.

(b) The Commissioner, without delay, after notification and determination that an occurrence involving injury or damage as specified in subsection (a) has occurred, shall make a complete and thorough investigation of the occurrence. The report of the investigation shall be placed on file in the office of the division and shall give in detail all facts and information available. The owner may submit for inclusion in the file results of investigations independent of the department's investigation.

(c) No person, following an occurrence as specified in subsection (a), shall operate, attempt to operate, use or move or attempt to move such device or equipment, or part thereof, without the approval of the Commissioner, unless so as to prevent injury to any person or persons.

(d) No person, following an occurrence as specified in subsection (a), shall remove or attempt to remove from the premises any damaged or undamaged part of such device or equipment or repair or attempt to repair any damaged part necessary to a complete and thorough investigation. The department must initiate its investigation within 24 hours of being notified. (1985 (Reg. Sess., 1986), c. 990, s. 1.)

§ 95-110.10. Violations; civil penalties; appeals.

(a) Any person who violates G.S. 95-110.7(a) or (b) (Operation without certificate; operation not in accordance with Article or rules and regulations) shall be subject to a civil penalty not to exceed two hundred fifty dollars (\$250.00) for each day each device or equipment is so operated or used.

(b) Any person who violates G.S. 95-110.7(c) (Operation after refusal to issue or after revocation of certificate) or G.S. 95-110.9(c) (Reports required) shall be subject to a civil penalty not to exceed five hundred dollars (\$500.00) for each day any such device or equipment is operated or used.

(c) Any person who violates the provisions of G.S. 95-110.9(d) (Reports required) shall be subject to a civil penalty not to exceed five hundred dollars (\$500.00).

(d) In determining the amount of any penalty ordered under authority of this section, the Commissioner shall give due consideration to the appropriateness of the penalty with respect to the size of the business of the person being charged, the gravity of the violation, the good faith of the person and the record of previous violations.

(e) The determination of the amount of the penalty by the Commissioner shall be final, unless within 15 days after receipt of notice thereof by certified

mail the person charged with the violation takes exception to the determination in which event the final determination of the penalty shall be made in an administrative proceeding and in a judicial proceeding pursuant to Chapter 150B of the General Statutes, the Administrative Procedure Act.

(f) The Commissioner may file in the office of the clerk of the superior court of the county wherein the person, against whom a civil penalty has been ordered, resides, or if a corporation is involved, in the county wherein the corporation maintains its principal place of business, or in the county wherein the violation occurred, a certified copy of a final order of the Commissioner unappealed from, or of a final order of the Commissioner affirmed upon appeal. Whereupon, the clerk of said court shall enter judgment in accordance therewith and notify the parties. Such judgment shall have the same effect, and all proceedings in relation thereto shall thereafter be the same, as though said judgment had been rendered in a suit duly heard and determined by the superior court of the General Court of Justice. (1985 (Reg. Sess., 1986), c. 990, s. 1.)

§ 95-110.11. Violations; criminal penalties.

(a) Any person who violates G.S. 95-110.8 (Operation of unsafe device or equipment) shall be guilty of a misdemeanor and upon conviction thereof shall be fined one thousand dollars (\$1,000), or imprisoned for a period of six months, or both, in the discretion of the court.

(b) Any person misrepresenting himself as an authorized inspector administering or enforcing the provisions of this Article or the rules and regulations promulgated thereunder shall be guilty of a misdemeanor and upon conviction thereof shall be fined one thousand dollars (\$1,000), or imprisoned for a period of six months, or both, in the discretion of the court.

(c) Any person knowingly making a material and false statement, representation or certification in any application, record, report, plan or any other document filed or required to be maintained pursuant to this Article or the rules and regulations promulgated thereunder shall be fined a maximum of five thousand dollars (\$5,000), or imprisoned for not more than six months, or both, in the discretion of the court. (1985 (Reg. Sess., 1986), c. 990, s. 1.)

§ 95-110.12. Legal representation.

It shall be the duty of the Attorney General of North Carolina, when requested, to represent the Department of Labor in actions or proceedings in connection with this Article or the rules and regulations promulgated thereunder. (1985 (Reg. Sess., 1986), c. 990, s. 1.)

§ 95-110.13. Authorization for similar safety and health federal-State programs.

Consistent with the requirements and conditions provided in this Article and the rules and regulations promulgated thereunder, the State, upon recommendation of the Commissioner of Labor, may enter into agreements or arrangements with appropriate federal agencies for the purpose of administering the enforcement of federal statutes and rules and regulations governing devices and equipment subject to the provisions of this Article. (1985 (Reg. Sess., 1986), c. 990, s. 1.)

§ 95-110.14. Confidentiality of trade secrets.

All information reported to or otherwise obtained by the Commissioner or his agents or representatives in connection with any inspection or proceeding under this Article or the rules and regulations promulgated thereunder which contains or might reveal a trade secret shall be considered confidential, except as to carrying out this Article and the rules and regulations promulgated thereunder, or when it is relevant in any proceeding under the same. In any such proceeding the Commissioner or the court shall issue such orders as may be appropriate to protect the confidentiality of trade secrets. (1985 (Reg. Sess., 1986), c. 990, s. 1.)

§ 95-110.15. Construction of Article and rules and regulations and severability.

This Article and the rules and regulations promulgated thereunder shall receive a liberal construction to the end that the welfare of the people may be protected. If any provisions of either or the application thereof to any person or circumstances is held to be invalid, such invalidity shall not affect those provisions or applications which can be given effect without the invalid provision or application, and to that end the provisions of this Article are severable. (1985 (Reg. Sess., 1986), c. 990, s. 1.)

§ 95-111: Reserved for future codification purposes.

ARTICLE 14B.*Amusement Device Safety Act of North Carolina.***§ 95-111.1. Short title and legislative purpose.**

(a) This Article shall be known as the "Amusement Device Safety Act of North Carolina".

(b) The General Assembly finds that although most amusement devices are free from defect and operated in a safe manner, those which are not impose a substantial probability of serious and preventable injury to the public. Protection of the public from exposure to such unsafe conditions and the prevention of injuries is in the best interest and welfare of the people of the State.

(c) It is the intent of this Article that amusement devices shall be designed, constructed, assembled or disassembled, maintained, and operated so as to prevent injuries. (1985 (Reg. Sess., 1986), c. 990, s. 2.)

Editor's Note. — Section 4 of Session Laws 1985 (Reg. Sess., 1986), c. 990, makes this Article effective January 1, 1987.

Section 4 of Session Laws 1985 (Reg. Sess., 1986), c. 990 provides: "The Commissioner of

Labor may begin official rulemaking pursuant to this act immediately upon ratification [July 12, 1986] with such rules as he may adopt to become effective no earlier than January 1, 1987."

§ 95-111.2. Scope.

(a) This Article shall govern the design, construction, installation, plans review, testing, inspection, certification, operation, use, maintenance, alteration, relocation and investigation of accidents involving amusement devices.

(b) This Article shall not apply to any single passenger coin-operated device, manually, mechanically, or electrically operated which customarily is placed, singly or in groups, in a public location and which does not normally require the supervision or services of an operator. (1985 (Reg. Sess., 1986), c. 990, s. 2.)

§ 95-111.3. Definitions.

(a) The term "amusement device" shall mean any device or attraction that carries or conveys or permits persons to walk along, around or over a fixed or restricted route or course or within a defined area including the entrances and exits thereto, for the purpose of giving such persons amusement, pleasure, thrills or excitement. The term shall include but not be limited to roller coasters, Ferris wheels, merry-go-rounds, glasshouses, waterslides, and walk-through dark houses.

(b) The term "amusement park" shall mean any tract or area used principally as a permanent location for amusement devices.

(c) The term "Commissioner" shall mean the North Carolina Commissioner of Labor or his authorized representative.

(d) The term "Director" shall mean the Director of the Elevator and Amusement Device Division of the North Carolina Department of Labor.

(e) The term "operator" shall mean any person having direct control of the operation of an amusement device.

(f) The term "owner" shall mean any person or authorized agent of such person who owns an amusement device or in the event such device is leased, the lessee. The term "owner" also shall include the State of North Carolina or any political subdivision thereof or any unit of local government.

(g) The term "person" shall mean any individual, association, partnership, firm, corporation, private organization, or the State of North Carolina or any political subdivision thereof or any unit of local government. (1985 (Reg. Sess., 1986), c. 990, s. 2.)

§ 95-111.4. Powers and duties of Commissioner.

The Commissioner of Labor is hereby empowered:

- (1) To delegate to the Director of the Elevator and Amusement Device Division such powers, duties and responsibilities as the Commissioner determines will best serve the public interest in the safe operation of amusement devices;
- (2) To supervise the Director of the Elevator and Amusement Device Division;
- (3) To adopt, modify, or revoke such rules and regulations as are necessary for the purpose of carrying out the provisions of this Article including, but not limited to, those governing the design, construction, installation, plans review, testing, inspection, certification, operation, use, maintenance, alteration and relocation of devices subject to the provisions of this Article. The rules and regulations promulgated pursuant to this rulemaking authority shall conform with good engineering and safety standards, formulas and practices;

- (4) To enforce rules and regulations adopted under authority of this Article;
- (5) To inspect and have tested for acceptance all new and relocated devices subject to the provisions of this Article. Relocated amusement devices shall be inspected upon reassembly at each new location within this State;
- (6) To inspect amusement devices which have been substantially rebuilt or substantially modified so as to change the original action, structure or capacity of the device;
- (7) To make maintenance and periodic inspections and tests of all devices subject to the provisions of this Article. Devices located in amusement parks shall be inspected at least once annually;
- (8) To issue certificates of operation which certify for use such devices as are found to be in compliance with this Article and the rules and regulations promulgated thereunder;
- (9) To have reasonable access, with or without notice, to the devices subject to the provisions of this Article during reasonable hours, for purposes of inspection or testing;
- (10) To obtain an Administrative Search and Inspection Warrant in accordance with the provisions of Article 4A of Chapter 15 of the General Statutes;
- (11) To investigate accidents involving devices subject to the provisions of this Article to determine the cause of such accident, and he shall have full subpoena powers in conducting such investigation;
- (12) To institute proceedings in the civil courts of this State, when a provision of this Article or the rules and regulations promulgated thereunder has been violated;
- (13) To adopt, modify or revoke rules and regulations governing the qualifications of inspectors;
- (14) To grant exceptions from the requirements of the rules and regulations promulgated under authority of this Article and to permit the use of other devices when such exceptions and uses will not expose the public to an unsafe condition likely to result in serious personal injury or property damage;
- (15) To require that before any device subject to the provisions of this Article is erected in this State, or before any additions or alterations which substantially change such device are made, or before the physical spacing between such devices is changed, the owner or his authorized agent shall file with the Commissioner a written notice of his intention to do so and the type of device involved. Should circumstances necessitate, the Commissioner may require that such owner or his authorized agent furnish a copy of the plans, diagrams, specifications or stress analyses of such device before the inspection of same. When such plans, diagrams, specifications or stress analyses are requested by the Commissioner, he shall review them within 10 days of receipt, and upon approval, he shall authorize the device for use by the public;
- (16) To prohibit the use of any device subject to the provisions of this Article which is found upon inspection to expose the public to an unsafe condition likely to cause personal injury or property damage. Such device shall be made operational only upon the Commissioner's determination that such device has been made safe;
- (17) To order the payment of all civil penalties provided by this Article. Funds collected pursuant to a civil penalty order shall be deposited with the State Treasurer; and

- (18) To coordinate enforcement and inspection activity relative to equipment, devices and operations covered by this Article in order to minimize duplication of liability or regulatory responsibility on the part of the employer or owner. (1985 (Reg. Sess., 1986), c. 990, s. 2.)

Editor's Note. — Section 4 of Session Laws 1985 (Reg. Sess., 1986), c. 990 provides: "The Commissioner of Labor may begin official rule-making pursuant to this act immediately upon

ratification [July 12, 1986] with such rules as he may adopt to become effective no earlier than January 1, 1987."

§ 95-111.5. Pre-opening inspection and test; records; revocation of certificate of operation.

(a) An owner of a device subject to the provisions of this Article, or his authorized agent, is hereby required to make a pre-opening inspection and test of such device, prior to admitting the public, each day such device is intended to be used.

(b) An owner of a device subject to the provisions of this Article, or his authorized agent, is hereby required to maintain for at least 30 days a signed record of the required pre-opening inspection and test and such other pertinent information as the Commissioner may require by rule or regulation.

(c) The Commissioner is hereby empowered to revoke the certificate of operation for any device regulated by this Article upon failure by the owner or his authorized agent to make the required pre-opening inspection and test or to maintain the required record. (1985 (Reg. Sess., 1986), c. 990, s. 2.)

§ 95-111.6. Noncomplying devices; appeal.

(a) Whenever the Commissioner determines that a device is subject to the provisions of this Article and the operation of such device is exposing the public to an unsafe condition likely to result in serious personal injury or property damage, he immediately may order in writing that the use of the device be stopped or limited until such time as he determines that the device has been made safe for use by the public.

(b) Whenever the Commissioner determines that the provisions of this Article or the rules and regulations promulgated thereunder have not been complied with, he may refuse to issue or renew or may revoke, suspend or amend a certificate of operation.

(c) Whenever action is taken under this section, the affected party shall be given notice of the availability of an administrative hearing and of judicial review in accordance with Chapter 150B of the General Statutes, the Administrative Procedure Act. (1985 (Reg. Sess., 1986), c. 990, s. 2.)

§ 95-111.7. Operation without certificate; operation not in accordance with Article or rules and regulations; operation after refusal to issue or after revocation of certificate.

(a) No person shall operate or permit to be operated or use any device subject to the provisions of this Article without a valid certificate of operation.

(b) No person shall operate or permit to be operated or use any device subject to the provisions of this Article otherwise than in accordance with this Article and the rules and regulations promulgated thereunder.

(c) No person shall operate or permit to be operated or use any device subject to the provisions of this Article after the Commissioner has refused to issue or has revoked the certificate of operation for such device. (1985 (Reg. Sess., 1986), c. 990, s. 2.)

§ 95-111.8. Location notice.

No person shall operate for the public or permit the operation for the public any device subject to the provisions of this Article after initial assembly or after reassembly at any location within this State without first notifying the Commissioner of the intention to operate for the public. Written notice of a planned schedule of operation or use shall be received at least five days prior to the first planned date of operation or use. Notice of unscheduled use shall be given immediately to the Commissioner by telephone or telegraph. (1985 (Reg. Sess., 1986), c. 990, s. 2.)

§ 95-111.9. Operation of unsafe device.

No person shall operate, permit to be operated or use any device subject to the provisions of this Article if such person knows or reasonably should know that such operation or use will expose the public to an unsafe condition which is likely to result in personal injury or property damage. (1985 (Reg. Sess., 1986), c. 990, s. 2.)

§ 95-111.10. Reports required.

(a) The owner of any device regulated under the provisions of this Article, or his authorized agent, shall within 24 hours, notify the Commissioner of each and every occurrence involving such device when:

- (1) The occurrence results in death or injury requiring medical treatment, other than first aid, by a physician. First aid means the one time treatment or observation of scratches, cuts not requiring stitches, burns, splinters and contusions or a diagnostic procedure, including examination and x-rays, which does not ordinarily require medical treatment even though provided by a physician or other licensed personnel; or
- (2) The occurrence results in damage to the device indicating a substantial defect in design, mechanics, structure or equipment, affecting the future safe operation of the device. No reporting is required in the case of normal wear and tear.

(b) The Commissioner, without delay, after notification and determination that an occurrence involving injury or damage as specified in subsection (a) has occurred, shall make a complete and thorough investigation of the occurrence. The report of the investigation shall be placed on file in the office of the division and shall give in detail all facts and information available. The owner may submit for inclusion in the file results of investigations independent of the department's investigation.

(c) No person, following an occurrence as specified in subsection (a), shall operate, attempt to operate, use or move or attempt to move such device or part thereof, without the approval of the Commissioner, unless so as to prevent injury to any person or persons.

(d) No person, following an occurrence as specified in subsection (a), shall remove or attempt to remove from the premises any damaged or undamaged part of such device or repair or attempt to repair any damaged part necessary

to a complete and thorough investigation. The department must initiate its investigation within 24 hours of being notified. (1985 (Reg. Sess., 1986), c. 990, s. 2.)

§ 95-111.11. Operators.

Any operator of a device subject to the provisions of this Article shall be at least 18 years of age. An operator shall operate no more than one device at any given time. An operator shall be in attendance at all times the device is in operation. (1985 (Reg. Sess., 1986), c. 990, s. 2.)

§ 95-111.12. Liability insurance.

(a) No owner shall operate a device subject to the provisions of this Article, unless at the time, there is in existence a contract of insurance providing coverage of not less than one million dollars (\$1,000,000) per occurrence against liability for injury to persons or property arising out of the operation or use of such device. The insurance contract shall be provided by any insurer or surety that is acceptable to the North Carolina Insurance Commissioner and licensed to transact business in this State.

(b) No certificate of operation shall be issued by the Commissioner until such time as the owner or his authorized agent provides proof of the required contract of insurance.

(c) The Commissioner shall have the right to request from the owner of a device regulated by this Article, or his authorized agent, proof of the required contract of insurance, and upon failure of the owner or his authorized agent to provide such proof, the Commissioner shall have the right to prevent the commencement of or to stop the operation of the device until such time as proof is provided. (1985 (Reg. Sess., 1986), c. 990, s. 2.)

§ 95-111.13. Violations; civil penalties; appeal.

(a) Any person who violates G.S. 95-111.7(a) or (b) (Operation without certificate; operation not in accordance with Article or rules and regulations) shall be subject to a civil penalty not to exceed two hundred fifty dollars (\$250.00) for each day each device is so operated or used.

(b) Any person who violates G.S. 95-111.7(c) (Operation after refusal to issue or after revocation of certificate) or G.S. 95-111.10(c) (Reports required) or G.S. 95-111.12 (Liability insurance) shall be subject to a civil penalty not to exceed five hundred dollars (\$500.00) for each day each device is so operated or used.

(c) Any person who violates G.S. 95-111.8 (Location notice) shall be subject to a civil penalty not to exceed five hundred dollars (\$500.00) for each day any device is operated or used without the location notice having been provided.

(d) Any person who violates the provisions of G.S. 95-111.10(d) (Reports required) shall be subject to a civil penalty not to exceed five hundred dollars (\$500.00).

(e) Any person who violates G.S. 95-111.9 (Operation of unsafe device) shall be subject to a civil penalty not to exceed one thousand dollars (\$1,000).

(f) In determining the amount of any penalty ordered under authority of this section, the Commissioner shall give due consideration to the appropriateness of the penalty with respect to the size of the business of the person being charged, the gravity of the violation, the good faith of the person and the record of previous violations.

(g) The determination of the amount of the penalty by the Commissioner shall be final, unless within 15 days after receipt of notice thereof by certified mail, the person charged with the violation takes exception to the determination, in which event final determination of the penalty shall be made in an administrative proceeding and in a judicial proceeding pursuant to Chapter 150B of the General Statutes, the Administrative Procedure Act.

(h) The Commissioner may file in the office of the clerk of the superior court of the county wherein the person, against whom a civil penalty has been ordered, resides, or if a corporation is involved, in the county wherein the corporation maintains its principal place of business, or in the county wherein the violation occurred, a certified copy of a final order of the Commissioner unappealed from, or of a final order of the Commissioner affirmed upon appeal. Whereupon, the clerk of said court shall enter judgment in accordance therewith and notify the parties. Such judgment shall have the same effect, and all proceedings in relation thereto shall thereafter be the same, as though said judgment had been rendered in a suit duly heard and determined by the superior court of the General Court of Justice. (1985 (Reg. Sess., 1986), c. 990., s. 2.)

§ 95-111.14. Denial of permission to enter amusement device.

The owner or amusement device operator may deny any person entrance to an amusement device if he or she believes such entry may jeopardize the safety of the person desiring entry, riders or other persons. (1985 (Reg. Sess., 1986), c. 990, s. 2.)

§ 95-111.15. Legal representation.

It shall be the duty of the Attorney General of North Carolina, when requested, to represent the Department of Labor in actions or proceedings in connection with this Article or the rules and regulations promulgated thereunder. (1985 (Reg. Sess., 1986), c. 990, s. 2.)

§ 95-111.16. Authorization for similar safety and health federal-State programs.

Consistent with the requirements and conditions provided in this Article and the rules and regulations promulgated thereunder, the State, upon recommendation of the Commissioner of Labor, may enter into agreements or arrangements with appropriate federal agencies for the purpose of administering the enforcement of federal statutes and rules and regulations governing devices subject to the provisions of this Article. (1985 (Reg. Sess., 1986), c. 990, s. 2.)

§ 95-111.17. Confidentiality of trade secrets.

All information reported to or otherwise obtained by the Commissioner or his agents or representatives in connection with any inspection or proceeding under this Article or the rules and regulations promulgated thereunder which contains or might reveal a trade secret shall be considered confidential, except as to carrying out this Article and the rules and regulations promulgated thereunder or when it is relevant in any proceeding under the same. In any such proceeding the Commissioner or the Court shall issue such orders as may be appropriate to protect the confidentiality of trade secrets. (1985 (Reg. Sess., 1986), c. 990, s. 2.)

§ 95-111.18. Construction of Article and rules and regulations and severability.

This Article and the rules and regulations promulgated thereunder shall receive a liberal construction to the end that the welfare of the people may be protected. If any provisions of either or the application thereof to any person or circumstances is held to be invalid, such invalidity shall not affect those provisions or applications which can be given effect without the invalid provision or application, and to that end the provisions of this Article are severable. (1985 (Reg. Sess., 1986), c. 990, s. 2.)

§§ 95-112 to 95-115: Reserved for future codification purposes.

ARTICLE 16.*Occupational Safety and Health Act of
North Carolina.***§ 95-126. Short title and legislative purpose.****CASE NOTES**

Cited in Walker v. Westinghouse Elec. S.E.2d 637 (1985); Hogan v. Forsyth Country Corp., 77 N.C. App. 253, 335 S.E.2d 79 (1985); Club Co., — N.C. App. —, 340 S.E.2d 116 Pittman v. Inco, Inc., 78 N.C. App. 134, 336 (1986).

§ 95-130. Rights and duties of employees.**CASE NOTES**

Cited in Hogan v. Forsyth Country Club Co.,
— N.C. App. —, 340 S.E.2d 116 (1986).

§ 95-135. Safety and Health Review Board.

(c) The Board shall meet at least once each calendar quarter but it may hold call meetings or hearings upon at least three days' notice to each member by the chairman and at such time and place as the chairman may fix. The chairman shall be responsible on behalf of the Board for the administrative operations of the Board and shall appoint such hearing examiners and other employees as he deems necessary to assist in the performance of the Board's functions and fix the compensation of such employees with the approval of the Governor. The assignment and removal of hearing examiners shall be made by the Board, and any hearing examiner may be removed for misfeasance, malfeasance, misconduct, immoral conduct, incompetency, the commission of any crime, or for any other good and adequate reason as found by the Board. The Board shall give notice to such hearing examiner, along with written allegations as to the charges against him, and the same shall be heard by the Board, and its decision shall be final. The compensation of the members of the Board shall be on a per diem basis and shall be fixed by the Governor. The chairman of the Board may be paid a higher rate of compensation than the other two members of the Board. For the purpose of carrying out its duties and functions under this Article, two members of the Board shall constitute a quorum and official action can be taken only on the affirmative vote of at least two members of the Board. On matters properly before the Board the chairman may issue temporary orders, subpoenas, and other temporary types of orders subject to the subsequent review of the Board. The issuance of subpoenas, orders to take depositions, orders requiring interrogatories and other procedural matters of evidence issued by the chairman shall not be subject to review. Prior to taking any action under this subsection to set compensation, the Governor may consult with the Advisory Budget Commission.

(1973, c. 295, s. 10; c. 1331, s. 3; 1985 (Reg. Sess., 1986), c. 955, ss. 6, 7.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. —

Section 1 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "This act may be cited as the Separation of Powers Act of 1986."

Section 127 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "If any part of this act

shall be declared invalid by any court, this shall not affect any other part of this act."

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 1, 1986, deleted "with the approval of the Advisory Budget Commission" at the end of the fifth sentence of subsection (c) and added the last sentence of subsection (c).

Chapter 96.

Employment Security.

Article 2.

Unemployment Insurance Division.

Sec.

96-12. Benefits.

ARTICLE 2.

Unemployment Insurance Division.

§ 96-12. Benefits.

(e) Extended Benefits. — Effective January 1, 1972, extended benefits shall be paid under this Chapter as herein specified:

A. Definitions. — As used in this subsection, unless the context clearly requires otherwise —

- (1) "Extended benefit period" means a period which:
 - (a) Begins the third week after a week for which there is an "on" indicator; and
 - (b) Ends with either of the following weeks, whichever occurs later:
 - (I) The third week after the first week for which there is an "off" indicator; or
 - (II) The 13th consecutive week of such period.

Provided, that no extended benefit period may begin before the 14th week following the end of a prior extended benefit period which was in effect with respect to this State.

- (2) Repealed by Session Laws 1981 (Regular Session, 1982), c. 1178, s. 4.
- (3) Repealed by Session Laws 1982 (Regular Session, 1982), c. 1178, s. 5.
- (4) There is an "on indicator" for this State for a week if the Commission determines, in accordance with the regulations of the United States Secretary of Labor, that for the period consisting of such week and the immediate preceding 12 weeks, the rate of insured unemployment (not seasonally adjusted) under this Chapter:
 - a. Equalled or exceeded one hundred twenty percent (120%) of the average of such rates for the corresponding 13-week period ending in each of the preceding two calendar years, and equalled or exceeded five percent (5%), or
 - b. Equalled or exceeded six percent (6%).
- (5) There is an "off indicator" for this State for a week if the Commission determines, in accordance with the regulations of the United States Secretary of Labor, that for the period consisting of such week and the immediately preceding 12 weeks, the rate of insured unemployment (not seasonally adjusted) under this Chapter:
 - a. Was less than one hundred twenty percent (120%) of the average of such rates for the corresponding 13-week period ending in each of the preceding two calendar years, and was less than six percent (6%), or

- b. Was less than five percent (5%).
- (6) "Rate of insured unemployment," for the purposes of subparagraphs (4) and (5) of this subsection, means the percentage derived by dividing
- a. The average weekly number of individuals filing claims for regular compensation in this State for weeks of unemployment with respect to the most recent 13 consecutive-week period, as determined by the Commission on the basis of its reports to the United States Secretary of Labor, by
- b. The average monthly employment covered under this Chapter for the first four of the most recent six completed calendar quarters ending before the end of such 13-week period.
- (7) "Regular benefits" means benefits payable to an individual under this Chapter or any other State law (including benefits payable to federal civilian employees and to ex-servicemen pursuant to 5 U.S.C. Chapter 85) other than extended benefits.
- (8) "Extended benefits" means benefits (including benefits payable to federal civilian employees and to ex-servicemen pursuant to 5 U.S.C. Chapter 85) payable to an individual under the provisions of this section for weeks of unemployment in his eligibility period.
- (9) "Eligibility period" of an individual means the period consisting of the weeks in his benefit year which begin in an extended benefit period and if his benefit year ends within such extended benefit period, any weeks thereafter which begin in such period.
- (10) "Exhaustee" means an individual who, with respect to any week of unemployment in his eligibility period:
- a. Has received, prior to such week, all of the regular benefits that were available to him under this Chapter or any other State law (including dependents' allowances and benefits payable to federal civilian employees and ex-servicemen under 5 U.S.C. Chapter 85) in his current benefit year that includes such week;
- Provided, that, for the purposes of this subparagraph, an individual shall be deemed to have received all of the regular benefits that were available to him although (1) as a result of a pending appeal with respect to wages that were not considered in the original monetary determination in his benefit year, he may subsequently be determined to be entitled to added regular benefits, or (2) he may be entitled to regular benefits with respect to future weeks of unemployment, but such benefits are not payable with respect to such week of unemployment by reason of the provisions in G.S. 96-16; or
- b. His benefit year having expired prior to such week, has no, or insufficient, wages on the basis of which he could establish a new benefit year that would include such week; and
- c. (1) Has no right to unemployment benefits or allowances, as the case may be, under the Railroad Unemployment Insurance Act, the Trade Expansion Act of 1962, the Automotive Products Trade Act of 1965 and such other federal laws as are specified in regulations issued by the United States Secretary of Labor; and
- (2) Has not received and is not seeking unemployment benefits under the unemployment compensation law of Canada; but if he is seeking such benefits and the appropriate agency

finally determines that he is not entitled to benefits under such law, he is considered an exhaustee.

- (11) "State law" means the unemployment insurance law of any state approved by the United States Secretary of Labor under section 3304 of the Internal Revenue Code of 1954.
- B. Effect of State Law Provisions Relating to Regular Benefits on Claims for, and for Payment of, Extended Benefits. — Except when the result would be inconsistent with the other provisions of this section, as provided in the regulations of the Commission, the provisions of this Chapter which apply to claims for, or the payment of, regular benefits shall apply to claims for, and the payment of, extended benefits.
- C. Eligibility Requirements for Extended Benefits. — An individual shall be eligible to receive extended benefits with respect to any week of unemployment in his eligibility period only if the Commission finds that with respect to such week:
1. He is an "exhaustee" as defined in subsection A(10).
 2. He has satisfied the requirements of this Chapter for the receipt of regular benefits that are applicable to individuals claiming extended benefits, including not being subject to a disqualification for the receipt of benefits. Provided, however, that for purposes of disqualification for extended benefits for weeks of unemployment beginning after March 31, 1981, the term "suitable work" means any work which is within the individual's capabilities to perform if: (i) The gross average weekly remuneration payable for the work exceeds the sum of the individual's weekly extended benefit amount plus the amount, if any, of supplemental unemployment benefits (as defined in section 501(C)(17)(D) of the Internal Revenue Code of 1954) payable to such individual for such week; and (ii) the gross wages payable for the work equal the higher of the minimum wages provided by section 6(a)(1) of the Fair Labor Standards Act of 1938 as amended (without regard to any exemption), or the State minimum wage; and (iii) the work is offered to the individual in writing and is listed with the State employment service; and (iv) the considerations contained in G.S. 96-14(3) for determining whether or not work is suitable are applied to the extent that they are not inconsistent with the specific requirements of this subdivision; and (v) the individual cannot furnish evidence satisfactory to the Commission that his prospects for obtaining work in his customary occupation within a reasonably short period of time are good, but if the individual submits evidence which the Commission deems satisfactory for this purpose, the determination of whether or not work is suitable with respect to such individual shall be made in accordance with G.S. 96-14(3) without regard to the definition contained in this subdivision. Provided, further, that no work shall be deemed to be suitable work for an individual which does not accord with the labor standard provisions set forth in this subdivision, but the employment service shall refer any individual claiming extended benefits to any work which is deemed suitable hereunder. Provided, further, that any individual who has been disqualified for voluntarily leaving employment, being discharged for misconduct or substantial fault, or refusing suitable work under G.S. 96-14 and who has had the disqualification terminated, shall have such disqualification reinstated when claiming extended benefits unless the termination of the disqualification was based upon employment subsequent to the date of the disqualification.

3. After March 31, 1981, he has not failed either to apply for or to accept an offer of suitable work, as defined in G.S. 96-12(e)C.2., to which he was referred by an employment office of the Commission, and he has furnished the Commission with tangible evidence that he has actively engaged in a systematic and sustained effort to find work. If an individual is found to be ineligible hereunder, he shall be ineligible beginning with the week in which he either failed to apply for or to accept the offer of suitable work or failed to furnish the Commission with tangible evidence that he has actively engaged in a systematic and sustained effort to find work and such individual shall continue to be ineligible for extended benefits until he has been employed in each of four subsequent weeks (whether or not consecutive) and has earned remuneration equal to not less than four times his weekly benefit amount.

D. **Weekly Extended Benefit Amount.** — The weekly extended benefit amount payable to an individual for a week of total unemployment in his eligibility period shall be an amount equal to the weekly benefit amount payable to him during his applicable benefit year. For any individual who was paid benefits during the applicable benefit year in accordance with more than one weekly benefit amount, the weekly extended benefit amount shall be the average of such weekly benefit amounts rounded to the nearest lower full dollar amount (if not a full dollar amount). Provided, that for any week during a period in which federal payments to states under Section 204 of the Federal-State Extended Unemployment Compensation Act of 1970, P.L. 91-373, are reduced under an order issued under Section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985, P.L. 99-177, the weekly extended benefit amount payable to an individual for a week of total unemployment in his eligibility period shall be reduced by a percentage equivalent to the percentage of the reduction in the federal payment. The reduced weekly extended benefit amount, if not a full dollar amount, shall be rounded to the nearest lower full dollar amount.

E. **Total Extended Benefit Amount.** —

(a) Except as provided in subparagraph (b) hereof, the total extended benefit amount payable to any eligible individual with respect to his applicable benefit year shall be the least of the following amounts:

1. Fifty percent (50%) of the total amount of regular benefits which were payable to him under this Chapter in his applicable benefit year; or
2. Thirteen times his weekly benefit amount which was payable to him under this Chapter for a week of total unemployment in the applicable benefit year.

Provided, that during any fiscal year in which federal payments to states under Section 204 of the Federal-State Extended Unemployment Compensation Act of 1970, P.L. 91-373, are reduced under an order issued under Section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985, P.L. 99-177, the total extended benefit amount payable to an individual with respect to his applicable benefit year shall be reduced by an amount equal to the aggregate of the reductions under G.S. 96-12(e)D and the weekly amounts paid to the individual.

(b) Notwithstanding any other provisions of this Chapter, if the benefit year of any individual ends within an extended benefit pe-

riod, the remaining balance of extended benefits that such individual would, but for this subparagraph, be entitled to receive in that extended benefit period, with respect to weeks of unemployment beginning after the end of the benefit year, shall be reduced (but not below zero) by the product of the number of weeks for which the individual received any amounts as trade readjustment allowances within that benefit year, multiplied by the individual's weekly benefit amount for extended benefits.

F. Beginning and Termination of Extended Benefit Period. —

1. Whenever an extended benefit period is to become effective in this State as a result of an "on" indicator, or an extended benefit period is to be terminated in this State as a result of an "off" indicator, the Commission shall make an appropriate public announcement; and
2. Computations required by the provisions of subsection A(6) shall be made by the Commission, in accordance with regulations prescribed by the United States Secretary of Labor.

G. Prior to January 1, 1978, any extended benefits paid to any claimant under G.S. 96-12(e) shall not be charged to the account of the base period employer(s) who pay taxes as required by this Chapter. However, fifty percent (50%) of any such benefits paid shall be allocated as provided in G.S. 96-9(c)(2)a (except that G.S. 96-9(c)(2)b shall not apply), and the applicable amount shall be charged to the account of the appropriate employer paying on a reimbursement basis in lieu of taxes.

On and after January 1, 1978, the federal portion of any extended benefits shall not be charged to the account of any employer who pays taxes as required by this Chapter but the State portion of such extended benefits shall be charged to the account of such employer. All state portions of the extended benefits paid shall be charged to the account of governmental entities or other employers not liable for FUTA taxes who are the base period employers.

- H. Notwithstanding the provisions of G.S. 96-9(d)(1)a, 96-9(d)(2)c, 96-12(e)G, or any other provision of this Chapter, any extended benefits paid which are one hundred percent (100%) federally financed shall not be charged in any percentage to any employer's account.**
- I. For weeks of unemployment beginning on or after June 1, 1981, a claimant who is filing an interstate claim under the interstate benefit payment plan shall be eligible for extended benefits for no more than two weeks when there is an "off indicator" in the state where the claimant files.**

(Ex. Sess. 1936, c. 1, s. 3; 1937, c. 448, s. 1; 1939, c. 27, ss. 1-3, 14; c. 141; 1941, c. 108, s. 1; c. 276; 1943, c. 377, ss. 1-4; 1945, c. 522, ss. 24-26; 1947, c. 326, s. 21; 1949, c. 424, ss. 19-21; 1951, c. 332, ss. 10-12; 1953, c. 401, ss. 17, 18; 1957, c. 1059, ss. 12, 13; c. 1339; 1959, c. 362, ss. 12-15; 1961, c. 454, ss. 17, 18; 1965, c. 795, ss. 15, 16; 1969, c. 575, s. 9; 1971, c. 673, ss. 25, 26; 1973, c. 1138, ss. 3-7; 1975, c. 2, ss. 1-5; 1977, c. 727, s. 52; 1979, c. 660, ss. 18, 19; 1981, c. 160, ss. 17-23; 1981 (Reg. Sess., 1982), c. 1178, ss. 3-14; 1983, c. 585, ss. 12-16; c. 625, ss. 1, 7; 1985, c. 552, s. 9; 1985 (Reg. Sess., 1986), c. 918.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective July 1, 1986, added the last two sentences of subdivision (e)D and added the last sentence of paragraph (e)E(a).

§ 96-14. Disqualification for benefits.

CASE NOTES

I. GENERAL CONSIDERATION.

Burden of Proof. —

The burden is on the employer to show circumstances which disqualify the claimant. *Umstead v. Employment Sec. Comm'n*, 75 N.C. App. 538, 331 S.E.2d 218, cert. denied, 314 N.C. 675, 336 S.E.2d 405, 337 S.E.2d 853 (1985).

Substantial Fault Not Rising to Level of Misconduct. — The personal financial mismanagement of claimant, a legal secretary, constituted substantial fault connected with her work not rising to the level of misconduct for which she could be terminated, as the actions of the claimant, though unintentional and occurring primarily away from her work, had the effect of posing a serious threat to the reputation of her employer, the integrity of his law practice, and his relationship with clients and associates. *Smith v. Spence & Spence, Att'ys*, — N.C. App. —, 343 S.E.2d 256 (1986), affirming the decision of the Commission to disqualify the secretary from receiving unemployment benefits for a period of four weeks.

III. MISCONDUCT.

Conversion of Employer's Surplus Property. — Where the Commission found as facts that claimants had participated in a sale of their employer's surplus property without specific approval or authorization by the employer, that claimants never attempted to see that the employer received the proceeds of the sale, and that claimants knew or should have known that converting their employer's prop-

erty to their own benefit was not permitted, the Commission logically concluded that claimants' conduct was misconduct connected with their work as defined by case law and properly decided that claimants were disqualified from unemployment benefits. *Vanhorn v. Bassett Furn. Indus., Inc.*, 76 N.C. App. 377, 333 S.E.2d 309 (1985).

An employee's conduct in not reporting directly to his supervisor, replying that he needed at least an hour to go over some papers on his desk, did not rise to the level of culpability required for a finding of "misconduct," considering the supervisor's admission that there was very little by way of information that he had to convey, that there was no urgent need for an immediate meeting, and that he could have conveyed the information by telephone. *State v. Field*, 75 N.C. App. 647, 331 S.E.2d 221, cert. denied and appeal dismissed, 315 N.C. 186, 337 S.E.2d 582 (1985).

An employee who had a good faith cause for leaving work early without permission, not notifying his supervisor and entering hours into his time record that he did not actually work (i.e., he completed his work and was tired, he didn't want to disturb his supervisor at home early in the morning, and he entered his time before his work day and forgot to later correct it), did not demonstrate a willful and deliberate disregard of company policy or an unwillingness to work which would disqualify him from unemployment insurance benefits. *Williams v. Burlington Indus., Inc.*, 75 N.C. App. 273, 330 S.E.2d 657, cert. granted, 314 N.C. 549, 335 S.E.2d 28 (1985).

§ 96-15. Claims for benefits.

CASE NOTES

Conclusiveness of Findings of Fact, etc. —

In accord with 5th paragraph in main volume. See *Vanhorn v. Bassett Furn. Indus., Inc.*, 76 N.C. App. 377, 333 S.E.2d 309 (1985).

Remand Where Findings of Fact, etc. —

Where there is no finding as to a material fact which is necessary for a proper determination of a case, the case must be remanded to the Commission to make a proper finding. *Williams v. Burlington Indus., Inc.*, 75 N.C. App. 273, 330 S.E.2d 657, cert. granted, 314 N.C. 549, 335 S.E.2d 28 (1985).

Where the appeals referee made all of the necessary findings of material fact, but reached the wrong legal conclusion, it was error for the Commission to remand the case for a second, subsequent hearing before the appeals referee. *Williams v. Burlington Indus., Inc.*, 75 N.C. App. 273, 330 S.E.2d 657, cert. granted, 314 N.C. 549, 335 S.E.2d 28 (1985).

Cited in *Umstead v. Employment Sec. Comm'n*, 75 N.C. App. 538, 331 S.E.2d 218 (1985).

Chapter 97.

Workers' Compensation Act.

Article 1.

Workers' Compensation Act.

Sec.

- 97-94. Employers required to give proof within 30 days that they have complied with preceding section; fine for not keeping liability insured; review; liability for compensation; failure to secure payment of compensation a misdemeanor.
- 97-100. Rates for insurance; carrier to make reports for determination of solvency; tax upon premium; returned or cancelled premiums; reports of premiums collected; wrongful or fraudulent representation of carrier punishable as misdemeanor; notices to carrier; employer who carries own risk shall make report on payroll.

Article 3.

Security Funds.

Sec.

- 97-123 to 97-129. [Reserved.]

Article 4.

North Carolina Self-Insurance Guaranty Association.

- 97-130. Definitions.
- 97-131. Creation.
- 97-132. Board of directors.
- 97-133. Powers and duties of the Association.
- 97-134. Plan of Operation.
- 97-135. Insolvency.
- 97-136. Powers and duties of the Commissioner.
- 97-137. Examination of the Association.
- 97-138. Tax exemption.
- 97-139. Immunity.
- 97-140. Nonduplication of recovery.
- 97-141. Stay of proceedings.
- 97-142. Disposition of assets upon dissolution.

ARTICLE 1.

Workers' Compensation Act.

§ 97-1. Short title.

CASE NOTES

The Workers' Compensation Act is to be liberally construed, etc. —

In accord with 4th paragraph in main volume. See *Harrell v. Harriet & Henderson Yarns*, 314 N.C. 566, 336 S.E.2d 47 (1985).

In accord with 6th paragraph in main volume. See *Belfield v. Weyerhaeuser Co.*, 77 N.C. App. 332, 335 S.E.2d 44 (1985).

Or to Expand Liability. —

In accord with main volume. See *McDonald v. Brunswick Elec. Membership Corp.*, 77 N.C. App. 753, 336 S.E.2d 407 (1985).

Act Not Exclusive Remedy, etc. —

An employee was free to assert an inten-

tional assault and battery tort action against a coemployee. The coemployee was liable when he intentionally tapped the employee behind the knees, causing her to fall and injure herself, although he allegedly did not intend or foresee the injury. *Andrews v. Peters*, 75 N.C. App. 252, 330 S.E.2d 638, cert. denied, 315 N.C. 182, 337 S.E.2d 65 (1985).

Cited in *Lemmerman v. A.T. Williams Oil Co.*, — N.C. App. —, 339 S.E.2d 820 (1986); *Cain v. Guyton*, — N.C. App. —, 340 S.E.2d 501 (1986); *Carawan v. Carolina Tel. & Tel. Co.*, — N.C. App. —, 340 S.E.2d 506 (1986).

§ 97-2. Definitions.

CASE NOTES

I. IN GENERAL.

Failure to Specify Defense. — Plaintiff was not prejudiced by failure of defendants to specify the defense which they planned to use at his hearing, and whatever defense the defendants may have relied upon, the burden was on plaintiff to prove that he was injured by an accident arising out of and in the course of employment. *Parker v. Burlington Indus., Inc.*, 78 N.C. App. 517, 337 S.E.2d 589 (1985).

Quoted in *Capps v. Standard Trucking Co.*, 77 N.C. App. 448, 335 S.E.2d 357 (1985); *Underwood v. Cone Mills Corp.*, 78 N.C. App. 155, 336 S.E.2d 634 (1985).

II. EMPLOYMENT, EMPLOYEES, AND EMPLOYERS.

A. In General.

Stipulation as to Employment Relationship. — Stipulation of defendants, prior to hearing, that at the time of injury, the employment relationship existed between plaintiff and defendant employer, was binding on defendants; such a stipulation made it unnecessary for plaintiff to offer evidence of the validity or legal status of his corporate employer at the time of plaintiff's injury. *Sorrell v. Sorrell's Farms & Ranches, Inc.*, 78 N.C. App. 415, 337 S.E.2d 595 (1985).

C. Regular Employment of Four or More.

Having five (now four) or more employees is a jurisdictional prerequisite, etc. —

In accord with main volume. See *Cain v. Guyton*, — N.C. App. —, 340 S.E.2d 501 (1986).

The plaintiff has the burden of proving that the employer regularly employed five (now four) or more employees. *Cain v. Guyton*, — N.C. App. —, 340 S.E.2d 501 (1986).

Evidence Held Sufficient. —

Plaintiff's testimony, which was corroborated by defendant's records, held competent evidence that defendant regularly employed five (now four) or more employees during the period of plaintiff's employment with defendant and that the Commission thus had jurisdiction. *Cain v. Guyton*, — N.C. App. —, 340 S.E.2d 501 (1986).

D. Casual Employment.

Eight-year-old child of part-time cashier who sustained an accidental injury on the

premises of defendant's convenience store and service station, at which he stayed after school, and at which on some afternoons he did tasks about the place, such as carrying out the garbage, picking up trash and restocking the cigarette, candy and soft drink machines, for which he was paid a dollar or so, was at least a casual employee, whose employment was not excluded by the statute, since the work that he did was required in the operation of defendant's business. Fact that the child was too young to be lawfully employed was irrelevant. *Lemmerman v. A.T. Williams Oil Co.*, — N.C. App. —, 339 S.E.2d 820 (1986).

E. Independent Contractors.

1. In General.

Act Inapplicable to Independent Contractor. —

To establish that he was covered by the provisions of this Article, a worker had the burden of proving that he was either an employee of a subcontractor or the general contractor, rather than an independent subcontractor. *Gordon v. West Constr. Co.*, 75 N.C. App. 608, 331 S.E.2d 259 (1985).

III. AVERAGE WEEKLY WAGES.

A. In General.

And It Uses Only Wages of Volunteer Fireman's Principal Employment. —

In providing the method by which compensation for volunteer firemen is calculated, the General Assembly adopted as the basis for determining compensation the wages earned by the volunteer fireman in his principal employment, rather than permitting a combination of his earnings from multiple employments. *Derebery v. Pitt County Fire Marshall*, 76 N.C. App. 67, 332 S.E.2d 94, cert. granted, 315 N.C. 183, 337 S.E.2d 856 (1985).

IV. COMPENSABLE INJURIES, GENERALLY.

Finding of Injury Required. — The fact that plaintiff sustained an injury is a critical fact upon which her right to compensation depends; thus, a specific finding of that fact is required by the Commission. *Jackson v. Fayetteville Area Sys. of Transp.*, 78 N.C. App. 412, 337 S.E.2d 110 (1985).

Finding that plaintiff experienced pain as a result of what occurred while performing her duties was not a sufficient finding that plaintiff sustained an injury. *Jackson*

v. Fayetteville Area Sys. of Transp., 78 N.C. App. 412, 337 S.E.2d 110 (1985).

Back Injuries. — By amending the second sentence of subdivision (6) to say that an accident with respect to back injuries includes an injury that is the "result of a specific traumatic incident," the General Assembly intended to relax the requirement that there be some unusual circumstance that accompanied the injury; the use of the words "specific" and "incident" means that the trauma or injury must not have developed gradually but must have occurred at a cognizable time. *Bradley v. E.B. Sportswear, Inc.*, 77 N.C. App. 450, 335 S.E.2d 52 (1985).

V. ACCIDENT.

The terms "injury" and "accident," as used in the act, etc. —

In accord with main volume. See *Swindell v. Davis Boat Works, Inc.*, 78 N.C. App. 393, 337 S.E.2d 592 (1985).

The accident must be a separate event, etc. —

In accord with 2nd paragraph in main volume. See *Bowles v. CTS of Asheville, Inc.*, 77 N.C. App. 547, 335 S.E.2d 502 (1985).

Or Involves a Result Produced by, etc. —

In accord with 1st paragraph in main volume. See *Bowles v. CTS of Asheville, Inc.*, 77 N.C. App. 547, 335 S.E.2d 502 (1985).

Accident involves the interruption of the work routine and, etc. —

In accord with main volume. See *Sanderson v. Northeast Constr. Co.*, 78 N.C. App. 393, 334 S.E.2d 392 (1985).

An injury which occurs under normal work conditions, etc. —

Once an activity, even a strenuous or otherwise unusual activity, becomes a part of the employee's normal work routine, an injury caused by such activity is not the result of an interruption of the work routine or otherwise an "injury by accident" under the Workers' Compensation Act. *Bowles v. CTS of Asheville, Inc.*, 77 N.C. App. 547, 335 S.E.2d 502 (1985).

No matter how great the injury, if it is caused by an event that involves both an employee's normal work routine and normal working conditions it will not be considered to have been caused by an accident. *Swindell v. Davis Boat Works, Inc.*, 78 N.C. App. 393, 337 S.E.2d 592 (1985).

There must be some new circumstance not a part of usual work routine in order to find that an accident has occurred. *Swindell v. Davis Boat Works, Inc.*, 78 N.C. App. 393, 337 S.E.2d 592 (1985).

Where employee was not engaged in his routine duties in his customary fashion at the time he sustained an injury to his back, the injury was accidental and compensable.

Sanderson v. Northeast Constr. Co., 77 N.C. App. 117, 334 S.E.2d 392 (1985) (decision prior to the 1983 amendment to subdivision (6)).

Insufficient to Show that Activity Caused No Pain in Past. — It is insufficient as a matter of law to show only that in the past a regular activity caused no pain and that the same activity now causes pain; there must be a specific fortuitous event, rather than a gradual build-up of pain, in order to show injury by accident. *Bowles v. CTS of Asheville, Inc.*, 77 N.C. App. 547, 335 S.E.2d 502 (1985).

Employer's Knowledge of Earlier Injury Did Not Make Injury Compensable. —

Finding of the Commission that plaintiff's back injury was not accidental, in that the evidence failed to disclose an interruption of plaintiff's normal work routine, which involved the regular and repetitive lifting, albeit without usage of his left hand, was supported by the evidence, despite plaintiff's argument that because his employer knew of disability certificate given him by his physician following an earlier hand injury but nonetheless assigned him duties which involved lifting heavy objects, the injury occurred as a matter of law outside his normal work routine. *Pittman v. Inco, Inc.*, 78 N.C. App. 134, 336 S.E.2d 637 (1985).

VI. ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT.

A. In General.

Injury While Performing Task Which Was Not Part of Job. — Where it was not a part of the plaintiff's job to clean tote tank, the tote tank was not supposed to be cleaned and the cleaning of it did not further the business of the employer, the Industrial Commission was correct in concluding that plaintiff was "not about his work" when he was overcome by fumes while cleaning the tote tank. *Parker v. Burlington Indus., Inc.*, 78 N.C. App. 517, 337 S.E.2d 589 (1985).

If employee does something which he is not specifically ordered not to do by a then present superior and the thing he does furthers the business of the employer although it is not a part of the employee's job, an injury sustained by accident while he is so performing is in the course of employment. This has been characterized as "being about his work." *Parker v. Burlington Indus., Inc.*, 78 N.C. App. 517, 337 S.E.2d 589 (1985).

XIII. AGGRAVATION OF EXISTING CONDITION OR INFIRMITY.

Employment Need Not Be Sole, etc. —

In accord with 1st paragraph in main volume. See *Kendrick v. City of Greensboro*, — N.C. App. —, 341 S.E.2d 122 (1986).

Back Injury following Previous Back

Surgery. — Under the evidence the Commission could determine that plaintiff's work-related back injury and the surgery which followed contributed to his disability in a reasonable degree, regardless of the fact that he had two previous laminectomies, and that, as a result, plaintiff was entitled to compensation. *Kendrick v. City of Greensboro*, — N.C. App. —, 341 S.E.2d 122 (1986).

XVII. DISABILITY.

Under the act, disability refers not to physical infirmity, etc. —

In accord with 1st paragraph in main volume. See *Grant v. Burlington Indus., Inc.*, 77 N.C. App. 241, 335 S.E.2d 327 (1985); *Peoples v. Cone Mills Corp.*, — N.C. —, 342 S.E.2d 798 (1986).

"Disability" under this Chapter means an impairment in the employee's wage-earning capacity because of injury, not merely a physical impairment. *Hendrix v. Linn-Corriher Corp.*, 78 N.C. App. 373, 337 S.E.2d 106 (1985).

Fact that claimant may be capable of doing sedentary work does not establish that she is not disabled. Disability under the Workers' Compensation Act is not to be equated with physical infirmity. Other factors tending to show the unemployability of the worker, such as age, education and experience, may be considered. *McCubbins v. Fieldcrest Mills, Inc.*, — N.C. App. —, 339 S.E.2d 497 (1986).

And Not by Employer's Willingness, etc. —

The Workers' Compensation Act does not permit an employer to avoid its duty to pay compensation by offering an injured employee employment which the employee under normally prevailing market conditions could find nowhere else and which the employer could terminate at will or for reasons beyond its control. *Peoples v. Cone Mills Corp.*, — N.C. —, 342 S.E.2d 798 (1986).

When a person has been offered, but has not accepted, employment after an accident, and the proffered employment does not accurately reflect the person's ability to compete with others for wages, it cannot be considered evidence of earning capacity. *Peoples v. Cone Mills Corp.*, — N.C. —, 342 S.E.2d 798 (1986).

Supply room position offered to employee by employer, which was so modified because of employee's medical condition that the position would not be offered in the competitive job market, could not be considered as evidence of employee's ability to earn wages. *Peoples v. Cone Mills Corp.*, — N.C. —, 342 S.E.2d 798 (1986).

But there is no "disability," etc. —

Statement in *Branham v. Panel Co.*, 223 N.C. 233, 25 S.E.2d 865 (1943) [annotated in the main volume] that there is no disability if

the employee is receiving the same wages in the same or other employment is correct only so long as the employment reflects the employee's ability to earn wages in the competitive market. *Peoples v. Cone Mills Corp.*, — N.C. —, 342 S.E.2d 798 (1986).

Capacity of Particular Employee, etc. —

Where an employee's efforts to obtain employment would be futile because of age, inexperience, lack of education or other preexisting factors, the employee should not be precluded from compensation for failing to engage in the meaningless exercise of seeking a job which does not exist. *Peoples v. Cone Mills Corp.*, — N.C. —, 342 S.E.2d 798 (1986).

Individual, intellectual and vocational considerations may be taken into account on the issue of disability. *Calloway v. Mills*, 78 N.C. App. 702, 338 S.E.2d 548 (1986).

Employee Able to Do Other Work Not Entitled to Compensation. — Where the uncontradicted medical testimony indicated that plaintiff, a 46 year old man with an eighth grade education who was unable to read a newspaper or spell, suffered from a mild case of employment-related chronic obstructive lung disease, with a 20 to 30 percent lung impairment, but that plaintiff was capable of work involving a clean environment, moderate activity and anything requiring manual dexterity, plaintiff was not entitled to compensation under this Chapter. *Hendrix v. Linn-Corriher Corp.*, 78 N.C. App. 373, 337 S.E.2d 106 (1985).

When Search for Work Need Not Be Shown. — While in order to prove disability, an injured employee must prove that he is unable to work and not merely that he unsuccessfully sought work, the converse is not true. In order to prove disability, the employee need not prove that he unsuccessfully sought employment if the employee proves that he is unable to obtain employment. *Peoples v. Cone Mills Corp.*, — N.C. —, 342 S.E.2d 798 (1986).

The determination of whether a disability exists, etc. —

In accord with main volume. See *Grant v. Burlington Indus., Inc.*, 77 N.C. App. 241, 335 S.E.2d 327 (1985).

Findings Required to Support Conclusion of Disability. —

In accord with main volume. See *Grant v. Burlington Indus., Inc.*, 77 N.C. App. 241, 335 S.E.2d 327 (1985); *Hendrix v. Linn-Corriher Corp.*, 78 N.C. App. 373, 337 S.E.2d 106 (1985).

Inability to Earn Wages Earned Before Injury Must Be Shown. — Before the plaintiff may receive compensation, he must show that he is not capable of earning the same wages he had earned before his injury. Merely showing that plaintiff is not earning the same wages after his injury than before is insufficient. *Hendrix v. Linn-Corriher Corp.*, 78 N.C. App. 373, 337 S.E.2d 106 (1985).

Receipt of Higher Wages for Unsatisfactory Work. — It was not error for the Commission to conclude that employee was permanently partially disabled even though the evidence showed that he had worked in the packing room at a wage higher than he had ever before earned after his impairing lung disease was diagnosed, where the Commission found without exception that he performed unsatisfactorily at this job in the packing department, and where the evidence demonstrated that although he was capable of performing less skilled jobs at the mill, which he did for more than 30 years, he had difficulty in a posi-

tion requiring greater skills. *Calloway v. Mills*, 78 N.C. App. 702, 338 S.E.2d 548 (1986).

Expenses of Medical Monitoring Not Recoverable Absent Continuing Disability. — While an employee was required to undergo continued medical treatment for his injury, the treatment was for purposes of monitoring and observation rather than to hasten his return to health or give relief. The expenses involved in that treatment were not recoverable because there was no continuing "disability." *Little v. Penn Ventilator Co.*, 75 N.C. App. 92, 330 S.E.2d 276, cert. granted, 314 N.C. 666, 335 S.E.2d 902 (1985).

§ 97-6.1. Protection of claimants from discharge or demotion by employers.

CASE NOTES

The General Assembly intended subsection (e) of this section to be a narrow exception to the general rule in subsection (a) that an employer may not dismiss an employee who has in good faith instituted a proceeding against the employer. *Johnson v. Builder's Transp., Inc.*, — N.C. App. —, 340 S.E.2d 515 (1986).

Employee May Be Discharged for Bona Fide Reasons. — When subsections (a) and (e) of this section are read in pari materia, it becomes clear that pursuant to subsection (e) an employer may discharge an employee for a bona fide reason such as the fact that the employee is so disabled that he or she is no longer able to effectively carry out the duties for which he or she is employed. *Johnson v. Builder's Transp., Inc.*, — N.C. App. —, 340 S.E.2d 515 (1986).

Judgment for Employer Upheld. — In a civil action for retaliatory discharge instituted by plaintiff employee against defendant employer alleging a violation of this section, the fact that plaintiff had received compensation for permanent partial disability, along with uncontradicted affidavits submitted by defendant showing that this disability interfered with his ability to adequately perform available work, rendered inquiry into the reasoning for his dismissal pointless, and supported trial court's award of summary judgment to employer. *Johnson v. Builder's Transp., Inc.*, — N.C. App. —, 340 S.E.2d 515 (1986).

Cited in *Hogan v. Forsyth Country Club Co.*, — N.C. App. —, 340 S.E.2d 116 (1986).

§ 97-9. Employer to secure payment of compensation.

Legal Periodicals. —

For note, "Pleasant v. Johnson: The North Carolina Supreme Court Enters the Twilight

Zone — Is a Co-employee Liable in Tort for Willful, Reckless, and Wanton Conduct?", see 64 N.C.L. Rev. 688 (1986).

CASE NOTES

Editor's Note. — For additional cases relating to rights and remedies against employer, see the case notes under § 97-10.1.

Act Provides Sole Remedy, etc. —

The North Carolina Workers' Compensation Act provides the exclusive remedy when an employee is injured in the course of his or her employment by the willful, wanton and reckless negligence of the employer, and an employee may not bring a civil action against the employer for injuries received as a result of

such negligence. *Barrino v. Radiator Specialty Co.*, — N.C. —, 340 S.E.2d 295 (1986).

A claim for punitive damages is also subject to the bar of the exclusivity provision of the act. *Barrino v. Radiator Specialty Co.*, — N.C. —, 340 S.E.2d 295 (1986).

Conduct Violating Safety Codes and Laws. — The exclusiveness of the act cannot be avoided by bringing a civil action against the employer merely because the conduct complained of is alleged to violate the National

Electric Code and Occupational Safety and Health Act of North Carolina (OSHANC).

Barrino v. Radiator Specialty Co., — N.C. —, 340 S.E.2d 295 (1986).

§ 97-10.1. Other rights and remedies against employer excluded.

Legal Periodicals. —

For note, "Pleasant v. Johnson: The North Carolina Supreme Court Enters the Twilight

Zone — Is a Co-employee Liable in Tort for Willful, Reckless, and Wanton Conduct?", see 64 N.C.L. Rev. 688 (1986).

CASE NOTES

Editor's Note. — For additional cases relating to rights and remedies against employer and coemployee, see the case notes under § 97-9.

Employee's Rights and Remedies Hereunder Are Exclusive. —

The North Carolina Workers' Compensation Act provides the exclusive remedy when an employee is injured in the course of his or her employment by the willful, wanton and reckless negligence of the employer, and an employee may not bring a civil action against the employer for injuries received as a result of such negligence. *Barrino v. Radiator Specialty Co.*, — N.C. —, 340 S.E.2d 295 (1986).

A claim for punitive damages is also subject to the bar of the exclusivity provision of the act. *Barrino v. Radiator Specialty Co.*, — N.C. —, 340 S.E.2d 295 (1986).

Conduct Violating Safety Codes and Laws. — The exclusiveness of the act cannot be avoided by bringing a civil action against the employer merely because the conduct complained of is alleged to violate the National Electric Code and Occupational Safety and Health Act of North Carolina (OSHANC). *Barrino v. Radiator Specialty Co.*, — N.C. —, 340 S.E.2d 295 (1986).

Action Against Employer for Intentional Conduct Is Not Barred. — The Workers' Compensation Act does not bar a common law action by an employee against his employer for the intentional conduct of the employer. *Hogan v. Forsyth Country Club Co.*, — N.C. App. —, 340 S.E.2d 116 (1986).

Actions for intentional infliction of mental and emotional distress are not barred by this section. *Hogan v. Forsyth Country Club Co.*, — N.C. App. —, 340 S.E.2d 116 (1986).

Sexual Harassment by Coemployee. — Although the North Carolina Workers' Compensation Act eliminated negligence as a basis of recovery against an employer, the act covers only those injuries which arise out of and in the course of employment. Emotional injury allegedly suffered by plaintiff, resulting from co-employee's sexual harassment, was not a natural and probable consequence or incident of the employment so as to bar her claim for negligence against employer in retaining the coemployee in a supervisory position after having actual notice of his proclivity to engage in sexually offensive conduct. *Hogan v. Forsyth Country Club Co.*, — N.C. App. —, 340 S.E.2d 116 (1986).

§ 97-10.2. Rights under Article not affected by liability of third party; rights and remedies against third parties.

Legal Periodicals. —

For note, "Pleasant v. Johnson: The North Carolina Supreme Court Enters the Twilight

Zone — Is a Co-employee Liable in Tort for Willful, Reckless, and Wanton Conduct?", see 64 N.C.L. Rev. 688 (1986).

CASE NOTES

I. IN GENERAL.

Trial court did not err in limiting interest allowed plaintiff to the interest on the amount of the jury award as reduced pursuant to this section. *Absher v. Vannoy-Lankford*

Plumbing Co., 78 N.C. App. 620, 337 S.E.2d 877 (1985).

Appeal from Reduced Award. — Plaintiff was not a "party aggrieved" by judgment entered in superior court reducing her ultimate recovery to the difference between jury award

and workers' compensation award pursuant to this section, so as to permit her appeal from such recovery. *Absher v. Vannoy-Lankford Plumbing Co.*, 78 N.C. App. 620, 337 S.E.2d 877 (1985).

Stated in *Barrino v. Radiator Specialty Co.*, — N.C. —, 340 S.E.2d 295 (1986).

§ 97-12. Use of intoxicant or controlled substance; willful neglect; willful disobedience of statutory duty, safety regulation or rule.

CASE NOTES

I. IN GENERAL.

The employer has the burden, etc. —

The employer has the burden of proving intoxication as an affirmative defense. He must prove not only that the employee was intoxicated at the time of the accident causing the injury or death, but also that the accident was proximately caused by the employee's intoxication. *Torain v. Fordham Drug Co.*, — N.C. App. —, 340 S.E.2d 111 (1986).

The employer need not disprove all other possible causes of the accident and injury, nor need he prove that intoxication was the sole proximate cause of the accident; he is only required to prove that the employee's intoxication was more probably than not a proximate cause of the accident and resulting injury. *Torain v. Fordham Drug Co.*, — N.C. App. —, 340 S.E.2d 111 (1986).

Evidence of Intoxication. — The Industrial Commission had the power to determine whether physician was qualified to testify as an expert in stating his opinion as to deceased employee's intoxication at 2:50 p.m., based on a blood alcohol test administered at 5:00 p.m. *Torain v. Fordham Drug Co.*, — N.C. App. —, 340 S.E.2d 111 (1986).

Suicide Induced by Injury. —

An employee who becomes mentally deranged and deprived of normal judgment as a result of a compensable accident and commits suicide in consequence does not act willfully within the meaning of this section. *Elmore v. Broughton Hosp.*, 76 N.C. App. 582, 334 S.E.2d 231, cert. denied, 315 N.C. 390, 338 S.E.2d 879 (1985).

Cited in *Barrino v. Radiator Specialty Co.*, — N.C. —, 340 S.E.2d 295 (1986).

II. ILLUSTRATIVE CASES.

Injury Held Result of Intoxication. —

When considered together, the evidence with respect to the manner in which deceased employee was driving, the presence of an odor of alcohol about his person, his statement that he had been drinking, and the level of alcohol found in his blood supported the Commission's finding of fact that he was intoxicated at the time of the accident, and that his intoxication was a proximate cause of the accident and his resulting injuries and death, as did evidence negating brake failure as a cause of the accident. *Torain v. Fordham Drug Co.*, — N.C. App. —, 340 S.E.2d 111 (1986).

§ 97-13. Exceptions from provisions of Article.

Legal Periodicals. — For 1984 survey, "Employee Exclusion Clauses in Automobile

Liability Insurance Policies," see 63 N.C.L. Rev. 1228 (1985).

CASE NOTES

V. NUMBER OF EMPLOYEES.

Whether or not the minimum number, etc. —

The requirement that five (now four) or more employees be regularly employed in the same business or establishment is jurisdictional.

Cain v. Guyton, — N.C. App. —, 340 S.E.2d 501 (1986).

The plaintiff has the burden of proving that the employer regularly employed five (now four) or more employees. *Cain v. Guyton*, — N.C. App. —, 340 S.E.2d 501 (1986).

§ 97-17. Settlements allowed in accordance with Article.

CASE NOTES

Applied in Roberts v. Carolina Tables of Hickory, 76 N.C. App. 148, 331 S.E.2d 757 (1985).

§ 97-18. Prompt payment of compensation required; installments; notice to Commission; penalties.

CASE NOTES

Modification of Award prior to Filing of Closing Receipt. — A closing receipt, also called I.C. Form 28B, must be filed with the Commission. Until it is filed with and approved by the Commission, the Commission may continue to receive evidence and modify or add to a preliminary compensation award. *Hill v. Hanes Corp.*, — N.C. App. —, 339 S.E.2d 1 (1986).

Determination of Final Payment. — For purposes of § 97-47, the statutory one-year period for filing a claim for a change of condition

begins at the time final payment is accepted, not when I.C. Form 28B is filed. Nonetheless, the Commission must be given the opportunity to determine whether a payment labeled “final” is or should be, in fact, the final payment. After this determination is made, the Commission accepts and approves a copy of Form 28B. *Hill v. Hanes Corp.*, — N.C. App. —, 339 S.E.2d 1 (1986).

Cited in Moretz v. Richards & Assocs., — N.C. —, 342 S.E.2d 844 (1986).

§ 97-21. Claims unassignable and exempt from taxes and debts; agreement of employee to contribute to premium or waive right to compensation void; unlawful deduction by employer.

CASE NOTES

Obligation to support one’s children is not a “debt” in the legal sense of the word; thus, a defendant can be required to pay child

support out of his workers’ compensation benefits. *State v. Miller*, 77 N.C. App. 436, 335 S.E.2d 187 (1985).

§ 97-22. Notice of accident to employer.

CASE NOTES

Claim Not Dismissed Where Insurer Had Actual Notice. — Where the defendant insurer had actual notice of the plaintiff employee’s injury within 30 days, the defendant could not have been prejudiced by plaintiff’s failure to give written notice; thus, there was no error in the Industrial Commission’s not finding the plaintiff failed to give timely writ-

ten notice or in its not dismissing plaintiff’s claim for not giving timely written notice. *Sanderson v. Northeast Constr. Co.*, 77 N.C. App. 117, 334 S.E.2d 392 (1985).

Cited in Belfield v. Weyerhaeuser Co., 77 N.C. App. 332, 335 S.E.2d 44 (1985); *Cain v. Guyton*, — N.C. App. —, 340 S.E.2d 501 (1986).

§ 97-23. What notice is to contain; defects no bar; notice personally or by registered letter or certified mail.

CASE NOTES

Cited in *Belfield v. Weyerhaeuser Co.*, 77 N.C. App. 332, 335 S.E.2d 44 (1985).

§ 97-24. Right to compensation barred after two years; destruction of records.

CASE NOTES

Limited Jurisdiction of the Industrial Commission. —

In accord with main volume. See *Belfield v. Weyerhaeuser Co.*, 77 N.C. App. 332, 335 S.E.2d 44 (1985).

The requirement that a claim be filed within, etc. —

In accord with 2nd paragraph in main vol-

ume. See *Belfield v. Weyerhaeuser Co.*, 77 N.C. App. 332, 335 S.E.2d 44 (1985).

Party may be equitably estopped from asserting time limitation in this section as a bar to jurisdiction. *Belfield v. Weyerhaeuser Co.*, 77 N.C. App. 332, 335 S.E.2d 44 (1985).

Cited in *C.W. Matthews Contracting Co. v. State*, 75 N.C. App. 317, 330 S.E.2d 630 (1985).

§ 97-25. Medical treatment and supplies.

CASE NOTES

I. IN GENERAL.

Where insurance company agreed to pay all necessary medical expenses incurred by plaintiff through May 31, 1983, while plaintiff waived any and all rights to reopen a claim for further compensation, and insurer was notified on May 16, 1983, that plaintiff urgently needed medical attention relating to his industrial injury, but took no action and did not authorize the urgently needed hospitalization, defendant breached its duty of good faith and fair dealing by acting to delay the treatment until after May 31, 1983, and the case would be remanded to determine how soon after notification the insurance company could have reasonably granted the authorization and to determine what portion of the costs would have then occurred prior to May 31, 1983, for which defendant was liable. *Gallimore v. Daniels Constr. Co.*, 78 N.C. App. 747, 338 S.E.2d 317 (1986).

Cited in *McDonald v. Brunswick Elec. Membership Corp.*, 77 N.C. App. 753, 336 S.E.2d 407 (1985); *Sawyer v. Ferebee & Son*, 78 N.C. App. 212, 336 S.E.2d 643 (1985).

II. WHAT TREATMENT MUST BE PROVIDED.

Expenses Monitoring and Observation.

— While an employee was required to undergo continued medical treatment for his injury, the treatment was for purposes of monitoring and observation rather than to hasten his return to health or give relief. The expenses involved in that treatment were not recoverable because there was no continuing "disability." *Little v. Penn. Ventilator Co.*, 75 N.C. App. 92, 330 S.E.2d 276, cert. granted, 314 N.C. 666, 335 S.E.2d 902 (1985).

Wheelchair Accessible Residence. — The General Assembly has not included the provision of housing within the liability of an employer to pay compensation to an injured employee; the Industrial Commission was, therefore, without authority to require a defendant to bear the responsibility to furnish an injured plaintiff with a wheelchair accessible residence. *Derebery v. Pitt County Fire Marshall*, 76 N.C. App. 67, 332 S.E.2d 94, cert. granted, 315 N.C. 183, 337 S.E.2d 856 (1985).

§ 97-27. Medical examination; facts not privileged; refusal to be examined suspends compensation; autopsy.

CASE NOTES

Remand Where Findings Fail to Determine Justification for Refusal. — Where the findings of fact of the Industrial Commission fail to determine whether the circumstances justified the plaintiff's refusal to submit to medical procedures, the case must be re-

manded to the Industrial Commission for determination of whether the plaintiff's refusal to undergo the procedures was reasonable under the circumstances. *Hooks v. Eastway Mills, Inc.*, 315 N.C. 657, 335 S.E.2d 898 (1985).

§ 97-29. Compensation rates for total incapacity.

CASE NOTES

I. IN GENERAL.

Construction with § 97-31. —

In accord with 5th paragraph in main volume. See *Whitley v. Columbia Lumber Mfg. Co.*, 78 N.C. App. 217, 336 S.E.2d 642 (1985).

In all cases in which compensation is sought under this section or § 97-30, total or partial disablement must be shown; however, if compensation is sought in the alternative under § 97-31, disablement is presumed from the injury and compensation is accordingly based on the schedule. *Grant v. Burlington Indus., Inc.*, 77 N.C. App. 241, 335 S.E.2d 327 (1985).

When all of an employee's injuries are included in the schedule set out in § 97-31, the employee's entitlement to compensation is exclusively under that section. However, if an employee receives an injury which is compensable and the injury causes him to become so emotionally disturbed that he is unable to work, he is entitled to compensation for total incapacity under this section. *Hill v. Hanes Corp.*, — N.C. App. —, 339 S.E.2d 1 (1986).

Where all of a worker's injuries are compensable under § 97-31, the compensation provided for under that section is in lieu of all other compensation. When, however, an employee cannot be fully compensated under § 97-31 and is permanently incapacitated, he or she is entitled to compensation under this section for total incapacity or under § 97-30 for partial incapacity. *Kendrick v. City of Greensboro*, — N.C. App. —, 341 S.E.2d 122 (1986).

Where an employee is properly determined to be totally and permanently disabled under this section, § 97-32 has no application. *Peoples v. Cone Mills Corp.*, — N.C. —, 342 S.E.2d 798 (1986).

Occupational Disease Is Not Compensable Until It Causes Incapacity to Work. — An occupational disease does not become com-

pensable under this section (relating to total incapacity) or § 97-30 (relating to partial incapacity) until it causes incapacity for work. This incapacity is the basic "loss" for which the worker receives compensation. *Caulder v. Mills*, 314 N.C. 70, 331 S.E.2d 646 (1985).

Fact that plaintiff can perform sedentary work does not in itself preclude the Commission from making an award for total disability if it finds upon supporting evidence that plaintiff, because of other preexisting limitations, is not qualified to perform the kind of sedentary jobs that might be available in the marketplace. *Peoples v. Cone Mills Corp.*, — N.C. —, 342 S.E.2d 798 (1986).

Where occupational lung disease incapacitates an employee from all but sedentary employment, and because of the employee's age, limited education or work experience no sedentary employment for which the employee is qualified exists, the employee is entitled to compensation for total disability. *Peoples v. Cone Mills Corp.*, — N.C. —, 342 S.E.2d 798 (1986).

The relevant injury, etc. —

If preexisting conditions such as the employee's age, education and work experience are such that an injury causes the employee a greater degree of incapacity for work than the same injury would cause some other person, the employee must be compensated for the actual incapacity he or she suffers, and not for the degree of disability which would be suffered by someone who is younger or who possesses superior education or work experience. *Peoples v. Cone Mills Corp.*, — N.C. —, 342 S.E.2d 798 (1986).

Remand for Findings as to Other Employment for Which Qualified. — Where the Commission found that plaintiff had chronic obstructive pulmonary disease caused in part

by her exposure to respirable cotton dust during her employment, but that her impairment was not sufficient to render plaintiff incapable of performing types of employment which did not require very strenuous activity or exposure to cotton dust, but the Commission's findings did not address evidence that due to plaintiff's education, age and experience she was probably not capable of earning wages in any employment which did not require substantial physical exertion, the case was remanded for appropriate findings and conclusions of plaintiff's capacity to earn wages in employment for which she might be qualified. *Webb v. Pauline Knitting Indus.*, 78 N.C. App. 184, 336 S.E.2d 645 (1985).

Wheelchair Accessible Residence. — The General Assembly has not included the provision of housing within the liability of an employer to pay compensation to an injured employee; the Industrial Commission was, therefore, without authority to require a defendant to bear the responsibility to furnish an injured plaintiff with a wheelchair accessible residence. *Derebery v. Pitt County Fire Marshall*, 76 N.C. App. 67, 332 S.E.2d 94, cert. granted, 315 N.C. 183, 337 S.E.2d 856 (1985).

Specially Equipped Van. — Neither the phrase "other treatment or care" nor the term "rehabilitative services" in this section can reasonably be interpreted to include a specially equipped van. *McDonald v. Brunswick Elec. Membership Corp.*, 77 N.C. App. 753, 336 S.E.2d 407 (1985), affirming the Commission's opinion and award, however, to the extent that it required defendants to reimburse plaintiff for the cost of special adaptive equipment in his specially equipped van.

Evidence held sufficient to support the Commission's award of compensation for temporary total disability based on stress-induced depression resulting from injury. *Hill v. Hanes Corp.*, — N.C. App. —, 339 S.E.2d 1 (1986).

Where physician testified that plaintiff suffered continuous pain in his back, both hips, and legs and continuous numbness of the right foot, and that he was 100% disabled, and opined that plaintiff's pain was caused by the use of his back in coordination with his hips and legs, the Commission could determine that plaintiff would not be totally compensated for his injuries under § 97-31 and that, as a result, he was entitled to compensation for permanent total incapacity under this section. *Kendrick v. City of Greensboro*, — N.C. App. —, 341 S.E.2d 122 (1986).

Plaintiff, who received temporal total disability benefits under this section for a compensable heart attack in April, 1979, was properly awarded permanent partial disability under § 97-30 on his application under § 97-47 for modification of the prior award following three additional heart attacks, where the Commission found that he had been permanently and totally disabled since June, 1981, partially as a result of his compensable heart attack in 1979. *Weaver v. Swedish Imports Maintenance, Inc.*, — N.C. App. —, 343 S.E.2d 205 (1986).

Defendants Held Not Entitled to Credit for Scheduled Award. — Where temporary total disability payments for stress-induced depression resulting from injury were to begin approximately six months after the final payment on the scheduled award for permanent partial disability, the defendants would not be given credit on the compensation awarded for temporary total disability for compensation previously awarded under § 97-31(15). *Hill v. Hanes Corp.*, — N.C. App. —, 339 S.E.2d 1 (1986).

Applied in *Harrell v. Harriet & Henderson Yarns*, 314 N.C. 566, 336 S.E.2d 47 (1985).

Cited in *Lumley v. Dancy Constr. Co.*, — N.C. App. —, 339 S.E.2d 9 (1986); *Moretz v. Richards & Assocs.*, — N.C. —, 342 S.E.2d 844 (1986).

§ 97-30. Partial incapacity.

CASE NOTES

Section 97-31 Compared. — In all cases in which compensation is sought under § 97-29 or this section, total or partial disablement must be shown; however, if compensation is sought in the alternative under § 97-31, disablement is presumed from the injury and compensation is accordingly based on the schedule. *Grant v. Burlington Indus., Inc.*, 77 N.C. App. 241, 335 S.E.2d 327 (1985).

Injuries Also Entitling Employee to Compensation under § 97-31. —

Where all of a worker's injuries are compen-

sable under § 97-31, the compensation provided for under that section is in lieu of all other compensation. When, however, an employee cannot be fully compensated under § 97-31 and is permanently incapacitated, he or she is entitled to compensation under § 97-29 for total incapacity or this section for partial incapacity. *Kendrick v. City of Greensboro*, — N.C. App. —, 341 S.E.2d 122 (1986).

Occupational Disease Is Not Compensable Until It Causes Incapacity for Work. — An occupational disease does not become com-

compensable under §§ 97-29 (relating to total incapacity) or this section (relating to partial incapacity) until it causes incapacity for work. This incapacity is the basic "loss" for which the worker receives compensation under those statutes. *Caulder v. Mills*, 314 N.C. 70, 331 S.E.2d 646 (1985).

Amount of Benefit. — Subject to the limitations and percentages stated in the statute in partial disability cases, the weekly benefit due is based on the difference between the employee's average weekly wage before the injury and average weekly wage which he is able to earn thereafter. *Thomason v. Fiber Indus.*, 78 N.C. App. 159, 336 S.E.2d 632 (1985).

The Commission did not err in allowing defendants a credit only for the wages actually earned by employee after he was found to be disabled, as implicit in the Commission's finding that employee was entitled to compensation at two-thirds the difference between his wages prior to disability and his average weekly wages immediately thereafter was a finding that the wages actually earned by the employee after he was found to be disabled were the wages he was capable of earning. *Cal-loway v. Mills*, 78 N.C. App. 702, 338 S.E.2d 548 (1986), remanding, however, for further findings so that the exact amount of credit could be set and compensation could be properly calculated.

Entitlement to Partial Disability Compensation Shown. — Plaintiff, who received temporary total disability benefits under § 97-29 for a compensable heart attack in April, 1979, was properly awarded permanent partial disability under this section on his application under § 97-47 for modification of the prior award following three additional heart attacks, where the Commission found that he had been permanently and totally disabled since June 1981, partially as a result of his compensable heart attack in 1979. *Weaver v. Swedish Imports Maintenance, Inc.*, — N.C. App. —, 343 S.E.2d 205 (1986).

Individual who retired from job in which he had 47 years of experience at age 70, and subsequently attempted to return to work but could not obtain comparable employment, was entitled to partial disability compensation based on the difference between his present and former wages, in view of environmental restriction, caused by his occupational disease (COPD), which combined with other factors to limit the scope of his potential employment. *Preslar v. Cannon Mills Co.*, — N.C. App. —, 343 S.E.2d 209 (1986).

Cited in *Hill v. Hanes Corp.*, — N.C. App. —, 339 S.E.2d 1 (1986).

§ 97-31. Schedule of injuries; rate and period of compensation.

CASE NOTES

I. IN GENERAL.

Disablement Presumed. — In all cases in which compensation is sought under § 97-29 or § 97-30, total or partial disablement must be shown; however, if compensation is sought in the alternative under this section, disablement is presumed from the injury and compensation is accordingly based on the schedule. *Grant v. Burlington Indus., Inc.*, 77 N.C. App. 241, 335 S.E.2d 327 (1985).

To obtain an award of benefits under any subsection of this section, a specific showing that the claimant has undergone a diminution in wage-earning capacity is not required; instead, disability is presumed from the fact of injury. *Grant v. Burlington Indus., Inc.*, 77 N.C. App. 241, 335 S.E.2d 327 (1985).

This section is a schedule of losses for which compensation is payable even if a claimant does not demonstrate loss of wage-earning capacity. Losses included in the schedule are conclusively presumed to diminish wage-earning ability. *Harrell v. Harriet & Henderson Yarns*, 314 N.C. 566, 336 S.E.2d 47 (1985).

Construction with § 97-29. — When all of plaintiff's injuries are included in the schedule set out in this section, the injured employee is entitled to compensation exclusively under this section, and not under § 97-29, regardless of his ability or inability to work. *Whitley v. Columbia Lumber Mfg. Co.*, 78 N.C. App. 217, 336 S.E.2d 642 (1985).

Injuries Enumerated in Schedule, etc. —

When all of an employee's injuries are included in the schedule set out in this section, the employee's entitlement to compensation is exclusively under that section. However, if an employee receives an injury which is compensable and the injury causes him to become so emotionally disturbed that he is unable to work, he is entitled to compensation for total incapacity under § 97-29. *Hill v. Hanes Corp.*, — N.C. App. —, 339 S.E.2d 1 (1986).

Where all of a worker's injuries are not included, etc. —

Where all of a worker's injuries are compensable under this section, the compensation provided for under this section is in lieu of all

other compensation. When, however, an employee cannot be fully compensated under this section and is permanently incapacitated, he or she is entitled to compensation under § 97-29 for total incapacity or § 97-30 for partial incapacity. *Kendrick v. City of Greensboro*, — N.C. App. —, 341 S.E.2d 122 (1986).

Section 97-52 Does Not Require Showing of Disability. — The obvious intent of the Legislature in enacting § 97-52 was to permit and not restrict recovery for occupational diseases. Section 97-52, therefore, does not require that disability be shown as a condition to recovery under the schedule for occupational disease in this section. *Harrell v. Harriet & Henderson Yarns*, 314 N.C. 566, 336 S.E.2d 47 (1985).

Words "disablement or death" in § 97-52 merely describe a condition that must occur before recovery may be had under § 97-29. They do not predicate recovery under this section upon disability. *Harrell v. Harriet & Henderson Yarns*, 314 N.C. 566, 336 S.E.2d 47 (1985).

Pain. — Pain is not in and of itself a compensable injury. *Jackson v. Fayetteville Area Sys. of Transp.*, 78 N.C. App. 412, 337 S.E.2d 110 (1985).

Pain, rather than being itself an injury, is a manifestation or indication of an injury. *Jackson v. Fayetteville Area Sys. of Transp.*, 78 N.C. App. 412, 337 S.E.2d 110 (1985).

Finding that plaintiff experienced pain as a result of what occurred while she was performing her duties was not a sufficient finding that plaintiff sustained an injury. *Jackson v. Fayetteville Area Sys. of Transp.*, 78 N.C. App. 412, 337 S.E.2d 110 (1985).

When Healing Period Terminates. —

Where plaintiff's "healing period" had stabilized and he had reached his maximum recovery by December 1977, it was this date that marked the termination of his compensation for temporary total disability and the initiation of compensation for permanent disability. And where according to the payment schedule of this section and in accord with the findings of the Commission, plaintiff was entitled to 180 weeks of permanent disability payments, and plaintiff had received nearly 255 weeks of disability payments since that date, plaintiff had already received more than he was entitled by statute to receive, and defendants owed plaintiff no additional compensation. *Moretz v. Richards & Assocs.*, — N.C. —, 342 S.E.2d 844 (1986).

Defendants Held Not Entitled to Credit for Scheduled Award. — Where temporary total disability payments for stress-induced depression resulting from injury were to begin approximately six months after the final payment on the scheduled award for permanent partial disability, the defendants would not be

given credit on the compensation awarded for temporary total disability for compensation previously awarded under subdivision (15) of this section. *Hill v. Hanes Corp.*, — N.C. App. —, 339 S.E.2d 1 (1986).

Award under § 97-29 Upheld. — Where physician testified that plaintiff suffered continuous pain in his back, both hips, and legs and continuous numbness of the right foot, and that he was 100% disabled, and opined that plaintiff's pain was caused by the use of his back in coordination with the hips and the legs, the Commission could determine that plaintiff would not be totally compensated for his injuries under this section and that, as a result, he was entitled to compensation for permanent total incapacity under § 97-29. *Kendrick v. City of Greensboro*, — N.C. App. —, 341 S.E.2d 122 (1986).

Cited in *McDonald v. Brunswick Elec. Membership Corp.*, 77 N.C. App. 753, 336 S.E.2d 407 (1985); *Lumley v. Dancy Constr. Co.*, — N.C. App. —, 339 S.E.2d 9 (1986).

V. EYES.

Eye Injury with Significant Risk of Future Vision Impairment. — While an employee who suffered a laceration of his cornea when a piece of metal hit his eye, presenting a clear danger of retinal detachment in the future, unquestionably sustained a permanent injury to his eye, he did not lose the injured eye or suffer any loss of vision. Since his injury was not specifically encompassed by subdivisions (16) or (19) of this section, or any other subdivision, subdivision (24) was the appropriate basis for the Commission's award. *Little v. Penn Ventilator Co.*, 75 N.C. App. 92, 330 S.E.2d 276, cert. granted, 314 N.C. 666, 335 S.E.2d 902 (1985).

While the evidence tended to support the claim of an employee suffering an eye injury that his risk of some form of future vision impairment was significantly increased, the statutory scheme allowed him to be compensated for "permanent injury," but made no provision for an additional recovery because the claimant could be subject to a greater risk of permanent disability as a result of his accident. Consequently, the amount awarded — \$2,500 — was supported by the evidence. *Little v. Penn Ventilator Co.*, 75 N.C. App. 92, 330 S.E.2d 276, cert. granted, 314 N.C. 666, 335 S.E.2d 902 (1985).

VII. DISFIGUREMENT.

Recovery for Disfigurement Is in Addition to Other Recovery. — Subdivision (21) of this section, when properly read, means that a person may recover for serious facial and head disfigurement in addition to recovery under other parts of the section. *Griffin v. Red &*

White Supermarket, 78 N.C. App. 617, 337 S.E.2d 657 (1985).

Scars Not Visible during Normal Employment. — Evidence did not support the Industrial Commission's award for serious disfigurement affecting plaintiff's future earning capacity where plaintiff's scars on the top of one of her breasts were not visible during her normal employment, plaintiff had affirmatively testified that she would not want a type of job where the scars might show, and she had returned to her former job without reduction in pay or apparent incident. *Anderson v. Shoney's*, 76 N.C. App. 158, 332 S.E.2d 93 (1985).

Enucleation where artificial eye cannot be fitted and used is a type of facial disfigurement under subdivision (21). No other type of eye injury is a compensable disfigurement. *Griffin v. Red & White Supermarket*, 78 N.C. App. 617, 337 S.E.2d 657 (1985).

IX. IMPORTANT ORGANS.

"Loss" as used in subdivision (24) includes loss of use. *Harrell v. Harriet & Henderson Yarns*, 314 N.C. 566, 336 S.E.2d 47 (1985).

Awards under subdivision (24) are equitable in nature and within the Industrial Commission's discretion. *Grant v. Burlington Indus., Inc.*, 77 N.C. App. 241, 335 S.E.2d 327 (1985).

Amount of Award Is Within Commission's Discretion. — While the amount of compensation for most injuries under this section is determined according to a statutory formula, compensation for injuries under subdivision (24) appears to be within the discretion of the Commission, provided that the amount of the award does not exceed the \$10,000 ceiling. *Little v. Penn Ventilator Co.*, 75 N.C. App. 92, 330 S.E.2d 276, cert. granted, 314 N.C. 666, 335 S.E.2d 902 (1985).

Consideration of Earning Capacity. —

An employee is not required to establish a diminution of wage earning capacity under subdivision (24) of this section, although it may be considered in setting the amount of the award. *Little v. Penn Ventilator Co.*, 75 N.C.

App. 92, 330 S.E.2d 276, cert. granted, 314 N.C. 666, 335 S.E.2d 902 (1985).

Remand for Findings as to Capacity for Other Employment. — Where the Commission found that plaintiff had chronic obstructive pulmonary disease caused in part by her exposure to respirable cotton dust during her employment, but that her impairment was not sufficient to render plaintiff incapable of performing types of employment which did not require very strenuous activity or exposure to cotton dust, but the Commission's findings did not address evidence that due to plaintiff's education, age and experience she was probably not capable of earning wages in any employment which did not require substantial physical exertion, the case would be remanded for appropriate findings and conclusions of plaintiff's capacity to earn wages in employment for which she might be qualified. *Webb v. Pauline Knitting Indus.*, 78 N.C. App. 184, 336 S.E.2d 645 (1985).

Lungs. —

An award for partial loss of lung function falls within the scope of subdivision (24) of this section. *Harrell v. Harriet & Henderson Yarns*, 314 N.C. 566, 336 S.E.2d 47 (1985).

There is no statutory justification for excluding loss of or permanent injury to the lungs resulting from occupational disease from the coverage of subdivision (24) of this section, and no statutory justification for making a specific finding of disability a condition precedent for recovery thereunder. *Grant v. Burlington Indus., Inc.*, 77 N.C. App. 241, 335 S.E.2d 327 (1985).

Occupational Disease. —

The Legislature intended for this section to apply to occupational disease. *Harrell v. Harriet & Henderson Yarns*, 314 N.C. 566, 336 S.E.2d 47 (1985).

The Legislature must have intended for occupational disease to be compensable under the schedule in this section or it would not have expressly provided that medical treatments be provided both in cases of disability and in cases of damage to organs. *Harrell v. Harriet & Henderson Yarns*, 314 N.C. 566, 336 S.E.2d 47 (1985).

§ 97-32. Refusal of injured employee to accept suitable employment as suspending compensation.

CASE NOTES

The purpose of this section, etc. —

One purpose of this section is to prevent a partially disabled employee from refusing employment within the employee's capacity in an effort to increase the amount of compensation

payable to the employee. *Peoples v. Cone Mills Corp.*, — N.C. —, 342 S.E.2d 798 (1986).

Where an employee is properly determined to be totally and permanently disabled under § 97-29, this section has no ap-

plication. *Peoples v. Cone Mills Corp.*, — N.C. —, 342 S.E.2d 798 (1986).

§ 97-38. Where death results proximately from the accident; dependents; burial expenses; compensation to aliens; election by partial dependents.

CASE NOTES

I. IN GENERAL.

When Disability or Death Resulting from Disease Is Compensable. — Disability caused by, or death resulting from, a disease is compensable only when the disease is an occupational disease, or is aggravated or accelerated by causes and conditions characteristic of and peculiar to the claimant's employment. *Goodman v. Cone Mills Corp.*, 75 N.C. App. 493, 331 S.E.2d 261 (1985).

Cited in *Elmore v. Broughton Hosp.*, 76 N.C. App. 582, 334 S.E.2d 231 (1985).

II. DEPENDENTS.

Stepchildren must be substantially dependent, etc. —

In accord with 1st paragraph in main volume. See *Capps v. Standard Trucking Co.*, 77 N.C. App. 448, 335 S.E.2d 357 (1985).

A stepchild must be factually "substantially" dependent upon the deceased in order to qualify as a child dependent on deceased under § 97-39 and, therefore, be entitled to a share of death benefits under this section. *Capps v. Standard Trucking Co.*, 77 N.C. App. 448, 335 S.E.2d 357 (1985).

§ 97-39. Widow, widower, or child to be conclusively presumed to be dependent; other cases determined upon facts; division of death benefits among those wholly dependent; when division among partially dependent.

CASE NOTES

Stepchildren must be substantially dependent, etc. —

In accord with 1st paragraph in main volume. See *Capps v. Standard Trucking Co.*, 77 N.C. App. 448, 335 S.E.2d 357 (1985).

A stepchild must be factually "substantially"

dependent upon the deceased in order to qualify as a child dependent on deceased under this section and, therefore, be entitled to a share of death benefits under § 97-38. *Capps v. Standard Trucking Co.*, 77 N.C. App. 448, 335 S.E.2d 357 (1985).

§ 97-42. Deduction of payments.

CASE NOTES

Due and Payable Benefits Are Not Deductible. — This section expressly provides that payments made by the employer which were "due and payable" when made are not deductible. Once the employer has accepted an injury as compensable, benefits are "due and payable." *Moretz v. Richards & Assocs.*, — N.C. —, 342 S.E.2d 844 (1986).

Defendants Held Not Entitled to Deduction. — Where temporary total disability payments for stress-induced depression resulting

from injury were to begin approximately six months after the final payment on the scheduled award for permanent partial disability, the defendants would not be given credit on award for temporary total disability for compensation previously awarded under § 97-31(15). *Hill v. Hanes Corp.*, — N.C. App. —, 339 S.E.2d 1 (1986).

Where employer and carrier accepted plaintiff's injury as compensable, and initiated the payment of benefits, those payments were due

and payable and were not deductible under the provisions of this section, so long as the payments did not exceed the amount determined

by statute or by the Commission to compensate plaintiff for his injuries. *Moretz v. Richards & Assocs.*, — N.C. —, 342 S.E.2d 844 (1986).

§ 97-47. Change of condition; modification of award.

CASE NOTES

I. IN GENERAL.

Continuing Jurisdiction. — It was the purpose of the General Assembly that the Industrial Commission should have a continuing jurisdiction of all proceedings begun before the Commission for compensation in accordance with its terms. *Hogan v. Cone Mills Corp.*, 315 N.C. 127, 337 S.E.2d 477 (1985).

Absent Previous Award, etc. —

This section is inapplicable in cases in which there has been no previous final award. In such cases, jurisdiction remains in the Commission pending termination of the case by a final award. *Hill v. Hanes Corp.*, — N.C. App. —, 339 S.E.2d 1 (1986).

Power of Commission to Grant Rehearing. —

The Commission has the power to order a rehearing on the basis of newly discovered evidence. *Hogan v. Cone Mills Corp.*, 315 N.C. 127, 337 S.E.2d 477 (1985).

The proper procedure to end, diminish or increase a compensation award previously issued is a motion to the Industrial Commission under this section. *Hill v. Hanes Corp.*, — N.C. App. —, 339 S.E.2d 1 (1986).

Power to Set Aside Judgment. — The Industrial Commission has inherent power analogous to that conferred on courts by § 1A-1, Rule 60(b)(6), in the exercise of supervision over its own judgments to set aside a former judgment when the paramount interest in achieving a just and proper determination of a workers' compensation claim requires it. *Hogan v. Cone Mills Corp.*, 315 N.C. 127, 337 S.E.2d 477 (1985).

Because the power to set aside a former judgment is vital to the proper functioning of the judiciary, the Legislature impliedly vested such power in the Commission in conjunction with the judicial power which the Legislature granted it to administer the Workers' Compensation Act. *Hogan v. Cone Mills Corp.*, 315 N.C. 127, 337 S.E.2d 477 (1985).

The Industrial Commission possesses such judicial power as is necessary to administer the Workers' Compensation Act. The Commission's judicial power includes the power to set aside a former judgment on the grounds of mutual mistake, misrepresentation, or fraud. *Hogan v. Cone Mills Corp.*, 315 N.C. 127, 337 S.E.2d 477 (1985).

On defendants' motion under § 1A-1, Rule 60(b)(6), seeking relief from Industrial Commission's award, the court would decline to circumvent the "due diligence" requirement of Rule 60(b)(2) by indiscriminately entertaining any and all "newly discovered evidence" under Rule 60(b)(6). Otherwise, Rule 60(b)(6) would become a vehicle for unsuccessful litigants to obtain automatic rehearings before the Commission without satisfying the requirements of this section. *Hill v. Hanes Corp.*, — N.C. App. —, 339 S.E.2d 1 (1986).

When Time for Filing Claim for Change of Condition Begins to Run. — For purposes of this section, the statutory one-year period for filing a claim for a change of condition begins at the time final payment is accepted, not when I.C. Form 28B is filed. Nonetheless, the Commission must be given the opportunity to determine whether a payment labeled "final" is or should be, in fact, the final payment. After this determination is made, the Commission accepts and approves a copy of Form 28B. *Hill v. Hanes Corp.*, — N.C. App. —, 339 S.E.2d 1 (1986).

Cited in *Calloway v. Mills*, 78 N.C. App. 702, 338 S.E.2d 548 (1986).

II. CHANGE OF CONDITION.

Where the Commission finds a fact in one hearing and evidence in a subsequent hearing shows that such finding was not correct, this will support a finding of a different fact which supports a finding of a change in condition. *Hubbard v. Burlington Indus.*, 76 N.C. App. 313, 332 S.E.2d 746 (1985).

Formation of Scar Tissue Not Change in Condition. — Where plaintiff's condition remained essentially unchanged since his award, and the intensifying of plaintiff's physical problems was due to the scar tissue that infiltrated the area where the operation had been done, plaintiff's continued incapacity was therefore of the same kind and character as his incapacity at the time of the award, and was not a change of condition within the meaning of this section. *Sawyer v. Ferebee & Son*, 78 N.C. App. 212, 336 S.E.2d 643 (1985).

Physician who did not examine plaintiff from December 1980 until September 1981, the date of the original award, would be unable to testify as to plaintiff's amount of disability

at the time of the award, and thus his testimony would be incompetent as to whether plaintiff had suffered a change of condition since that time. *Sawyer v. Ferebee & Son*, 78 N.C. App. 212, 336 S.E.2d 643 (1985).

Modification of Award Upheld. — Plaintiff, who received temporary total disability benefits under § 97-29 for a compensable heart attack in April, 1979, was properly awarded permanent partial disability under § 97-30 on his application under this section for modification of the prior award following three addi-

tional heart attacks, where the Commission found that he had been permanently and totally disabled since June, 1981, partially as a result of his compensable heart attack in 1979. *Weaver v. Swedish Imports Maintenance, Inc.*, — N.C. App. —, 343 S.E.2d 205 (1986).

III. TIME LIMITATIONS.

Estoppel to Rely on Delay. —

In accord with 1st paragraph in main volume. See *Belfield v. Weyerhaeuser Co.*, 77 N.C. App. 332, 335 S.E.2d 44 (1985).

§ 97-48. Receipts relieving employer; payment to minors; when payment of claims to dependents subsequent in right discharges employer.

CASE NOTES

Cited in *Hogan v. Cone Mills Corp.*, 315 N.C. 127, 337 S.E.2d 477 (1985).

§ 97-52. Occupational disease made compensable; "accident" defined.

CASE NOTES

Purpose, etc. —

The purpose of this section and § 97-53 was to compensate employees for occupational disease as defined in the Act. *Bowles v. CTS of Asheville, Inc.*, 77 N.C. App. 547, 335 S.E.2d 502 (1985).

The purpose of this section is to enable a worker to recover for disability caused by occupational disease under § 97-29. *Harrell v. Harriet & Henderson Yarns*, 314 N.C. 566, 336 S.E.2d 47 (1985).

Words "disablement or death" in this section merely describe a condition that must occur before recovery may be had under § 97-29. They do not predicate recovery under § 97-31 upon disability. *Harrell v. Harriet & Henderson Yarns*, 314 N.C. 566, 336 S.E.2d 47 (1985).

Limitation on meaning of "accident" simply prevents claims for maladies that are neither occupational in nature nor arise from an event definite in time and place. *Bowles v. CTS of Asheville, Inc.*, 77 N.C. App. 547, 335 S.E.2d 502 (1985).

Other Gradually Developing Conditions Not Compensable. — This section precludes claims for conditions that develop gradually but do not fall into the category of occupational disease. *Bowles v. CTS of Asheville, Inc.*, 77 N.C. App. 547, 335 S.E.2d 502 (1985).

Disability Need Not Be Shown to Re-

cover under § 97-31. — The obvious intent of the Legislature in enacting this section was to permit and not restrict recovery for occupational diseases. This section, therefore, does not require that disability be shown as a condition to recovery under the schedule for occupational disease in § 97-31. *Harrell v. Harriet & Henderson Yarns*, 314 N.C. 566, 336 S.E.2d 47 (1985).

Showing that Activity Did Not previously Cause Pain Insufficient. — It is insufficient as a matter of law to show only that in the past a regular activity caused no pain and that the same activity now causes pain; there must be a specific fortuitous event, rather than a gradual build-up of pain, in order to show injury by accident. *Bowles v. CTS of Asheville, Inc.*, 77 N.C. App. 547, 335 S.E.2d 502 (1985).

Remand for Findings as to Capacity for Other Employment. — Where the Commission found that plaintiff had chronic obstructive pulmonary disease caused in part by her exposure to respirable cotton dust during her employment, but that her impairment was not sufficient to render plaintiff incapable of performing types of employment which did not require very strenuous activity or exposure to cotton dust, but the Commission's findings did not address evidence that due to plaintiff's education, age and experience she was probably

not capable of earning wages in any employment which did not require substantial physical exertion, the case would be remanded for appropriate findings and conclusions of plaintiff's capacity to earn wages in employment for which she might be qualified. *Webb v. Pauline*

Knitting Indus., 78 N.C. App. 184, 336 S.E.2d 645 (1985).

Applied in *Grant v. Burlington Indus., Inc.*, 77 N.C. App. 241, 335 S.E.2d 327 (1985).

Stated in *Peoples v. Cone Mills Corp.*, — N.C. —, 342 S.E.2d 798 (1986).

§ 97-53. Occupational diseases enumerated; when due to exposure to chemicals.

CASE NOTES

I. IN GENERAL.

Legislative Intent. —

The purpose of § 97-52 and this section was to compensate employees for occupational disease as defined in the Act. *Bowles v. CTS of Asheville, Inc.*, 77 N.C. App. 547, 335 S.E.2d 502 (1985).

Or Aggravated or Accelerated, etc. —

Disability caused by, or death resulting from, a disease is compensable only when the disease is an occupational disease, or is aggravated or accelerated by causes and conditions characteristic of and peculiar to the claimant's employment. *Goodman v. Cone Mills Corp.*, 75 N.C. App. 493, 331 S.E.2d 261 (1985).

II. SUBDIVISION (13).

The 1971 amendment to subdivision (13) of this section broadened its coverage to include a wider range of conditions susceptible to interpretation of being occupational diseases within the meaning of the act. *Carawan v. Carolina Tel. & Tel. Co.*, — N.C. App. —, 340 S.E.2d 506 (1986).

Applicability of Amended, etc. —

The 1971 amendment of subdivision (13) of this section to its present form, which defines occupational disease, applies to all cases originating on and after July 1, 1971. Unlike the 1963 amendment, it was not limited to cases in which the "last exposure" to disease occurred after its effective date, but to cases "originating" after such date. *Hogan v. Cone Mills Corp.*, 315 N.C. 127, 337 S.E.2d 477 (1985).

The current (1971) version of subdivision (13) of this section applies to all claims for disablement in which the disability occurs after the statute's effective date, July 1, 1971. *Hogan v. Cone Mills Corp.*, 315 N.C. 127, 337 S.E.2d 477 (1985).

The 1963 amendment of subdivision (13) of this section to include infections or inflammations of "any other internal or external organ or organs of the body" applied only to cases in which the last exposure in an occupation subject to the hazards of such disease occurred on or after July 1, 1963. *Hogan v. Cone*

Mills Corp., 315 N.C. 127, 337 S.E.2d 477 (1985).

What Constitutes Occupational Disease.

— Under subdivision (13) of this section, any disease is an occupational disease if it is due to causes and conditions peculiarly characteristic of the worker's particular trade, occupation or employment, and if the disease is not one that the general public, outside of the particular employment, stands an equal risk of contracting. The statute contains no other conditions and excludes no particular diseases, including the ordinary diseases of life. *Thomason v. Fiber Indus.*, 78 N.C. App. 159, 336 S.E.2d 632 (1985).

A disease is an occupational disease compensable under this section if claimant's employment exposed him to a greater risk of contracting this disease than members of the public generally and such exposure significantly contributed to, or was a significant causal factor in, the disease's development. *Perry v. Burlington Indus., Inc.*, — N.C. App. —, 343 S.E.2d 215 (1986).

To prove the existence, etc. —

In accord with the main volume. See *Perry v. Burlington Indus., Inc.*, — N.C. App. —, 343 S.E.2d 215 (1986).

But Employment Need Not Be Exclusive Cause, etc. —

Rutledge v. Tultex Corp./Kings Yarn, 308 N.C. 85, 101, 301 S.E.2d 359 (1983), expressly replaced the former standard of actual causation with a liberalized standard of causation, whereby exposure to cotton dust need only be a significant causative or contributing factor in the disease's development. *Calloway v. Mills*, 78 N.C. App. 702, 338 S.E.2d 548 (1986).

Fact that on cross-examination physician testified that plaintiff's cigarette smoking was probably a more significant contributing factor than his occupation did not compel the conclusion that plaintiff did not have a compensable occupational disease. So long as the employment significantly contributed to, or was a significant causal factor in, the disease's development, an occupational disease is compensable under this section. *Perry v. Burlington Indus., Inc.*, — N.C. App. —, 343 S.E.2d 215 (1986).

Causal Connection May Be Established by Circumstantial Evidence. — In occupational disease cases, the causal connection between the disease and the employee's occupation must of necessity be based upon circumstantial evidence. *Lumley v. Dancy Constr. Co.*, — N.C. App. —, 339 S.E.2d 9 (1986).

Commission Must Determine Significance of Exposure. — Ultimately, the Commission must determine whether the occupational exposure was such a significant factor in the disease's development that without it the disease would not have developed to such an extent that it caused the physical disability which resulted in claimant's incapacity for work. *Gay v. J.P. Stevens & Co.*, — N.C. App. —, 339 S.E.2d 490 (1986); *Perry v. Burlington Indus., Inc.*, — N.C. App. —, 343 S.E.2d 215 (1986).

Factors in Determining Significance of Exposure. — In determining the role occupational exposure played in development of disease, the Commission may consider, in addition to expert medical testimony, factual circumstances which bear on the question of causation. Thus, the Commission may consider (1) the nature and extent of claimant's occupational exposure, (2) the presence or absence of other nonwork-related exposures and components which contributed to the disease's development, and (3) correlations between claimant's work history and the development of the disease. *Gay v. J.P. Stevens & Co.*, — N.C. App. —, 339 S.E.2d 490 (1986).

Causal Relationship Between Disease and Inability to Work. — Evidence that a claimant's environmental restriction (caused by an occupational disease) significantly limits the scope of potential employment in his or her usual vocation, when combined with other factors such as a lack of training in any other vocation, is competent to establish a causal nexus between the occupational disease and the partial or total inability to earn wages in the same or any other employment. *Preslar v. Cannon Mills Co.*, — N.C. App. —, 343 S.E.2d 209 (1986).

The right to compensation, etc. —

In accord with main volume. See *Gay v. J.P. Stevens & Co.*, — N.C. App. —, 339 S.E.2d 490 (1986).

Award Where Occupational and Nonoccupational Disease Cannot Be Apportioned. — Where medical evidence would not permit any reasonable apportionment of claimant's disability between occupational and non-occupational disease, claimant would be entitled to an award for her entire disability if her occupational disease was a substantial and material factor in bringing about that disability. *Harrell v. Harriet & Henderson Yarns*, 314 N.C. 566, 336 S.E.2d 47 (1985), remanding to

the Commission for a determination of the issue.

Claimant Has Burden, etc. —

The claimant carries the burden of proving the existence of a compensable claim. *Gay v. J.P. Stevens & Co.*, — N.C. App. —, 339 S.E.2d 490 (1986).

Individual who retired from job in which he had 47 years of experience at age 70, and subsequently attempted to return to work but could not obtain comparable employment, was entitled to partial disability compensation based on the difference between his present and former wages, in view of environmental restriction, caused by his occupational disease (COPD), which combined with other factors to limit the scope of his potential employment. *Preslar v. Cannon Mills Co.*, — N.C. App. —, 343 S.E.2d 209 (1986).

III. PARTICULAR DISEASES.

Chronic Obstructive Pulmonary Disease. —

In accord with 2nd paragraph in main volume. See *McHargue v. Burlington Indus.*, 78 N.C. App. 324, 337 S.E.2d 584 (1985); *Callo-way v. Mills*, 78 N.C. App. 702, 338 S.E.2d 548 (1986).

Chronic obstructive lung disease may be an occupational disease provided that the worker's exposure to substances peculiar to the occupation in question significantly contributed to, or was a significant causal factor in, the development of the disease. *Goodman v. Cone Mills Corp.*, 75 N.C. App. 493, 331 S.E.2d 261 (1985).

In determining whether exposure to an occupational substance significantly contributed to, or was a significant causal factor in, chronic obstructive lung disease, the Commission may consider medical testimony as well as other factual circumstances in the case, including the extent of the worker's exposure to the substance, the extent of non-occupational but contributing factors, and the manner of development of the disease as it relates to the claimant's work history. *Goodman v. Cone Mills Corp.*, 75 N.C. App. 493, 331 S.E.2d 261 (1985).

Where a medical doctor, a specialist in pulmonary medicine, testified, and the Commission found, that the claimant's chronic obstructive lung disease was not caused, in whole or in part, by exposure to an occupational substance (i.e., cotton dust), but was due instead, to cigarette smoking, upon such a finding, the Commission was required to conclude that the claimant's disease was not an occupational disease. *Goodman v. Cone Mills Corp.*, 75 N.C. App. 493, 331 S.E.2d 261 (1985).

Doctor's testimony that the sulfuric acid fumes inhaled by plaintiff in his employment as a "battery buster" were a respiratory irri-

tant, along with testimony that plaintiff often inhaled those fumes, was sufficient to establish a causal relationship with plaintiff's obstructive lung disease. *Cain v. Guyton*, — N.C. App. —, 340 S.E.2d 501 (1986).

Obstruction caused by chronic obstructive lung disease need not be apportioned between occupational and nonoccupational causes; a claimant may recover the entire disability resulting from such obstruction, so long as the occupation-related cause was a significant causal factor in the disease's development. *Harrell v. Harriet & Henderson Yarns*, 314 N.C. 566, 336 S.E.2d 47 (1985).

Progression of chronic obstructive lung disease is not the test of compensability; rather, the test is whether the occupational exposure significantly contributed to the disabling disease's development. *Neal v. Leslie Fay, Inc.*, 78 N.C. App. 117, 336 S.E.2d 628 (1985).

Lung Disease Partially Caused by Occupational Exposure. — In determining chronic obstructive lung disabilities which are caused in part by occupational exposure to cotton dust and in part by some other cause or causes unrelated to the employment, the following rule applies: When exposure to cotton dust is an insignificant causal factor in, or does not significantly contribute to, the development of the disabling lung disease, it is not an occupational disease within the purview of subdivision (13) of this section and no compensation is due therefor; but when the exposure to cotton dust significantly contributes to, or is a significant causal factor in, the development of a disabling lung disease it is an occupational disease and compensation for the full extent of the disability is due. *Neal v. Leslie Fay, Inc.*, 78 N.C. App. 117, 336 S.E.2d 628 (1985).

Findings as to Cause of Lung Disease. — It was not enough for the Commission to say that claimant's lung disease was "not caused by" exposure to cotton dust in her employment, where the Commission did not, however, make any findings on the issue of "significant contribution." *McHargue v. Burlington Indus.*, 78 N.C. App. 324, 337 S.E.2d 584 (1985).

Costochondritis. — Evidence tending to show that the disabling inflammation of the cartilaginous tissues between plaintiff's sternum and ribs was caused by her constant lifting of 50 pound cakes of yarn, as her employment required; that the causes and conditions of her inflammation were peculiarly characteristic of her employment; and that her work placed her at a greater risk of contracting the inflammatory disease process than the public at large, few of whom regularly and repeatedly lift anything weighing 50 pounds, was support enough for the Commission's conclusion that plaintiff's disabling costochondritis was an oc-

cupational disease under subdivision (13). *Thomason v. Fiber Indus.*, 78 N.C. App. 159, 336 S.E.2d 632 (1985).

Pesticide Allergy. — Although chlorpyrifos (Dursban), to which plaintiff was allergic, is not listed in this section, the evidence permitted the Commission to find and conclude that the form and quantity of her exposure to chlorpyrifos, due to repeated treatment of the workplace by the employer, caused her to contract a compensable occupational disease. *Carawan v. Carolina Tel. & Tel. Co.*, — N.C. App. —, 340 S.E.2d 506 (1986).

Scarring of Ulnar Arteries. — Evidence held to support the Commission's finding that adventitial scarring of the ulnar arteries was peculiar to the occupation of carpenter's helper, which trade involves repetitive trauma to the palm area of the hand. *Lumley v. Dancy Constr. Co.*, — N.C. App. —, 339 S.E.2d 9 (1986).

IV. HEARING LOSS.

Compensability of Hearing Loss Existing Prior to October 1, 1971. — Nothing in Session Laws 1971, c. 1108, s. 3, which added subdivision (28) of this section, or in subdivision (28) itself, expressly mandates that hearing loss existing prior to October 1, 1971, is not compensable, as long as the last injurious exposure occurred after that date. *Clark v. Burlington Indus., Inc.*, 78 N.C. App. 695, 338 S.E.2d 553 (1986).

If plaintiff, who suffered an occupational hearing loss while employed with defendant, could show any augmentation of his condition, however slight, proximately resulting from his employment with defendant and occurring after October 1, 1971, then defendant could properly and constitutionally be liable for the entire disability. *Clark v. Burlington Indus., Inc.*, — N.C. App. —, 338 S.E.2d 553 (1986).

The 90 decibel limit in this section is the ambient noise level. *Clark v. Burlington Indus., Inc.*, 78 N.C. App. 695, 338 S.E.2d 553 (1986).

Effect of Regular Use of Protective Devices. — The last sentence of paragraph (28)i of this section means that regular use of protective devices constitutes removal from exposure only for purposes of triggering the statutory six-month waiting period established by the first sentence of paragraph (28)i. *Clark v. Burlington Indus., Inc.*, 78 N.C. App. 695, 338 S.E.2d 553 (1986).

The providing of protective devices does not establish any absolute bar to claims for hearing loss, and the Commission erred in so interpreting paragraph (28)i of this section. *Clark v. Burlington Indus., Inc.*, 78 N.C. App. 695, 338 S.E.2d 553 (1986).

Noise to Be Measured in Workplace and

Not inside Protective Device. — North Carolina industrial noise monitoring requirements require noise to be measured in the workplace. Contentions that compliance with the 90 decibel standard should be measured inside the

hearing protective device worn by the employee, rather than in the workplace itself, have been rejected. *Clark v. Burlington Indus., Inc.*, 78 N.C. App. 695, 338 S.E.2d 553 (1986).

§ 97-54. "Disablement" defined.

CASE NOTES

When Plaintiff First Learned of Disease Irrelevant to When Disability Began. — Plaintiff did not become disabled within the meaning of the Workers' Compensation Act until June 3, 1982, when he was forced to stop work of any kind because of his occupational disease. Because plaintiff was able to earn the wages he had always received until that date,

the arguments as to when plaintiff was first informed of the nature and work-related cause of his disease were irrelevant. Thus his claim, filed on February 2, 1983, was timely. *Underwood v. Cone Mills Corp.*, 78 N.C. App. 155, 336 S.E.2d 634 (1985).

Stated in Peoples v. Cone Mills Corp., — N.C. —, 342 S.E.2d 798 (1986).

§ 97-57. Employer liable.

CASE NOTES

"Hazard." — The term "hazard" should be given its common and ordinary meaning, since there is nothing to indicate that the legislature intended it to have some other meaning and it has not acquired some technical meaning. *Caulder v. Mills*, 314 N.C. 70, 331 S.E.2d 646 (1985).

By the phrase "hazards of the disease," as used in this section, the legislature intended to include more than substances which are capable in themselves of producing an occupational disease. *Caulder v. Mills*, 314 N.C. 70, 331 S.E.2d 646 (1985).

In order for a substance to be a "hazard" of an occupational disease within the meaning of this section, it must be a substance peculiar to the workplace. By this it is meant that the substance is one to which the worker has a greater exposure on the job than does the public generally, either because of the nature of the substance itself or because the concentrations of the substance in the workplace are greater than concentrations to which the public generally is exposed. *Caulder v. Mills*, 314 N.C. 70, 331 S.E.2d 646 (1985).

A condition peculiar to the workplace which accelerates the progress of an occupational disease to such an extent that the disease finally causes the worker's incapacity to work constitutes a source of danger and difficulty to that worker and increases the possibility of that worker's ultimate loss. It constitutes, therefore, a hazard of the disease as the term "hazard" is commonly used. *Caulder v. Mills*, 314 N.C. 70, 331 S.E.2d 646 (1985).

Dust as Substance Peculiar to Work-

place. — Dust arising from the processing of synthetic fibers in textile plants is a substance to which, because of its nature, workers in those plants have a greater exposure than does the public generally. It is, therefore, a substance peculiar to the workplace. *Caulder v. Mills*, 314 N.C. 70, 331 S.E.2d 646 (1985).

Liability of Employer in Whose Employment Employee Was Last Injuriouly Exposed. — In compensable cases of occupational diseases, the employer in whose employment the employee was last injuriouly exposed to the hazards of such disease is liable. This section does not require an independent showing of a significant contribution to the occupational disease. *Cain v. Guyton*, — N.C. App. —, 340 S.E.2d 501 (1986).

Last Injurious Exposure Can Be Quantitatively Slight. — Exposure to a substance which can cause an occupational disease can be a last injurious exposure to the hazards of such disease under this section even if the exposure in question is so slight quantitatively that it could not in itself have produced the disease. *Caulder v. Mills*, 314 N.C. 70, 331 S.E.2d 646 (1985).

If the occupational exposure in question is such that it augments the disease process to any degree, however slight, the employer is liable. *Gay v. J.P. Stevens & Co.*, — N.C. App. —, 339 S.E.2d 490 (1986).

"Last injuriouly exposed" means an exposure which proximately augmented the disease to any extent, however slight. *Cain v. Guyton*, — N.C. App. —, 340 S.E.2d 501 (1986).

Substance Need Not Be Known to Cause

Disease. — In addition, the substance to which plaintiff was last injuriously exposed need not be a substance known to cause the disease. *Gay v. J.P. Stevens & Co., — N.C. App. —, 339 S.E.2d 490 (1986).*

Finding of Last Injurious Exposure Held Not Inconsistent with Other Findings. —

Where an employee's exposure to dust at his last employer's plants, including the last plant at which he worked, contributed to his pulmonary symptoms and was harmful to him, and his last injurious exposure to the hazards of his lung disease occurred while he was employed by his last employer, the Commission's finding that dust from the synthetic fibers present at his last employer's plants was not known to cause chronic obstructive lung disease did not preclude a conclusion that exposure to it constituted a last injurious exposure to the hazards of the disease. *Caulder v. Mills, 314 N.C. 70, 331 S.E.2d 646 (1985).*

In chronic obstructive lung disease cases, the last injurious exposure to "the hazards of such disease" is not necessarily limited to cotton dust; it can be to other conditions that enhance or augment the disease process and the worker's condition to any extent. *Neal v. Leslie Fay, Inc., 78 N.C. App. 117, 336 S.E.2d 628 (1985).*

It is not necessary that the last injurious exposure to the hazards of chronic obstructive lung disease either caused or significantly contributed to the occupational disease; it is enough if the exposure augmented the disease to any extent whatever. *Neal v. Leslie Fay, Inc., 78 N.C. App. 117, 336 S.E.2d 628 (1985).*

Findings Required to Support Award, etc. —

In accord with main volume. See *Woodell v. Starr Davis Co., 77 N.C. App. 352, 335 S.E.2d 48 (1985).*

§ 97-58. Claims for certain diseases restricted; time limit for filing claims.

Legal Periodicals. —

For note, "Wilder v. Amatex Corp.: A First Step Toward Ameliorating the Effect of Stat-

utes of Repose on Plaintiffs with Delayed Manifestation Diseases," see 64 N.C.L. Rev. 416 (1986).

CASE NOTES

I. IN GENERAL.

Subsections (b) and (c) must be construed in pari materia. *Underwood v. Cone Mills Corp., 78 N.C. App. 155, 336 S.E.2d 634 (1985).*

Cited in *C.W. Matthews Contracting Co. v. State, 75 N.C. App. 317, 330 S.E.2d 630 (1985); Wilder v. Amatex Corp., 314 N.C. 550, 336 S.E.2d 66 (1985); Hogan v. Cone Mills Corp., 315 N.C. 127, 337 S.E.2d 477 (1985).*

IV. FILING OF CLAIMS.

The two-year time limit, etc. —

Two year statute of limitation is a condition precedent with which a plaintiff must comply in order to confer jurisdiction on the Industrial Commission. *Underwood v. Cone Mills Corp., 78 N.C. App. 155, 336 S.E.2d 634 (1985).*

When Two-Year Limit Begins, etc. — The two year period within which claims for benefits for an occupational disease must be filed begins running when an employee has suffered injury from an occupational disease which renders the employee incapable of earning, at any job, the wages the employee was receiving at the time of the incapacity, and the employee is informed by competent medical authority of the nature and work-related cause of the dis-

ease. *Underwood v. Cone Mills Corp., 78 N.C. App. 155, 336 S.E.2d 634 (1985).*

Though the two-year time limit for timely filing is a jurisdictional requisite, without which the Commission may not consider a workers' compensation claim, the time does not begin to run against occupational disease claims until the employee is informed by competent medical authority of the nature and work-related cause of the disease. *McCubbins v. Fieldcrest Mills, Inc., — N.C. App. —, 339 S.E.2d 497 (1986).*

V. KNOWLEDGE OF EMPLOYEE.

When Plaintiff First Learned of Disease Irrelevant to When Disability Began. — Plaintiff did not become disabled within the meaning of the Workers' Compensation Act until June 3, 1982, when he was forced to stop work of any kind because of his occupational disease. Because plaintiff was able to earn the wages he had always received until that date, the arguments as to when plaintiff was first informed of the nature and work-related cause of his disease were irrelevant. Thus his claim, filed on February 2, 1983, was timely. *Underwood v. Cone Mills Corp., 78 N.C. App. 155, 336 S.E.2d 634 (1985).*

§ 97-59. Employer to pay for treatment.

CASE NOTES

Applied in *Harrell v. Harriet & Henderson Yarns*, 314 N.C. 566, 336 S.E.2d 47 (1985).

§ 97-61.6. Hearing after third examination and report; compensation for disability and death from asbestosis or silicosis.

CASE NOTES

Cited in *Woodell v. Starr Davis Co.*, 77 N.C. App. 352, 335 S.E.2d 48 (1985).

§ 97-63. Period necessary for employee to be exposed.

CASE NOTES

Findings Required to Support Award, etc. — *Starr Davis Co.*, 77 N.C. App. 352, 335 S.E.2d 48 (1985).
In accord with main volume. See *Woodell v.*

§ 97-77. North Carolina Industrial Commission created; members appointed by Governor; terms of office; chairman.

CASE NOTES

The Commission is not a court, etc. —
In accord with 1st paragraph in main volume. See *Hogan v. Cone Mills Corp.*, 315 N.C. 127, 337 S.E.2d 477 (1985).

Commission Is Special Tribunal, etc. —
In accord with 1st paragraph in main volume. See *Hogan v. Cone Mills Corp.*, 315 N.C. 127, 337 S.E.2d 477 (1985).

Continuing Jurisdiction. — It was the purpose of the General Assembly that the Industrial Commission should have a continuing jurisdiction of all proceedings begun before the Commission for compensation in accordance with its terms. *Hogan v. Cone Mills Corp.*, 315 N.C. 127, 337 S.E.2d 477 (1985).

Power to Order Rehearing. — The Commission has the power to order a rehearing on the basis of newly discovered evidence. *Hogan v. Cone Mills Corp.*, 315 N.C. 127, 337 S.E.2d 477 (1985).

Power to Set Aside Judgment. — The Industrial Rule Commission has inherent power analogous to that conferred on courts by

§ 1A-1, Rule 60 (b) (6), in the exercise of supervision over its own judgments to set aside a former judgment when the paramount interest in achieving a just and proper determination of a workers' compensation claim requires it. *Hogan v. Cone Mills Corp.*, 315 N.C. 127, 337 S.E.2d 477 (1985).

Because the power to set aside a former judgment is vital to the proper functioning of the judiciary, the Legislature impliedly vested such power in the Commission in conjunction with the judicial power which the Legislature granted it to administer the Workers' Compensation Act. *Hogan v. Cone Mills Corp.*, 315 N.C. 127, 337 S.E.2d 477 (1985).

The Industrial Commission possesses such judicial power as is necessary to administer the Workers' Compensation Act. The Commission's judicial power includes the power to set aside a former judgment on the grounds of mutual mistake, misrepresentation, or fraud. *Hogan v. Cone Mills Corp.*, 315 N.C. 127, 337 S.E.2d 477 (1985).

§ 97-80. Rules and regulations; subpoena of witnesses; examination of books and records; depositions; costs.

CASE NOTES

I. IN GENERAL.

Continuing Jurisdiction. — It was the purpose of the General Assembly that the Industrial Commission should have a continuing jurisdiction of all proceedings begun before the Commission for compensation in accordance with its terms. *Hogan v. Cone Mills Corp.*, 315 N.C. 127, 337 S.E.2d 477 (1985).

Power to Order Rehearing. — The Commission has the power to order a rehearing on the basis of newly discovered evidence. *Hogan v. Cone Mills Corp.*, 315 N.C. 127, 337 S.E.2d 477 (1985).

Power to Set Aside Judgment. — The Industrial Rule Commission has inherent power analogous to that conferred on courts by § 1A-1, Rule 60 (b) (6), in the exercise of supervision over its own judgments to set aside a former judgment when the paramount interest in achieving a just and proper determination of a workers' compensation claim requires it. *Hogan v. Cone Mills Corp.*, 315 N.C. 127, 337 S.E.2d 477 (1985).

Because the power to set aside a former judg-

ment is vital to the proper functioning of the judiciary, the Legislature impliedly vested such power in the Commission in conjunction with the judicial power which the Legislature granted it to administer the Workers' Compensation Act. *Hogan v. Cone Mills Corp.*, 315 N.C. 127, 337 S.E.2d 477 (1985).

The Industrial Commission possesses such judicial power as is necessary to administer the Workers' Compensation Act. The Commission's judicial power includes the power to set aside a former judgment on the grounds of mutual mistake, misrepresentation, or fraud. *Hogan v. Cone Mills Corp.*, 315 N.C. 127, 337 S.E.2d 477 (1985).

Cited in *Belfield v. Weyerhaeuser Co.*, 77 N.C. App. 332, 335 S.E.2d 44 (1985).

IV. FINDINGS.

Findings Required. — To enable a proper review of a conclusion concerning disability, the Industrial Commission is required to make specific findings of fact as to a plaintiff's earning capacity. *Grant v. Burlington Indus., Inc.*, 77 N.C. App. 241, 335 S.E.2d 327 (1985).

§ 97-82. Memorandum of agreement between employer and employee to be submitted to Commission on prescribed forms for approval.

CASE NOTES

Conclusiveness of Commission's Approval. —

An agreement for compensation, when ap-

proved by the Commission, is binding on the parties. *Roberts v. Carolina Tables of Hickory*, 76 N.C. App. 148, 331 S.E.2d 757 (1985).

§ 97-83. In event of disagreement, Commission is to make award after hearing.

CASE NOTES

Applied in *Long v. Reeves*, 77 N.C. App. 830, 336 S.E.2d 98 (1985).

§ 97-84. Determination of disputes by Commission or deputy.

CASE NOTES

Duty of Commission as Fact-Finder. — Appellate courts must follow the "any competent evidence" standard in deciding whether the evidence permits a determination by the Commission, which is the fact-finder. The fact-finder, however, is not required so to view the evidence. Rather, its duty is to weigh the evidence, resolve conflicts therein, and make its own determination as to weight and credibility. *Wagoner v. Douglas Battery Mfg. Co.*, — N.C. App. —, 341 S.E.2d 120 (1986).

Incorrect Notice Did Not Affect Right to Appeal. — Since the law permits appeals only

from actual rather than supposed decisions, the incorrect notice of a decision that had not been made had no effect on plaintiff's right to appeal from the decision that was made. *Crawford v. McLaurin Trucking Co.*, 78 N.C. App. 219, 336 S.E.2d 647 (1985).

True Copy to Be Sent to Parties. — This section requires that when the Commission or one of its deputies determines a dispute before it, a copy of the opinion and award be sent to the parties; this necessarily means a true copy. *Crawford v. McLaurin Trucking Co.*, 78 N.C. App. 219, 336 S.E.2d 647 (1985).

§ 97-85. Review of award.

CASE NOTES

Plenary Powers of Commission, etc. — In accord with 2nd paragraph in main volume. See *Cable v. Macke Co.*, 78 N.C. App. 793, 338 S.E.2d 320 (1986); *Ballenger v. ITT Grinnell Indus. Piping, Inc.*, — N.C. App. —, 342 S.E.2d 582 (1986).

Consideration of Expert Testimony in Light Most Favorable to Plaintiff. — Given the legislative policy underlying the Workers' Compensation Act, which requires the Commission and the courts to construe its provisions liberally in favor of the injured worker, it was entirely proper for the Commission, after considering all of the evidence, to view the expert testimony in the light most favorable to the plaintiff. *Ballenger v. ITT Grinnell Indus. Piping, Inc.*, — N.C. App. —, 342 S.E.2d 582 (1986).

Power to Resolve Conflicts. — The Industrial Commission has the duty and authority to resolve conflicts in the testimony, whether medical or not, and the conflict should not always be resolved in favor of the claimant. *Cable v. Macke Co.*, 78 N.C. App. 793, 338 S.E.2d 320 (1986).

When Application for Review Is Timely. — Application by an employer for review of an award by the Industrial Commission is timely when the application is mailed to the full Commission within 15 days from the date when notice of the award is received. *Hubbard v. Burlington Indus.*, — N.C. App. —, 332 S.E.2d 746 (1985).

Time for Appeal Based on Presumption of Correct Notice. — Though this section requires that appeal from an opinion and award

of a Deputy Commissioner be taken within 15 days from the date a party is notified of the Deputy Commissioner's opinion and award, this requirement is based on the presumption that the notice given was correct. *Crawford v. McLaurin Trucking Co.*, 78 N.C. App. 219, 336 S.E.2d 647 (1985).

Incorrect Notice Did Not Affect Right to Appeal. — Since the law permits appeals only from actual rather than supposed decisions, the incorrect notice of a decision that had not been made had no effect on plaintiff's right to appeal from the decision that was made. *Crawford v. McLaurin Trucking Co.*, 78 N.C. App. 219, 336 S.E.2d 647 (1985).

Motion for New Hearing on Ground That Notice Not Given. — Since the North Carolina Industrial Commission has no rule comparable to § 1A-1, Rule 60 (b), and because the Rules of Civil Procedure are applicable, the Industrial Commission should have treated defendant's motion pursuant to this section and Industrial Commission Rule XXI for a new hearing on the ground that he had not received notice of hearing in which plaintiff was awarded compensation as one made pursuant to § 1A-1, Rule 60 (b) to be relieved from a judgment. *Long v. Reeves*, 77 N.C. App. 830, 336 S.E.2d 98 (1985).

Remand for Misapprehension of Law. — Where facts were found by the Commission under the misapprehension that the law required a finding for the plaintiff if there was any competent evidence to support such a finding, the Court of Appeals was empowered to remand the case so that the evidence could be consid-

ered in its true legal light. *Cauble v. Macke Co.*, 78 N.C. App. 793, 338 S.E.2d 320 (1986).

§ 97-86. Award conclusive as to facts; appeal; certified questions of law.

CASE NOTES

I. IN GENERAL.

Cited in *Gallimore v. Daniels Constr. Co.*, 78 N.C. App. 747, 338 S.E.2d 317 (1986).

IV. FINDINGS OF COMMISSION.

Findings Must Be Specific, etc. —

The Industrial Commission is required to make specific findings as to the facts upon which a compensation claim is based, including the extent of a claimant's disability. *Grant v. Burlington Indus., Inc.*, 77 N.C. App. 241, 335 S.E.2d 327 (1985).

V. SCOPE OF REVIEW.

The Commission's legal conclusions are subject to court review. —

In accord with main volume. See *Grant v. Burlington Indus., Inc.*, 77 N.C. App. 241, 335 S.E.2d 327 (1985).

In passing upon an appeal from an award, etc. —

In accord with 1st paragraph in main volume. See *Sanderson v. Northeast Constr. Co.*, 77 N.C. App. 117, 334 S.E.2d 392 (1985).

In accord with 3rd paragraph in main volume. See *Woodell v. Starr Davis Co.*, 78 N.C. App. 352, 335 S.E.2d 48 (1985).

And Whether Findings Support Commission's Conclusions, etc. —

On appeal from an award of the Industrial Commission, the appellate court's review is limited to the questions of whether the findings made by the Commission are supported by competent evidence in the record and whether these findings support the conclusions of law drawn by the Commission. *Little v. Penn Ventilator Co.*, 75 N.C. App. 92, 330 S.E.2d 276,

cert. granted, 314 N.C. 666, 335 S.E.2d 902 (1985).

Commission Is Sole Judge of Weight, etc. —

In accord with 1st paragraph in main volume. See *Woodell v. Starr Davis Co.*, 78 N.C. App. 352, 335 S.E.2d 48 (1985); *Grant v. Burlington Indus., Inc.*, 77 N.C. App. 241, 335 S.E.2d 327 (1985).

When Supported by Competent Evidence. —

In accord with 1st paragraph in main volume. See *Sanderson v. Northeast Constr. Co.*, 77 N.C. App. 117, 334 S.E.2d 392 (1985).

Even If Evidence Would Also Have Supported Contrary Findings. —

In accord with 1st paragraph in main volume. See *Sanderson v. Northeast Constr. Co.*, 77 N.C. App. 117, 334 S.E.2d 392 (1985); *Woodell v. Starr Davis Co.*, 78 N.C. App. 352, 335 S.E.2d 48 (1985).

When the evidence before the Commission is such as to permit either of two contrary findings, its determination is conclusive on appeal. *Ballenger v. ITT Grinnell Indus. Piping, Inc.*, — N.C. App. —, 342 S.E.2d 582 (1986).

VII. REMAND AND REHEARING.

Remand Where Findings Insufficient. —

In accord with 3rd paragraph in main volume. See *Grant v. Burlington Indus., Inc.*, 77 N.C. App. 241, 335 S.E.2d 327 (1985).

Remand Where Facts Found under Misapprehension of Law. —

In accord with 1st paragraph in main volume. See *Cauble v. Macke Co.*, 78 N.C. App. 793, 338 S.E.2d 320 (1986).

§ 97-88. Expenses of appeals brought by insurers.

CASE NOTES

Fees Not Awarded Where Only Claimant Appeals. — In its sound discretion, the Industrial Commission may award claimant attorney's fees in cases in which defendant insurer appealed. However, the Industrial Commission may not award attorney's fees pursuant to this section in cases in which only the claimant ap-

pealed. *Harwell v. Thread*, 78 N.C. App. 437, 337 S.E.2d 112 (1985).

Remand for Determination of Attorney's Fees. — Where the language in the Commission's order regarding this section was so ambiguous as to preclude review as to whether the Commission believed it lacked authority to

award attorney's fees where both the insurer and the claimant appealed, the case could be remanded to the Commission for a discretion-

ary determination as to an award of attorney's fees to claimant. *Harwell v. Thread*, 78 N.C. App. 437, 337 S.E.2d 112 (1985).

§ 97-94. Employers required to give proof within 30 days that they have complied with preceding section; fine for not keeping liability insured; review; liability for compensation; failure to secure payment of compensation a misdemeanor.

(a) Every employer subject to the compensation provisions of this Article shall, within 30 days, after this Article takes effect, file with the Industrial Commission, in form prescribed by it, and thereafter, annually or as often as may be necessary, evidence of his compliance with the provisions of G.S. 97-93 and all others relating thereto.

(1929, c. 120, s. 68; 1945, c. 766; 1963, c. 499; 1973, c. 1291, s. 13; 1985, c. 119, s. 4; 1985 (Reg. Sess., 1986), c. 1027, s. 54.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. —

Session Laws 1985 (Reg. Sess., 1986), c. 1027, s. 57, contains a severability clause.

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective July 16, 1986, substituted "Industrial Commission" for "Commissioner of Insurance" in subsection (a).

§ 97-100. Rates for insurance; carrier to make reports for determination of solvency; tax upon premium; returned or canceled premiums; reports of premiums collected; wrongful or fraudulent representation of carrier punishable as misdemeanor; notices to carrier; employer who carries own risk shall make report on payroll.

(k) Every group of two or more employers who have pooled their liabilities pursuant to G.S. 97-93 shall pay a tax upon premiums received in this State in the same manner as the tax is calculated and paid by insurance carriers insuring employers in this State and set forth in subsections (c), (d), (e), and (f) above. (1929, c. 120, s. 73; 1931, c. 274, s. 13; 1947, c. 574; 1961, c. 833, s. 13; 1977, c. 828, s. 7; 1985, c. 119, s. 2; 1985 (Reg. Sess., 1986), c. 928, s. 13.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective July 8, 1986, added subsection (k).

§§ 97-123 to 97-129: Reserved for future codification purposes.

ARTICLE 4.

North Carolina Self-Insurance Guaranty Association.

§ 97-130. Definitions.

As used in this Article:

- (1) "Association" means the North Carolina Self-Insurance Guaranty Association established by G.S. 97-131.
- (2) "Board" means the Board of Directors of the Association established by G.S. 97-132.
- (3) "Commissioner" means the North Carolina Commissioner of Insurance.
- (4) "Covered claim" means an unpaid claim against an insolvent self-insurer that relates to an injury that occurs while the self-insurer is a member of the Association and that is compensable under this Chapter.
- (5) "Fund" means the North Carolina Self-Insurance Guaranty Fund established by G.S. 97-133.
- (6) "Plan" means the Plan of Operation authorized by G.S. 97-134.
- (7) "Self-insurer" or "member self-insurer" means either: (i) an individual employer who has demonstrated under G.S. 97-93 the financial ability to directly pay compensation in the amounts and manner and when due as provided in this Chapter or (ii) a group of two or more employers who have agreed to pool their liabilities under this Chapter pursuant to G.S. 97-93. (1985 (Reg. Sess., 1986), c. 1013, s. 1.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1013, s. 18, makes this Article effective October 1, 1986.

§ 97-131. Creation.

(a) There is created a nonprofit unincorporated legal entity to be known as the North Carolina Self-Insurance Guaranty Association. The Association is to provide mechanisms for the payment of covered claims under self-insurance coverage, to avoid excessive delay in payment, to avoid financial loss to claimants because of the insolvency of a self-insurer, and to assist, when called upon to do so by the Commissioner, in the detection of self-insurer insolvencies. It is declared that the Association is an instrumentality of the State, provided that the debts and liabilities of the Association shall not constitute debts and liabilities of the State.

(b) All individual and group self-insurers shall be and remain members of the Association as a condition of authority to self-insure in this State under G.S. 97-93. The Association shall perform its functions under a Plan of Operation established or amended, or both, and approved by the Commissioner, and shall exercise its powers through the Board.

- (1) A self-insurer shall be deemed to be a member of the Association for purposes of another self-insurer's insolvency, as defined in G.S. 97-135, when:

- a. The self-insurer is a member of the Association when an insolvency occurs, or
 - b. The self-insurer has been a member of the Association at some point in time during the 12-month period immediately preceding the insolvency in question.
- (2) A self-insurer shall be deemed to be a member of the Association for purposes of its own insolvency when:
- a. The self-insurer is a member of the Association when the insolvency occurs, but claims relating to a compensable event that occurred prior to the date the self-insurer joined the Association are not included hereunder; or
 - b. The self-insurer becomes insolvent after leaving the Association, but claims relating to a compensable event that occurred prior to the date the self-insurer joined the Association are not included hereunder, and claims relating to a compensable event that occurred after the self-insurer ceased to be an approved self-insurer are not to be afforded coverage hereunder.
- (3) In determining the membership of the Association pursuant to subdivisions (1) and (2) of this subsection for any date after the effective date of this Article, no employer or group of employers claiming self-insurer status may be deemed to be a member of the Association on any date after the effective date of this Article, unless that employer or group of employers is at that time authorized as a self-insurer by the Commissioner pursuant to G.S. 97-93, 97-94, and 97-96. (1985 (Reg. Sess., 1986), c. 1013, s. 1.)

§ 97-132. Board of directors.

The Board shall consist of not less than nine persons serving terms as established in the Plan. The members of the Board shall be selected by the member self-insurers, subject to the approval of the Commissioner, until the next annual meeting of the Board. If no members of the Board are selected within 60 days after the effective date of this Article, the Commissioner may appoint the initial members of the Board. In approving selections to the Board, the Commissioner shall consider, among other things, whether all member self-insurers are fairly represented. Members of the Board may be reimbursed from the assets of the Association for expenses incurred by them as members of the Board. (1985 (Reg. Sess., 1986), c. 1013, s. 1.)

§ 97-133. Powers and duties of the Association.

- (a) The Association shall:
- (1) Obtain from each member self-insurer and file with the Commissioner individual reports specifying the aggregate benefits each member paid during the previous calendar year, and the annual standard premium that would have been paid by each member self-insurer during the previous calendar year pursuant to manual rates established by the North Carolina Rate Bureau and using the experience rating procedure approved by the Commissioner for that member self-insurer. These reports shall be due on or before July 15 following the close of that calendar year, except that this deadline may be extended by the Commissioner for up to three additional months for good cause shown.
 - (2) Assess each member of the Association as follows:

- a. Each individual member self-insurer shall be annually assessed an amount equal to one-half of one percent (0.5%) of the annual standard premium that would have been paid by that member self-insurer for workers' compensation insurance during the prior calendar year; and payment to the Association shall be made no later than September 15 following the close of that calendar year. Where any such assessment is paid based in whole or in part upon estimates of annual standard premium for the prior calendar year, there shall be made in the next year's assessment an adjustment of the assessment of such prior year based on actual audited annual standard premium. Each group member self-insurer shall be annually assessed an amount equal to one-half of one percent (0.5%) of the annual premium collected by the group member self-insurer during the prior calendar year; and payment to the Association shall be made no later than September 15 following the close of that calendar year. Regardless of the size of the Fund, during its first 12 months of membership, no member self-insurer may discount or reduce this one-half of one percent (0.5%) assessment.
 - b. Each member self-insurer shall be notified of the assessment no later than 30 days before it is due.
 - c. If a self-insurer is a member of the Association for less than a full calendar year, the annual standard premium shall be adjusted by that portion of the year the self-insurer is not a member of the Association.
 - d. If application of the contribution rates referred to in sub-subdivisions a. and b. of this subdivision would produce an amount in excess of the limits of the Fund, an equitable proration shall be made;
- (3) Administer a fund, to be known as the North Carolina Self-Insurance Guaranty Fund, which shall receive the assessments required in subdivision (2) of this subsection. Once the Fund reaches one million dollars (\$1,000,000), no further assessments shall be made except subsequent initial assessments of new member self-insurers that are required to be made in subdivision (2) of this subsection. Assessments may be subsequently made only to maintain the Fund at a level of one million dollars (\$1,000,000). The costs of administration by the Association shall be borne by the Fund, and the Association is authorized to secure reinsurance and bonds and to otherwise invest the assets of the Fund to effectuate the purpose of the Association, subject to the approval of the Commissioner. All earnings from investment of Fund assets shall be placed in or credited to the Fund.
- The Association may purchase primary excess insurance from an insurer licensed by the Commissioner for the appropriate lines of authority to defray its exposure to loss occasioned by the default of one or more of its members. Any excess insurance so purchased shall be limited to coverage of post-assessment liability of the Association's members; and the Association shall fund any such purchase by levying a special assessment on its members for this purpose or by application of any unencumbered funds available but that have not been raised by imposition of any pre-assessment or post-assessment. The Association may obtain from each member any information the Association may reasonably require in order to facilitate the securing of this primary excess insurance. The Association shall establish reasonable safeguards designed to ensure that information so received is used only for this purpose and is not otherwise disclosed;

- (4) Be obligated to the extent of covered claims occurring prior to the determination of the member self-insurer's insolvency, or occurring after such determination but prior to the obtaining by the self-insurer of workers' compensation insurance as otherwise required under this Chapter. The Association shall pay claims against a self-insurer that are not or have not been paid as a result of a determination of insolvency or the institution of bankruptcy or receivership proceedings that occurred prior to the effective date of this Article; provided that any assessments made to pay such claims may be credited towards the tax paid by the self-insurers under G.S. 97-100;
 - (5) After paying any claim resulting from a self-insurer's insolvency, be subrogated to the rights of the injured employee and dependents and be entitled to enforce liability against the self-insurer by any appropriate action brought in its own name or in the name of the injured employee and dependents;
 - (6) Assess the Fund in an amount necessary to pay only:
 - a. The obligations for the Association under this Article subsequent to an insolvency;
 - b. The expenses of handling covered claims subsequent to an insolvency;
 - c. The costs of examinations under subdivision (8) of this subsection; and
 - d. Other expenses authorized by this Article;
 - (7) Investigate claims brought against the Association and adjust, compromise, settle, and pay covered claims to the extent of the Association's obligation; and deny all other claims. The Association may review settlements to which the insolvent self-insurer was a party to determine the extent to which such settlements may be properly contested;
 - (8) Notify such persons as the Commissioner directs under subdivision (7) of this subsection;
 - (9) Handle claims through its employees or through one or more self-insurers or other persons designated as servicing facilities. Designation of a servicing facility is subject to the approval of the Commissioner, but designation of a member self-insurer as a servicing facility may be declined by such self-insurer;
 - (10) Reimburse each servicing facility for obligations of the Association paid by the facility and for expenses incurred by the facility while handling claims on behalf of the Association;
 - (11) Pay the other expenses of the Association authorized by this section; and
 - (12) Establish in the Plan a mechanism to calculate the assessments required by subdivisions (1), (2), and (3) of this subsection by a simple and equitable means to convert from policy or fund years that are different from a calendar year.
- (b) The Association may:
- (1) Employ or retain such persons as are necessary to handle claims and perform other duties of the Association;
 - (2) Borrow funds necessary to effect the purposes of this Article in accord with the Plan;
 - (3) Sue or be sued;
 - (4) Negotiate and become a party to such contracts as are necessary to carry out the purpose of this section; and
 - (5) Perform such other acts as are necessary or proper to effectuate the purpose of this section.
- (c) The following pertains to post-insolvency assessment:

- (1) In the event the assets of the Fund are not sufficient to pay the obligations of the Association, then the Association shall make an additional assessment of each individual member self-insurer in an amount not in excess of two percent (2%) each year of the annual standard premium that would have been paid by that member self-insurer during the prior calendar year. The assessments of each individual member self-insurer shall be in the proportion that the annual standard premium of the individual member self-insurer for the premium calendar year bears to the annual standard premium of all individual member self-insurers for the preceding calendar year. For group member self-insurers, the assessment shall not exceed two percent (2%) each year of the annual premium collected by that group member self-insurer during the prior calendar year. The assessments of each group member self-insurer shall be in the proportion that the annual collected premium of the group member self-insurer for the premium calendar year bears to the annual collected premium of all group member self-insurers for the preceding calendar year.
 - (2) Each member self-insurer shall be notified of the assessment no later than 30 days before it is due.
 - (3) The Association may exempt or defer, in whole or in part, the assessment of any member self-insurer, if the assessment would cause that member's financial statement to reflect liabilities in excess of assets.
 - (4) Delinquent assessments, except as provided in subdivision (3) of this subsection, shall bear interest at the rate to be established by the Board, but not to exceed the discount rate of the Federal Reserve Bank, Richmond, Virginia, on the due date of the assessment, plus four percent (4%) annually, computed from the due date of the assessment.
 - (5) The Association shall establish in the Plan a mechanism to calculate the assessments required by subdivision (1) of this subsection by a simple and equitable means to convert from policy or fund years that are different from a calendar year.
- (d) No individual member self-insurer may be assessed in any calendar year an amount greater than two and one-half percent (2.5%) of the annual standard premium that would have been paid by that individual member self-insurer during the prior calendar year. No group member self-insurer may be assessed in any calendar year an amount greater than two and one-half percent (2.5%) of the annual premium collected by that group member self-insurer during the prior calendar year. If the maximum assessment does not provide in any one year an amount sufficient to make all necessary payments, the funds available shall be prorated and the unpaid portion shall be paid as soon thereafter as funds become available. There shall be established in the Plan a mechanism to calculate the assessments required by this section by a simple and equitable means to convert from policy or fund years that are different from a calendar year. (1985 (Reg. Sess., 1986), c. 928, s. 1(a); 1985 (Reg. Sess., 1986), c. 1013, s. 1.)

Effect of Amendments. — Session Laws 1985 (Reg. Sess., 1986), c. 928, s. 1(a), effective Oct. 1, 1986, added the second sentence of sub-

division (a)(4) of this section, as enacted by Session Laws 1985 (Reg. Sess., 1986), c. 1013, s. 1.

§ 97-134. Plan of Operation.

The Plan is as follows:

- (1) The Association shall submit to the Commissioner a Plan and any amendments necessary or suitable to assure the fair, reasonable, and equitable administration of the Association. The Plan and any amendments become effective upon approval in writing by the Commissioner. If the Association fails to submit a suitable Plan within 90 days after October 1, 1986, or if at any time thereafter the Association fails to submit suitable amendments to the Plan, the Commissioner shall, after notice and hearing, adopt such reasonable rules as are necessary or advisable to effectuate this Article. Such rules shall continue in force until modified by the Commissioner or superseded by a Plan submitted by the Association and approved by the Commissioner.
- (2) All member self-insurers shall comply with the Plan.
- (3) The Plan shall:
 - a. Establish the procedures whereby all the powers and duties of the Association under G.S. 97-133 will be performed;
 - b. Establish procedures for handling assets of the Association;
 - c. Adopt a reasonable mechanism and procedure to achieve equity in assessing the funds required in G.S. 97-133. Consideration shall be given to adjustments for audited payroll, differential effects caused by rate changes, and other relevant factors;
 - d. Establish the amount and method of reimbursing members of the Board under G.S. 97-132;
 - e. Establish procedures by which claims may be filed with the Association and establish acceptable forms of proof of covered claims. A list of such claims shall be periodically submitted to the Association;
 - f. Establish regular places and times for meetings of the Board;
 - g. Establish procedures for records to be kept of all financial transactions of the Association, its agents, and the Board;
 - h. Provide that any member self-insurer aggrieved by any final action or decision of the Association may appeal to the Commissioner within 30 days after the action or decision;
 - i. Establish the procedures whereby selections for the Board shall be submitted to the Commissioner; and
 - j. Contain additional provisions necessary or proper for the execution of the powers and duties of the Association. (1985 (Reg. Sess., 1986), c. 1013, s. 1.)

§ 97-135. Insolvency.

A member self-insurer shall be insolvent for the purposes of this Article under the following circumstances:

- (1) Determination of insolvency by a court of competent jurisdiction; and
- (2) Institution of bankruptcy proceedings by or regarding the member self-insurer. (1985 (Reg. Sess., 1986), c. 1013, s. 1.)

§ 97-136. Powers and duties of the Commissioner.

(a) The Commissioner shall notify the Association of the existence of an insolvent member self-insurer not later than 30 days after he receives notice of an insolvency pursuant to the standards set forth in G.S. 97-135.

(b) The Commissioner may:

- (1) Require that the Association notify the insureds of the insolvent member self-insurer and any other interested parties of the insolvency and of their rights under this Article. Such notifications shall be by mail at their last known addresses, where available; but if required information for notification is not available, notice by publication in a newspaper of general circulation in this State shall be sufficient; and
- (2) Revoke the designation of any servicing facility if he finds claims are being handled unsatisfactorily. (1985 (Reg. Sess., 1986), c. 1013, s. 1.)

§ 97-137. Examination of the Association.

The Association shall be subject to examination and regulation by the Commissioner. The Board shall submit, not later than March 30 of each year, a financial report for the preceding calendar year in a form approved by the Commissioner. (1985 (Reg. Sess., 1986), c. 1013, s. 1.)

§ 97-138. Tax exemption.

The Association shall be exempt from payment of all fees and all taxes levied by this State or any of its political subdivisions, except taxes levied on real or personal property. (1985 (Reg. Sess., 1986), c. 928, s. 1(b).)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 928, s. 14 makes this section effective October 1, 1986.

§ 97-139. Immunity.

There shall be no liability on the part of and no cause of action of any nature may arise against any member self-insurer, the Association, or its agents or employees, the Board or its individual members, or the Commissioner or his representatives for any acts or omissions taken by them in the performance of their powers and duties under this Article. The immunity established by this section shall not extend to willful neglect or malfeasance that would otherwise be actionable. (1985 (Reg. Sess., 1986), c. 1013, s. 1.)

§ 97-140. Nonduplication of recovery.

Any person having a covered claim that may be recovered under more than one insurance or self-insurance guaranty association or its equivalent shall seek recovery first from the association of the place or residence of the claimant. Any recovery under this Article shall be reduced by the amount of recovery from any other insurance guaranty association or its equivalent. (1985 (Reg. Sess., 1986), c. 1013, s. 1.)

§ 97-141. Stay of proceedings.

All proceedings under this Chapter to which the insolvent member self-insurer is a party either before the Industrial Commission or a court in this State and the running of all time periods against either the insolvent member self-insurer or the Association under this Chapter shall be stayed for 60 days from the date of notice to the Association of the insolvency in order to permit the Association to investigate, prosecute, or defend properly any petition, claim, or appeal under this Chapter, provided that the payment of weekly compensation for incapacity is made whenever time periods or proceedings affecting the payment of weekly compensation are stayed. (1985 (Reg. Sess., 1986), c. 1013, s. 1.)

§ 97-142. Disposition of assets upon dissolution.

In the event of dissolution of the Association, all assets remaining after provision for satisfaction of all outstanding claims shall be distributed to the State Treasurer for establishment of a reserve to satisfy potential claims against the Association and, all such claims being satisfied, for inclusion in the general fund of the State. (1985 (Reg. Sess., 1986), c. 1013, s. 1.)

Chapter 99B.

Products Liability.

§ 99B-1. Definitions.

CASE NOTES

The imprinting of retailer's trademark in shoe was insufficient to bring retailer within the definition of manufacturer in subdivision

(2) of this section. *Morrison v. Sears, Roebuck & Co.*, — N.C. App. —, 341 S.E.2d 40 (1986).

§ 99B-2. Liability of seller and manufacturer.

CASE NOTES

Applied in *Tetterton v. Long Mfg. Co.*, 314 N.C. 44, 332 S.E.2d 67 (1985).

Cited in *Martin v. Worth Chem. Corp.*, 620 F. Supp. 64 (W.D.N.C. 1985).

Chapter 105.

Taxation.

SUBCHAPTER I. LEVY OF TAXES.

Article 1.

Schedule A. Inheritance Tax.

Sec.

- 105-2.1. Internal Revenue Code definition.
- 105-6. Rate of tax — Class C.
- 105-22. Duties of clerks of superior court.
- 105-23. Information by administrator and executor.
- 105-24. Access to safe deposits of decedent; withdrawal of bank deposit, etc., payable to either husband or wife or survivor.

Article 2.

Schedule B. License Taxes.

- 105-33. Taxes under this Article.
- 105-37. Amusements — Moving pictures — Admission.
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- 105-89. Automobiles, wholesale supply dealers and service stations.
- 105-99. Wholesale distributors of motor fuels.
- 105-102.3. Banks.

Article 3.

Schedule C. Franchise Tax.

- 105-114. Nature of taxes; definitions.
- 105-120.2. (Effective for franchise taxes due on or after March 15, 1987) Franchise or privilege tax on holding companies.
- 105-122. (Effective for franchise taxes due before March 15, 1987) Franchise or privilege tax on domestic and foreign corporations.
- 105-122. (Effective for franchise taxes due on or after March 15, 1987) Franchise or privilege tax on domestic and foreign corporations.
- 105-123. New corporations.
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Article 4.

Schedule D. Income Tax.

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- 105-130.2. Definitions.
- 105-130.5. Adjustments to federal taxable income in determining State net income.
- 105-130.11. Conditional and other exemptions.

Division II. Individual Income Tax.

Sec.

- 105-135. Definitions.
- 105-144.2. Sale of principal residence of taxpayer — Nonrecognition of gain.
- 105-147. Deductions.
- 105-149. Exemptions.

Division IV. Income Tax Credits for Property Taxes.

- 105-163.02. Definitions.
- 105-163.06. Income tax credit for property taxes paid by manufacturers on their inventories.

Article 4A.

Withholding of Income Taxes from Wages and Filing of Declarations of Estimated Income and Payment of Income Tax by Individuals.

- 105-163.1. Definitions.
- 105-163.1A. Ordained or licensed clergyman may elect to be considered self-employed.

Article 4C.

Filing of Declarations of Estimated Income Tax and Installment Payments of Estimated Income Tax by Corporations.

- 105-163.42. [Repealed.]

Article 5.

Schedule E. Sales and Use Tax.

Division II. Taxes Levied.

Part 1. Retail Sales Tax.

- 105-164.4. Imposition of tax; retailer.

Part 4. General Provisions.

- 105-164.12A. Electric golf cart and battery charger considered a single article.

Division III. Exemptions and Exclusions.

- 105-164.13. Retail sales and use tax.
- 105-164.14. Certain refunds authorized.

Division IV. Reporting and Payment.

- 105-164.16. Report and payment of taxes.

Article 6.

Schedule G. Gift Taxes.

Sec.

105-197. When return required; due date of return.

Article 7.

Schedule H. Intangible Personal Property.

105-212. Institution exempted; conditional and other exemptions.

Article 8B.

Schedule I-B. Taxes upon Insurance Companies.

- 105-228.3. To whom this Article shall apply.
- 105-228.5. (Effective for taxable years beginning prior to January 1, 1988) Taxes measured by gross premiums.
- 105-228.5. (Effective for taxable years beginning on or after January 1, 1988) Taxes measured by gross premiums.
- 105-228.6. [Repealed.]
- 105-228.7. Registration fees for agents, brokers and others.

Article 9.

Schedule J. General Administration; Penalties and Remedies.

105-236. Penalties.

SUBCHAPTER II. LISTING, APPRAISAL, AND ASSESSMENT OF PROPERTY AND COLLECTION OF TAXES ON PROPERTY.

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105-273. Definitions.

Article 12.

Property Subject to Taxation.

- 105-275. Property classified and excluded from the tax base.
- 105-277. Property classified for taxation at reduced rates; certain deductions.
- 105-277A. Reimbursement for partial exclusion of retailers' and wholesalers' inventories.
- 105-277.1. Property classified for taxation at reduced valuation.
- 105-278.9. [Repealed.]

Sec.

105-282.1. Applications for property tax exemption or exclusion.

Article 17.

Administration of Listing.

105-309. What the abstract shall contain.

Article 20.

Approval, Preparation, and Disposition of Records.

105-320. Tax receipts; preparation.

SUBCHAPTER V. GASOLINE TAX.

Article 36.

Gasoline Tax.

- 105-431. Purpose of Article.
- 105-432. Sales from pipeline or seaport terminals not first sales.
- 105-433. Application for license as distributor.
- 105-434. Excise tax on motor fuel; payment of tax.
- 105-435. Tax on fuels not within definition; manner of collection; from whom collected.
- 105-440. Applications for and administration of tax refunds; penalty.
- 105-441. Enumeration of acts constituting misdemeanor; cancellation of license and bond.
- 105-446. Refund for tax on motor fuel used other than to propel a motor vehicle.
- 105-446.1. Refunds of taxes paid by counties and municipalities.
- 105-446.3. Refund of taxes paid on motor fuels used in operation of motor buses transporting fare-paying passengers in a city transit system, in operation of a taxicab transporting fare-paying passengers, and in operation of private non-profit transportation services.
- 105-446.5. Refund of taxes paid on motor fuel used by concrete mixing vehicles, solid waste compacting vehicles, and certain agricultural delivery vehicles.
- 105-446.6. Refund on taxpaid motor fuel transported to another state.
- 105-449. Exemption of motor fuel used in public school transportation; false returns, etc.

Article 36A.

Special Fuels Tax.

- 105-449.2. Definitions.
- 105-449.3. License required of supplier.
- 105-449.5. Supplier to file bond.
- 105-449.9. License required of user and user-seller.

Sec.

- 105-449.10. Records and reports required of user-seller or user.
- 105-449.11. Display of license.
- 105-449.14. Power of Secretary to cancel licenses.
- 105-449.16. Levy of tax; purposes; special provision for certain nonanhydrous ethanol.
- 105-449.19. Tax reports; computation and payment of tax.
- 105-449.22. Leased motor vehicles.
- 105-449.24. Exemptions and refunds.
- 105-449.30, 105-449.31. [Repealed.]

Article 36B.**Tax on Carriers Using Fuel Purchased outside State.**

- 105-449.38. Tax levied.
- 105-449.39. Credit for payment of motor fuel tax.
- 105-449.42A. Leased motor vehicles.
- 105-449.47. Registration of vehicles.

SUBCHAPTER VI. TAX RESEARCH.**Article 37.****Tax Research.**

- 105-455. Submission of proposed amendments and information to Advisory Budget Commission; continuing study of economic conditions.

SUBCHAPTER VIII. LOCAL GOVERNMENT SALES AND USE TAX.**Article 39.****Local Government Sales and Use Tax.**

- 105-472. Disposition and distribution of taxes collected.

Article 40.**Supplemental Local Government Sales and Use Taxes.**

Sec.

- 105-486. Distribution of additional taxes.

Article 41.**Alternative Local Government Sales and Use Taxes.**

- 105-493. Distribution of taxes.

Article 42.**Additional Supplemental Local Government Sales and Use Taxes.**

- 105-495. Short title.
- 105-496. Purpose and intent.
- 105-497. Limitations.
- 105-498. Levy and collection of additional taxes.
- 105-499. Form of ballot.
- 105-500. Retail collection bracket.
- 105-501. Distribution of additional taxes.
- 105-502. Use of additional tax revenue by counties.
- 105-503. Report on county spending on public school capital outlay.
- 105-504. Use of additional tax revenue by municipalities.

SUBCHAPTER I. LEVY OF TAXES.**ARTICLE 1.*****Schedule A. Inheritance Tax.*****§ 105-2. General provisions.****Legal Periodicals. —**

For 1984 survey, "North Carolina's Shift to the Minority Rule Regarding Inheritance Tax-

ation and Will Compromise Agreements," see 63 N.C.L. Rev. 1286 (1985).

§ 105-2.1. Internal Revenue Code definition.

As used in this Article, the term "Code" means the Internal Revenue Code as enacted as of January 1, 1986, and includes any provisions enacted as of that date which become effective after that date. (1983, c. 713, s. 62; 1985, c. 656, s. 7; 1985 (Reg. Sess., 1986), c. 853, s. 1.)

Effect of Amendments. —
The 1985 (Reg. Sess., 1986) amendment, effective for taxable years beginning on or after

January 1, 1986, substituted "January 1, 1986" for "December 31, 1984."

§ 105-6. Rate of tax — Class C.

Where the person or persons entitled to any beneficial interest in such property shall be in any other degree of relationship or collateral consanguinity than is hereinbefore stated, or shall be a stranger in blood to the person who died possessed as aforesaid, or shall be a body politic or corporate, at the following rates of tax (for each one hundred dollars (\$100.00) or fraction thereof) of the value of such interest:

First \$ 10,000	8 percent
Over \$ 10,000 and to \$ 25,000	9 percent
Over \$ 25,000 and to \$ 50,000	10 percent
Over \$ 50,000 and to \$ 100,000	11 percent
Over \$ 100,000 and to \$ 250,000	12 percent
Over \$ 250,000 and to \$ 500,000	13 percent
Over \$ 500,000 and to \$ 1,000,000	14 percent
Over \$1,000,000 and to \$1,500,000	15 percent
Over \$1,500,000 and to \$2,500,000	16 percent
Over \$2,500,000	17 percent

(1939, c. 158, s. 5.)

Editor's Note. — This section is set out to correct a typographical error in the schedule in the main volume.

§ 105-22. Duties of clerks of superior court.

It shall be the duty of the clerk of the superior court to obtain from any executor or administrator, at the time of the qualification of such executor or administrator, the address of the personal representative qualifying, the names and addresses of the heirs-at-law, legatees, distributees, devisees, etc., as far as practical, the approximate value and character of the property or estate, both real and personal, the relationship of the heirs-at-law, legatees, devisees, etc., to the decedents, and forward the same to the Secretary of Revenue on or before the tenth day of each month. The clerk shall make no report of a death if no inheritance tax return is required to be filed for the decedent's estate under G.S. 105-23 because the estate meets the requirements of subsection (b) of that section. Any clerk of the superior court who shall fail, neglect, or refuse to file such monthly reports as required by this section shall be liable to a penalty in the sum of one hundred dollars (\$100.00) to be recovered by the Secretary of Revenue in an action to be brought by the Secretary of Revenue. (1939, c. 158, s. 20; 1943, c. 400, s. 1; 1953, c. 1302, s. 1; 1973, c. 108, s. 49; c. 476, s. 193; c. 1287, s. 2; 1979, c. 801, s. 23; 1981 (Reg. Sess., 1982), c. 1221, s. 1; 1985, c. 82, s. 1; c. 656, s. 3.1; 1985 (Reg. Sess., 1986), c. 822, s. 1.)

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective July 1, 1986, and applicable to the es-

tates of decedents dying on or after that date, rewrote the second sentence of this section.

§ 105-23. Information by administrator and executor.

(a) **Return Required.** — Every administrator shall prepare a statement showing as far as can be ascertained the names of all the heirs-at-large and their relationship to decedent, and every executor shall prepare a like statement, accompanied by a copy of the will, showing the relationship to the decedent of all legatees, distributees, and devisees named in the will, and the age at the time of the death of the decedent of all legatees, distributees, devisees, to whom property is bequeathed or devised for life or for a term of years, and the names of those, if any, who have died before the decedent, together with the post-office address of executor, administrator, or trustee. If any of the heirs-at-law, distributees, and devisees are minor children of the decedent, such statement shall also show the age of each of such minor children. The statement shall also contain a complete inventory of all the real property of the decedent located in and outside the State, and of all personal property, wherever situate, of the estate, of all insurance policies upon the life of the decedent, together with an appraisal under oath or affirmation of the value of each class of property embraced in the inventory, and the value of the whole, together with any deductions permitted by this statute, so far as they may be ascertained at the time of filing such statement; and also the full statement of all gifts or advancements made by deed, grant, or sale to any person or corporation, in trust or otherwise, within three years prior to the death of the decedent. The statement herein provided for shall be filed with the Secretary of Revenue at Raleigh, North Carolina, within nine months after the qualification of the executor or administrator, upon blank forms to be prepared by the Secretary of Revenue. If any administrator or executor fails or refuses to comply with any of the requirements of this section, he shall be liable to a penalty in the sum of five hundred dollars (\$500.00), to be recovered by the Secretary of Revenue in an action to be brought by the Secretary of Revenue to collect such sum in the Superior Court of Wake County against such administrator or executor. The Secretary of Revenue, for good cause shown, may remit all or any portion of the penalty imposed under the provisions of this section. Every executor or administrator may make a tentative settlement of the inheritance tax with the Secretary of Revenue, based on the inventory supported by oath or affirmation provided in this section. If any executor, administrator, collector, committee, trustee or any other fiduciary within or without this State holding or having control of any funds, property, trust or estate, the transfer of which becomes taxable under the provisions of this Article, shall fail to file the statement herein required, within the times herein required, the Secretary of Revenue is authorized and shall be required to secure the information herein required from the best sources available, and therefrom assess the taxes levied hereunder, together with the penalties herein and otherwise provided.

(b) **Exception.** — An inheritance tax return is not required to be filed for an estate (i) whose beneficiaries are all either Class A beneficiaries, as described in G.S. 105-4(a), or the surviving spouse, and (ii) whose gross value, including the value of transfers over which the decedent retained an interest and the value of gifts made within three years before the decedent's death, as provided in G.S. 105-2(3), is less than the amount specified in the following table:

Estates of Decedents Dying

<i>On or After</i>	<i>Gross Value of Estates</i>
July 1, 1985	\$100,000
August 1, 1985	75,000
July 1, 1986	150,000
January 1, 1987	250,000.

(1939, c. 158, s. 21; 1947, c. 501, s. 1; 1951, c. 643, s. 1; 1971, c. 1054, s. 4; 1973, c. 476, s. 193; 1979, c. 801, s. 24; 1981 (Reg. Sess., 1982), c. 1221, s. 2; 1985, c. 82, s. 2; c. 656, s. 3.1; 1985 (Reg. Sess., 1986), c. 822, s. 2.)

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective July 1, 1986, and applicable to the estates of decedents dying on or after that date,

designated the first paragraph of this section as subsection (a), deleted a former second paragraph, relating to when a return was not required, and added subsection (b).

§ 105-24. Access to safe deposits of decedents; withdrawal of bank deposit, etc., payable to either husband or wife or survivor.

No safe deposit company, trust company, corporation, bank, or other institution, person or persons having in possession or control or custody, in whole or in part, securities, deposits, assets, or property belonging to or standing in the name of a decedent, or belonging to or standing in the joint names of a decedent and one or more persons, shall deliver or transfer the same to any person whatsoever, whether in a representative capacity or not, or to the survivor or to the survivors when held in the joint names of a decedent and one or more persons, without retaining a sufficient portion or amount thereof to pay taxes or interest which would thereafter be assessed thereon under this Article; but the Secretary of Revenue may consent in writing to such delivery or transfer, and such consent shall relieve said safe deposit company, trust company, corporation, bank or other institution, person or persons from the obligation herein imposed. Securities whose declaration date is after the decedent's death, or interest that accrues after the decedent's death on money on deposit at a bank, savings and loan association, credit union, or other corporation, however, may be transferred or delivered without retaining a portion of the property for the payment of taxes or interest and without obtaining the written consent of the Secretary to the delivery or transfer. Provided: The clerk of superior court of the resident county of a decedent may authorize in writing any bank, safe deposit company, trust company, or any other institution to transfer to the properly qualified representative of the estate any funds on deposit in the name of the decedent or the decedent and one or more persons when the total amount of such deposit or deposits is three hundred dollars (\$300.00) or less, and when such deposit or deposits compose the total cash assets of the estate. Such authorization shall have the same force and effect as when issued in writing by the Secretary of Revenue. Every safe deposit company, trust company, corporation, bank or other institution, person, or persons engaged in the business of renting lock boxes for the safekeeping of valuable papers and personal effects, or having in their possession or supervision in such lock boxes such valuable papers or personal effects shall, upon the death of any person using or having access to such lock box, as a condition precedent to the opening of such lock box by the executor, administrator, personal representative lessee or cotenant of such deceased person, require the presence of the clerk of the superior court of the county in which such lock box is located. It shall be the duty of the clerk of the superior court, or his representative, in the presence of an officer or representative of the safe deposit company, trust

company, corporation, bank, or other institution, person or persons, to make an inventory of the contents of such lock box and to furnish a copy of such inventory to the Secretary of Revenue, to the executor, administrator, personal representative, or cotenant of the decedent, and a copy to the safe deposit company, trust company, corporation, bank, or other institution, person, or persons having possession of such lock box; provided, that for lock boxes to which decedent merely had access the inventory shall include only assets in which the decedent has or had an interest. Immediately after the clerk of superior court has made an inventory of the contents of the lock box, the safe deposit company, trust company, corporation, bank or other institution, or person shall, upon request, release to the lessee or cotenant of the lock box any life insurance policy stored in the lock box for delivery to the beneficiary named in the policy. Notwithstanding any of the provisions of this section any life insurance company may pay the proceeds of any policy upon the life of a decedent to the person entitled thereto as soon as it shall have mailed to the Secretary of Revenue a notice, in such form as the Secretary of Revenue may prescribe, setting forth the fact of such payment; but if such notice be not mailed, all of the provisions of this section shall apply.

Notwithstanding any of the provisions of this section, in any case where a bank deposit has been heretofore made or is hereafter made, or where savings and loan stock has heretofore been issued or is hereafter issued, in the names of two or more persons and payable to either or the survivor or survivors of them, such bank or savings and loan association may, upon the death of either of such persons, allow the person or persons entitled thereto under the provisions of G.S. 41-2.1 to withdraw as much as fifty percent (50%) of such deposit or stock, and the balance thereof shall be retained by the bank or savings and loan association to cover any taxes that may thereafter be assessed against such deposit or stock under this Article. When such taxes as may be due on such deposit or stock are paid, or when it is ascertained that there is no liability of such deposit or stock for taxes under this Article, the Secretary of Revenue shall furnish the bank or savings and loan association his written consent for the payment of the retained percentage to the person or persons entitled thereto by law; and the Secretary of Revenue may furnish such written consent to the bank or savings and loan association upon the qualification of a personal representative of the deceased. If the person entitled to funds in an account is the surviving spouse and the account is a joint account of the surviving spouse and the decedent with right of survivorship, no tax waiver is required from the Secretary of Revenue to release the funds in the account.

Failure to comply with the provisions of this section shall render such safe deposit company, trust company, corporation, bank or other institution, person or persons liable for the amount of the taxes and interest due under this Article on the succession to such securities, deposits, assets, or property, but in any action brought under this provision it shall be a sufficient defense that the delivery or transfer of securities, deposits, assets, or property was made in good faith without knowledge of the death of the decedent and without knowledge of circumstances sufficient to place the defendant on inquiry. (1939, c. 158, s. 21 $\frac{1}{2}$; 1943, c. 400, s. 1; 1959, c. 1192; 1973, c. 108, s. 50; c. 476, s. 193; c. 1287, s. 2; 1983, c. 198; 1985, c. 87; c. 106; 1985 (Reg. Sess., 1986), c. 822, s. 4.)

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective July 1, 1986, and applicable to the estates of decedents dying on or after that date, deleted a former second sentence of the second

paragraph, relating to release of the balance of certain accounts to the personal representative without the requirements of a tax waiver, and added the last sentence of the second paragraph.

ARTICLE 2.

Schedule B. License Taxes.

§ 105-33. Taxes under this Article.

(d) The State license issued under G.S. 105-41, 105-42, 105-45, 105-53, 105-54, 105-55, 105-57, 105-58, and 105-91 shall be and constitute a personal privilege to conduct the profession or business named in the State license, shall not be transferable to any other person, firm or corporation and shall be construed to limit the person, firm or corporation named in the license to conducting the profession or business and exercising the privilege named in the State license to the county and/or city and location specified in the State license, unless otherwise provided in this Article or schedule. Other license issued for a tax year for the conduct of a business at a specified location shall upon a sale or transfer of the business be deemed a sufficient license for the succeeding purchaser for the conduct of the business specified at such location for the balance of the tax year: Provided, that if the holder of a license under this schedule moves the business for which a license has been paid to another location, a new license may be issued to the licensee at a new location for the balance of the license year, upon surrender of the original license for cancellation and the payment of a fee of five dollars (\$5.00) for each license certificate reissued.

(e) Whenever, in any section of this Article or schedule, the tax is graduated with reference to the population of the city or town in which the business is to be conducted or the privilege exercised, the minimum tax provided in such section shall be applied to the same business or privilege when conducted or exercised outside of the municipality, unless such business is conducted or privilege exercised within one mile of the corporate limits of such municipality, in which event the same tax shall be imposed and collected as if the business conducted or the privilege exercised were inside of the corporate limits of such municipality: Provided, that with respect to taxes in this Article, assessed on a population basis, the same rates shall apply to incorporated towns and unincorporated places or towns alike, with the best estimate of population available being used as a basis for determining the tax in unincorporated places or towns. The term "places or towns" means any unincorporated community, point or collection of people having a geographical name by which it may be generally known, and is so generally designated. For the purpose of this subsection, a municipality does not include an incorporated municipality unless it is a city as defined by G.S. 153A-1(1), but such lack of status as a city does not prevent it from being an "unincorporated place or town" as defined by this subsection.

(i) The tax collector of a county or city shall issue licenses required under this Article by the governing body of the county or city and shall collect the taxes due for these licenses.

(1939, c. 158, s. 100; 1943, c. 400, s. 2; 1951, c. 643, s. 2; 1953, c. 981, s. 1; 1963, c. 294, s. 3; 1973, c. 476, s. 193; 1977, c. 657, s. 1; 1981, c. 83, ss. 1, 2; 1985, c. 114, s. 10; 1985 (Reg. Sess., 1986), c. 826, ss. 1, 2; c. 934, s. 3.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. —

Session Laws 1985 (Reg. Sess., 1986), c. 826, ss. 1, 2, effective June 30, 1986, deleted references to §§ 105-56 and 105-59 from the first sentence of subsection (d) and rewrote subsection (i).

Session Laws 1985 (Reg. Sess., 1986), c. 934, s. 3, effective September 1, 1986, added the last sentence of subsection (e).

§ 105-37. Amusements — Moving pictures — Admission.

(e1) Motion picture shows promoted and managed by a qualifying corporation that operates a center for the performing and visual arts are exempt from the license tax imposed under this section if the motion pictures are shown at the center and if the showing of motion pictures is not the primary purpose of the center. As used in this subsection, "qualifying corporation" and "center for the performing and visual arts" have the same meaning as in G.S. 105-37.1(a).

(f) Counties shall not levy any license tax on the business taxed under the foregoing portions of this section. On the business described in the first paragraph of this section, cities and towns may levy a license tax not in excess of the following:

In cities or towns of less than 1,500 population	\$ 12.50
In cities or towns of 1,500 and less than 3,000 population	31.25
In cities or towns of 3,000 and less than 5,000 population	62.50
In cities or towns of 5,000 and less than 10,000 population	87.50
In cities or towns of 10,000 and less than 15,000 population	137.50
In cities or towns of 15,000 and less than 25,000 population	187.50
In cities or towns of 25,000 population or over	212.50

On a business described in subsections (d) or (e) of this section, cities and towns may levy a license tax not in excess of one half of the tax authorized by the schedule set forth in this subsection. Cities and towns may not levy a license tax on a business described in subsection (e1). (1939, c. 158, s. 105; 1943, c. 400, s. 2; 1945, c. 708, s. 2; 1947, c. 501, s. 2; 1949, c. 392, s. 1; c. 1201; 1957, c. 1340, s. 2; 1959, c. 1259, s. 9G; 1973, c. 476, s. 193; 1977, c. 657, s. 1; 1979, c. 801, ss. 25-27; 1981, c. 45, ss. 2, 3; 1985 (Reg. Sess., 1986), c. 819, ss. 1, 2.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 (Reg.

Sess., 1986) amendment, effective July 1, 1986, added subsection (e1) and added the last sentence of subsection (f).

§ 105-37.1. Amusements — Forms of amusement not otherwise taxed.

(a) Every person, firm or corporation engaged in the business of giving, offering or managing any form of entertainment or amusement not otherwise taxed or specifically exempted in this Article, for which an admission is charged, shall pay an annual license tax for each room, hall, tent or other place where such admission charges are made, graduated according to population, as follows:

In cities or towns of less than 1,500 population	\$10.00
In cities or towns of 1,500 and less than 3,000 population	15.00
In cities or towns of 3,000 and less than 5,000 population	20.00
In cities or towns of 5,000 and less than 10,000 population	25.00
In cities or towns of 10,000 and less than 15,000 population	30.00
In cities or towns of 15,000 and less than 25,000 population	40.00
In cities or towns of 25,000 population or over	50.00

In addition to the license tax levied in the above schedule, such person, firm, or corporation shall pay an additional tax upon the gross receipts of such business at the rate of tax levied in Article V, Schedule E, G.S. 105-164.1 to 105-164.44, upon retail sales of merchandise. Reports shall be made to the Secretary of Revenue, in such form as he may prescribe, within the first 10 days of each month covering all such gross receipts for the previous month, and the additional tax herein levied shall be paid monthly at the time such reports are made. The annual license tax herein levied shall be treated as an advance payment of the tax upon gross receipts herein levied, and the annual license tax shall be applied as a credit upon or advance payment of the gross receipts tax.

Every person, firm, or corporation giving, offering, or managing any dance or athletic contest of any kind, except high school and elementary school athletic contests, for which an admission fee in excess of fifty cents (50¢) is charged, shall pay an annual license tax of five dollars (\$5.00) for each location where such charges are made, and, in addition, a tax upon the gross receipts derived from admission charges in excess of fifty cents (50¢) at the rate of tax levied in Article V, Schedule E, G.S. 105-164.1 to 105-164.44, upon retail sales of merchandise. The additional tax upon gross receipts shall be levied and collected in accordance with such regulations as may be made by the Secretary of Revenue. No tax shall be levied on admission fees for high school and elementary school contests.

Dances and other amusements actually promoted and managed by civic organizations and private and public secondary schools, shall not be subject to the license tax imposed by this section and the first one thousand dollars (\$1,000) of gross receipts derived from such events shall be exempt from the gross receipts tax herein levied when the entire proceeds of such dances or other amusements are used exclusively for the school or civic and charitable purposes of such organizations and not to defray the expenses of the organization conducting such dance or amusement. The mere sponsorship of dance or other amusement by such a school, civic, or fraternal organization shall not be deemed to exempt such dance or other amusement as provided in this paragraph, but the exemption shall apply only when the dance or amusement is actually managed and conducted by the school, civic, or fraternal organization and the proceeds are used as hereinbefore required.

Dances and other amusements promoted and managed by a qualifying corporation that operates a center for the performing and visual arts are exempt from the license tax and the gross receipts tax imposed under this section if the dance or other amusement is held at the center. "Qualifying corporation" means a corporation that is exempt from income tax under G.S. 105-130.11(a)(3). "Center for the performing and visual arts" means a facility, having a fixed location, that provides space for dramatic performances, studios, classrooms and similar accommodations to organized arts groups and individual artists. This exemption shall not apply to athletic events.

The license and gross receipts taxes imposed by this section do not apply to a person, firm, or corporation that is exempt from income tax under Article 4 of this Chapter and is engaged in the business of operating a teen center. A "teen center" is a fixed facility whose primary purpose is to provide recreational activities, dramatic performances, dances, and other amusements exclusively for teenagers.

(1939, c. 158, s. 105; 1943, c. 400, s. 2; 1945, c. 708, s. 2; 1947, c. 501, s. 2; 1963, c. 1231; 1967, c. 865; 1973, c. 476, s. 193; 1977, c. 657, s. 1; 1981, c. 2; c. 83, s. 3; c. 977; 1985, c. 376; 1985 (Reg. Sess., 1986), c. 819, s. 3.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, ef-

fective July 1, 1986, deleted "as defined in G.S. 105-130.2(1)" following "means a corporation" in the second sentence of the next-to-last paragraph of subsection (a).

§ 105-89. Automobiles, wholesale supply dealers and service stations.

(a) Automotive Service Stations. —

- (1) Every person, firm, or corporation engaged in the business of servicing, storing, painting, repairing, welding, or upholstering motor vehicles, trailers, semitrailers, or engaged in the business of retail selling and/or delivering of any tires, tools, batteries, electrical equipment, automotive accessories, including radios designed for exclusive use in automobiles, or supplies, motor fuels and/or lubricants, or any of such commodities, in this state, shall apply for and obtain from the Secretary of Revenue a State license for the privilege of engaging in such business in this State, and shall pay for such license an annual tax for each location where such business is carried on, as follows. The tax shall be the greater of the amount equal to five dollars (\$5.00) multiplied by the number of motor fuel pumps, if any, operated at the location for which the license is sought and the applicable amount in the table below based on population.

In unincorporated communities and in cities or towns of less than 2,500 population	\$10.00
In cities or towns of 2,500 and less than 5,000 population	15.00
In cities or towns of 5,000 and less than 10,000 population	20.00
In cities or towns of 10,000 and less than 20,000 population	30.00
In cities or towns of 20,000 and less than 30,000 population	40.00
In cities or towns of 30,000 or more	50.00

In computing the tax, the number of motor fuel pumps operated at a location is considered the number of dispensing nozzles at the location from which motor fuel can be dispensed simultaneously.

- (2),(3) Repealed by Session Laws 1985 (Reg. Sess., 1986), c. 985, s. 1.
- (4) No additional license tax under this subsection shall be levied upon or collected from any employee, agent, or salesman whose employer or principal has paid the tax for each location levied in this subsection.
- (5) The tax imposed in G.S. 105-53 shall not apply to the sale of gasoline to dealers for resale.
- (6) Counties, cities, and towns may levy a license tax upon each place of business located therein under this subsection not in excess of one fourth of that levied by the State.

(c) Motor Vehicle Dealers. —

- (1) Every person, firm, or corporation engaged in the business of buying, selling, distributing, servicing, storing and/or exchanging motor vehicles, trailers, semitrailers, tires, tools, batteries, electrical equipment, lubricants, and/or automotive equipment, including radios designed for exclusive use in automobiles, and supplies in this State shall apply for and obtain from the Secretary of Revenue a State license for the privilege of engaging in such business in this State, and shall pay for such license an annual tax for each location where such business is carried on, as follows:

In unincorporated communities and in cities or towns of less than 1,000 population	\$ 25.00
In cities or towns of 1,000 and less than 2,500 population	50.00

In cities or towns of 2,500 and less than 5,000 population	\$ 75.00
In cities or towns of 5,000 and less than 10,000 population	110.00
In cities or towns of 10,000 and less than 20,000 population	140.00
In cities or towns of 20,000 and less than 30,000 population	175.00
In cities or towns of 30,000 or more	200.00

Provided, that persons, firms, or corporations dealing in second-hand or used motor vehicles exclusively shall be liable for the tax as set out in the foregoing schedule unless such business is of a seasonal, temporary, transient, or itinerant nature, in which event the tax shall be three hundred dollars (\$300.00) for each location where such business is carried on.

- (2) Any person, firm, or corporation who or which deals exclusively in motor fuels and lubricants, and has paid the license tax levied under subsection (a) of this section, shall not be subject to any license tax under subsections (b) and (c) of this section. A person, firm, or corporation licensed under this subsection is not required to be licensed under subsections (a) or (b) of this section.
- (3) No additional license tax under this subsection shall be levied upon or collected from any employee or salesman whose employer had paid the tax levied in this subsection; nor shall the tax apply to dealers in semitrailers weighing not more than five hundred pounds and carrying not more than one-thousand-pound load, and to be towed by passenger cars, nor to dealers in four-wheel, farm-type wagons equipped with rubber tires and designed to be pulled or towed by passenger cars or farm tractors.
- (4) Premises on which cars are stored or sold when owned or operated by a licensed car dealer under the same name shall not be deemed as a separate place of business when conducted within the corporate limits of any city or town in which such car business is conducted.
- (5) Counties, cities, and towns may levy a license tax on each place of business located therein, taxed under this subsection, not in excess of one fourth of that levied by the State, with the exception that the minimum tax may be as much as twenty dollars (\$20.00): Provided, if such business is of a seasonal, temporary, transient, or itinerant nature, counties, cities, and towns may levy a tax of three hundred dollars (\$300.00) for each location where such business is carried on. (1939, c. 158, s. 153; 1945, c. 708, s. 2; 1947, c. 501, s. 2; 1949, c. 392, s. 1; 1953, c. 1302, s. 2; 1959, c. 1259, ss. 9C-9E; 1973, c. 476, s. 193; 1985 (Reg. Sess., 1986), c. 826, s. 3; c. 985, ss. 1, 2.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Section 5 of Session Laws 1985 (Reg. Sess., 1986), c. 985, provides that the act does not affect pending litigation.

Effect of Amendments. — Session Laws 1985 (Reg. Sess., 1986), c. 826, s. 3, effective June 30, 1986, substituted "dealers in four-wheel" for "dealers to four-wheel" near the end of subdivision (c)(3). The 1985 (Reg. Sess., 1986) amendment by c.

985, s. 1, effective July 11, 1986, and applicable to licenses issued on or after July 1, 1986, added the last sentence of the introductory language of subdivision (a)(1), added the last sentence of subdivision (a)(1), and deleted subdivisions (a)(2) and (a)(3), which related to the tax rate in rural sections and the minimum tax per pump.

The amendment by c. 985, s. 2, effective July 11, 1986, added the last sentence of subdivision (c)(2).

§ 105-99. Wholesale distributors of motor fuels.

Every person, firm, or corporation engaged in the business of distributing or selling at wholesale any motor fuels in this State shall apply to the Secretary for an additional annual license to engage in such business, and shall pay for such privilege an additional annual license tax determined and measured by the number of pumps owned or leased by the distributor or wholesaler through which such motor fuels are sold, at retail, according to the following schedule:

For the first 50 pumps	\$ 2.00 per pump
For 51 additional pumps and not more than 100 pumps	4.00 per pump
For 101 additional pumps and not more than 200 pumps	5.00 per pump
For 201 additional pumps and not more than 300 pumps	6.00 per pump
For 301 additional pumps and not more than 400 pumps	7.00 per pump
For 401 additional pumps and not more than 500 pumps	8.00 per pump
For 501 additional pumps and not more than 600 pumps	9.00 per pump
For all over 600 pumps	10.00 per pump

In computing the tax, the number of pumps owned or leased by a distributor or wholesaler is considered the number of dispensing nozzles from which motor fuel can be dispensed simultaneously.

Any contract or agreement, oral or written, express or implied by the terms or the effects of which the tax herein imposed shall be passed on directly or indirectly to any person, firm, or corporation not engaged in the business hereby taxed is hereby declared to be against the public policy of this State and null and void, and any person, firm, or corporation negotiating such an agreement, or receiving the benefits thereof, shall be guilty of a misdemeanor and fined or imprisoned in the discretion of the court.

The tax herein imposed shall be in addition to all other taxes imposed by this Chapter or under any other laws.

Counties, cities and towns shall not levy any tax by reason of the additional tax imposed by this section, but this section shall in no way affect the right given to counties, cities, and towns to levy taxes under G.S. 105-89.

The business taxed under this section shall not be taxed under G.S. 105-98. (1939, c. 158, s. 162¹/₂; 1963, c. 1169, s. 12; 1973, c. 476, s. 193; 1985 (Reg. Sess., 1986), c. 985, s. 3.)

Editor's Note. — Section 5 of Session Laws 1985 (Reg. Sess., 1986), c. 985, provides that the act does not affect pending litigation.

Effect of Amendments. — The 1985 (Reg.

Sess., 1986) amendment, effective July 11, 1986, added the last sentence of the first paragraph.

§ 105-102.3. Banks.

There is hereby imposed upon every bank or banking association, including each national banking association, that is operating in this State as a commercial bank, an industrial bank, a savings bank created other than under Chapter 54B of the General Statutes or the Home Owners' Loan Act of 1933 (12 U.S.C. §§ 1461-68), a trust company, or any combination of such facilities or services, and whether such bank or banking association, hereinafter to be referred to as a bank or banks, be organized, under the laws of the United States or the laws of North Carolina, in the corporate form or in some other form of business organization, an annual privilege tax in the amount of thirty dollars (\$30.00) for each one million dollars (\$1,000,000) or fractional part thereof of total assets held as hereinafter provided. The assets upon which the tax is levied shall be determined by averaging the total assets shown in the four quarterly call reports of condition (consolidating domestic subsidiaries) for the preceding calendar year as required by bank regulatory authorities; provided, however, where a new bank commences operations within the State there shall be levied and paid an annual privilege tax of one hundred dollars (\$100.00) until such bank shall have made four quarterly call reports of condition (consolidating domestic subsidiaries) for a single calendar year; provided further, however, where a bank operates an international banking facility, as defined in G.S. 105-130.5(b)(13), the assets upon which the tax is levied shall be reduced by the average amount for the taxable year of all assets of the international banking facility which are employed outside the United States, as computed pursuant to G.S. 105-130.5(b)(13)c. The tax imposed hereunder shall be for the privilege of carrying on the businesses herein defined on a statewide basis regardless of the number of places or locations of business within the State. Counties, cities and towns shall not levy a license or privilege tax on the businesses taxed under this section, nor on the business of an international banking facility as defined in subsection (b)(13) of G.S. 105-130.5. (1973, c. 1053, s. 7; 1981, c. 855, s. 2; (1985 (Reg. Sess., 1986), c. 985, s. 4.)

Editor's Note. — Section 5 of Session Laws 1985 (Reg. Sess., 1986), c. 985, provides that the act does not affect pending litigation.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 11,

1986, inserted "created other than under Chapter 54B of the General Statutes or the Home Owners' Loan Act of 1933 (12 U.S.C. §§ 1461-68)" in the first sentence.

ARTICLE 3.

Schedule C. Franchise Tax.

§ 105-114. Nature of taxes; definitions.

The taxes levied in this Article upon persons and partnerships are for the privilege of engaging in business or doing the act named. The taxes levied in this Article upon corporations are privilege or excise taxes levied upon:

- (1) Corporations organized under the laws of this State for the existence of the corporate rights and privileges granted by their charters, and the enjoyment, under the protection of the laws of this State, of the powers, rights, privileges and immunities derived from the State by the form of such existence; and

- (2) Corporations not organized under the laws of this State for doing business in this State and for the benefit and protection which such corporations receive from the government and laws of this State in doing business in this State.

As used in this Article, the term "Code" means the Internal Revenue Code as enacted as of January 1, 1986, and includes any provisions enacted as of that date which become effective after that date.

The term "corporation" as used in this Article shall, unless the context clearly requires another interpretation, mean and include not only corporations but also associations or joint-stock companies and every other form of organization for pecuniary gain, having capital stock represented by shares, whether with or without par value, and having privileges not possessed by individuals or partnerships; and whether organized under, or without, statutory authority. The term "corporation" as used in this Article shall also mean and include any electric membership corporation organized under Chapter 117, and any electric membership corporation, whether or not organized under the laws of this State, doing business within the State.

When the term "doing business" is used in this Article, it shall mean and include each and every act, power or privilege exercised or enjoyed in this State, as an incident to, or by virtue of the powers and privileges acquired by the nature of such organizations whether the form of existence be corporate, associate, joint-stock company or common-law trust.

If the corporation is organized under the laws of this State, the payment of the taxes levied by this Article shall be a condition precedent to the right to continue in such form of organization; and if the corporation is not organized under the laws of this State, payment of said taxes shall be a condition precedent to the right to continue to engage in doing business in this State. The taxes levied in this Article or schedule shall be for the fiscal year of the State in which said taxes become due; except, that the taxes levied in G.S. 105-122 and 105-123 shall be for the income year of the corporation in which such taxes become due. For purposes of this Article, the words "income year" shall mean an income year as defined in G.S. 105-130.2(5). (1939, c. 158, s. 201; 1943, c. 400, s. 3; 1945, c. 708, s. 3; 1965, c. 287, s. 16; 1967, c. 286; 1969, c. 541, s. 6; 1973, c. 1287, s. 3; 1983, c. 713, s. 66; 1985, c. 656, s. 7; 1985 (Reg. Sess., 1986), c. 853, s. 1.)

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective for taxable years beginning on or after

January 1, 1986, substituted "January 1, 1986" for "December 31, 1984" in the second paragraph.

CASE NOTES

Constitutionality. — Assessment of tax under this section against a business trust did not violate the uniformity requirement of N.C. Const., Art. V, § 2, on grounds that it was similar to a limited partnership, which is not subject to the franchise tax. *First Carolina Investors v. Lynch*, 78 N.C. App. 583, 337 S.E.2d 691 (1985).

What Organizations Are Taxable under this Section. — This section levies a franchise tax only upon organizations which are (1) corporations as defined within that section, and (2) doing business within North Carolina. *First Carolina Investors v. Lynch*, 78 N.C. App. 583, 337 S.E.2d 691 (1985).

Corporation. — Under the terms of this section, an organization is properly classified as a corporation for franchise tax purposes when it satisfies three criteria: (1) It is a corporation, association, joint-stock company or any other form of organization for pecuniary gain; (2) it has capital stock represented by shares; and (3) it has privileges not possessed by individuals or partnerships. *First Carolina Investors v. Lynch*, 78 N.C. App. 583, 337 S.E.2d 691 (1985).

"Capital stock" must be read to encompass ownership interests in all the different types of business organizations potentially subject to

the franchise tax. *First Carolina Investors v. Lynch*, 78 N.C. App. 583, 337 S.E.2d 691 (1985).

Despite the fact that plaintiff was organized as a business trust rather than as an ordinary business corporation, and that its shares of capital stock were designated as "shares of beneficial interest," plaintiff's shares were the functional equivalent of capital stock for purposes of this section. *First Carolina Investors v.*

Lynch, 78 N.C. App. 583, 337 S.E.2d 691 (1985).

Privileges Not Possessed by Individuals or Partnerships. — By establishing for its trustees and shareholders limited liability for trust obligations, the plaintiff obtained a privilege not possessed by individuals or partnerships for purposes of this section. *First Carolina Investors v. Lynch*, 78 N.C. App. 583, 337 S.E.2d 691 (1985).

§ 105-120.2. (Effective for franchise taxes due on or after March 15, 1987) Franchise or privilege tax on holding companies.

(a) Every corporation, domestic and foreign, incorporated or, by an act, domesticated under the laws of this State or doing business in this State which, at the close of its taxable year is a holding company as defined in subsection (c) of this section, shall, pursuant to the provisions of G.S. 105-122:

- (1) Make a report and statement, and
- (2) Determine the total amount of its issued and outstanding capital stock, surplus and undivided profits, and
- (3) Apportion such outstanding capital stock, surplus and undivided profits to this State.

(b) (1) Every corporation taxed under this section shall annually pay to the Secretary of Revenue, at the time the report and statement are due, a franchise or privilege tax, which is hereby levied, at the rate of one dollar and fifty cents (\$1.50) per one thousand dollars (\$1,000) of the amount determined under subsection (a) of this section, but in no case shall the tax be more than seventy-five thousand dollars (\$75,000) nor less than twenty-five dollars (\$25.00).

(2) Notwithstanding the provisions of subdivision (1) of this subsection, if the tax produced pursuant to application of this paragraph (2) exceeds the tax produced pursuant to application of subdivision (1), then the tax shall be levied at the rate of one dollar and fifty cents (\$1.50) per one thousand dollars (\$1,000) on the greater of the amounts of

- a. Fifty-five percent (55%) of the appraised value as determined for ad valorem taxation of all the real and tangible personal property in this State of each such corporation plus the total appraised value of intangible property returned for taxation of intangible personal property as computed under G.S. 105-122(d); or
- b. The total actual investment in tangible property in this State of such corporation as computed under G.S. 105-122(d).

(c) For purposes of this section, a "holding company" is any corporation which receives during its taxable year more than eighty percent (80%) of its gross income from corporations in which it owns directly or indirectly more than fifty percent (50%) of the outstanding voting stock.

(d) Repealed by Session Laws 1985, c. 656, s. 39, effective for taxable years beginning on or after January 1, 1985.

(e) Counties, cities and towns shall not levy a franchise tax on corporations taxed under this section. The tax imposed under the provisions of G.S. 105-122 shall not apply to businesses taxed under the provisions of this section. (1975, c. 130, s. 1; 1985, c. 656, s. 39; 1985 (Reg. Sess., 1986), c. 854, s. 1.)

For this section as in effect for franchise taxes due before March 15, 1987, see the main volume.

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, ef-

fective for franchise taxes due on or after March 15, 1987, substituted "twenty-five dollars (\$25.00)" for "ten dollars (\$10.00)" in subdivision (b)(1).

§ 105-122. (Effective for franchise taxes due before March 15, 1987) Franchise or privilege tax on domestic and foreign corporations.

(a) Every corporation, domestic and foreign, incorporated, or, by an act, domesticated under the laws of this State or doing business in this State, except as otherwise provided in this Article or schedule, shall, on or before the fifteenth day of the third month following the end of its income year, annually, make and deliver to the Secretary of Revenue in such form as he may prescribe a full, accurate and complete report and statement signed by either its president, vice-president, treasurer, assistant treasurer, secretary or assistant secretary, containing such facts and information as may be required by the Secretary of Revenue as shown by the books and records of the corporation at the close of such income year.

There shall be annexed to the return required by this subsection the affirmation of the officer signing the return in the following form: "Under penalties prescribed by law, I hereby affirm that to the best of my knowledge and belief this return, including any accompanying schedules and statements, is true and complete. If prepared by a person other than taxpayer, his affirmation is based on all information of which he has any knowledge."

(b) Every such corporation taxed under this section shall determine the total amount of its issued and outstanding capital stock, surplus and undivided profits; no reservation or allocation from surplus or undivided profits shall be allowed other than for definite and accrued legal liabilities, except as herein provided; taxes accrued, dividends declared and reserves for depreciation of tangible assets as permitted for income tax purposes shall be treated as deductible liabilities. There shall also be treated as a deductible liability reserves for the entire cost of any air-cleaning device or sewage or waste treatment plant, including waste lagoons, and pollution abatement equipment purchased or constructed and installed which reduces the amount of air or water pollution resulting from the emission of air contaminants or the discharge of sewage and industrial wastes or other polluting materials or substances into the outdoor atmosphere or streams, lakes, or rivers, upon condition that the corporation claiming such deductible liability shall furnish to the Secretary a certificate from the Department of Natural Resources and Community Development certifying that said Environmental Management Commission has found as a fact that the air-cleaning device, waste treatment plant or pollution abatement equipment purchased or constructed and installed as above described has actually been constructed and installed and that such plant or equipment complies with the requirements of said Environmental Management Commission with respect to such devices, plants or equipment, that such device, plant or equipment is being effectively operated in accordance with the terms and conditions set forth in the permit, certificate of approval, or other document of approval issued by the Environmental Management Commission and that the primary purpose thereof is to reduce air or water pollution resulting from the emission of air contaminants or the discharge of sewage and waste and not merely incidental to other purposes and functions. The cost of purchasing and installing equipment or constructing facilities for the purpose of recycling or resource recovering of or from solid waste or for the purpose of reducing the volume of hazardous waste generated

shall be treated as deductible for the purposes of this section upon condition that the corporation claiming such deductible liability shall furnish to the Secretary a certificate from the Department of Human Resources certifying that the Department of Human Resources has found as a fact that the equipment or facility has actually been purchased, installed or constructed, that it is in conformance with all rules and regulations of the Department of Human Resources, and the recycling or resource recovering is the primary purpose of the facility or equipment. The cost of constructing facilities of any private or public utility built for the purpose of providing sewer service to residential and outlying areas shall be treated as deductible for the purposes of this section; the deductible liability allowed by this section shall apply only with respect to such pollution abatement plants or equipment constructed or installed on or after January 1, 1955. Treasury stock shall not be considered in computing the capital stock, surplus and undivided profits as the basis for franchise tax, but shall be excluded proportionately from said capital stock, surplus and undivided profits as the case may be upon the basis and to the extent of the cost thereof. In the case of an international banking facility, the capital base shall be reduced by the excess of the amount as of the end of the taxable year of all assets of an international banking facility which are employed outside the United States over liabilities of the international banking facility owed to foreign persons. For purposes of such reduction, foreign persons shall have the same meaning as defined in G.S. 105-130.5(b) (13)d.

Every corporation doing business in this State which is a parent, subsidiary, or affiliate of another corporation shall add to its capital stock, surplus and undivided profits all indebtedness owed to or endorsed or guaranteed by a parent, subsidiary or affiliated corporation as a part of its capital used in its business and as a part of the base for franchise tax under this section. The term "indebtedness" as used in this paragraph shall include all loans, credits, goods, supplies or other capital of whatsoever nature furnished by a parent, subsidiary, or affiliated corporation. The terms "parent," "subsidiary," and "affiliate" as used in this paragraph shall have the meaning specified in G.S. 105-130.6. If any part of the capital of the creditor corporation is capital borrowed from a source other than a parent, subsidiary or affiliate, the debtor corporation, which is required under this paragraph to include in its tax base the amount of debt by reason of being a parent, subsidiary, or affiliate of the said creditor corporation, may deduct from the debt thus included a proportionate part determined on the basis of the ratio of such borrowed capital as above specified of the creditor corporation to the total assets of the said creditor corporation. Further, in case the creditor corporation as above specified is also taxable under the provisions of this section, such creditor corporation shall be allowed to deduct from the total of its capital, surplus and undivided profits the amount of any debt owed to it by a parent, subsidiary or affiliated corporation to the extent that such debt has been included in the tax base of said parent, subsidiary or affiliated debtor corporation reporting for taxation under the provisions of this section.

- (c)(1) After ascertaining and determining the amount of its capital stock, surplus and undivided profits, as provided herein, every corporation permitted to allocate and apportion its net income for income tax purposes under the provisions of Article 4 of this Chapter shall apportion said capital stock, surplus and undivided profits to this State through use of the fraction computed for apportionment of its business income under said Article.

Provided, that although a corporation is authorized by the Tax Review Board to apportion its business income by use of an alternative formula or method, the corporation may not use such alternative formula or method for apportioning its capital stock, surplus and

undivided profits unless specifically authorized to do so by order of the Tax Review Board.

Provided, further, that a corporation which is required to pay an income tax to this State on its entire net income shall apportion its entire capital stock, surplus and undivided profits to this State.

- (2) If any corporation believes that the method of allocation or apportionment hereinbefore described as administered by the Secretary of Revenue has operated or will so operate as to subject it to taxation on a greater portion of its capital stock, surplus and undivided profits than is reasonably attributable to business within the State, it shall be entitled to file with the Tax Review Board a petition setting forth the facts upon which its belief is based and its argument with respect to the application of the allocation formula. This petition shall be filed in such form and within such time as the Tax Review Board may prescribe. The Board shall grant a hearing thereon. At least three members of the Tax Review Board shall attend any hearing pursuant to such petition. In such cases the Tax Review Board's membership shall be augmented by the addition of the Secretary of Revenue, who shall sit as a member of said Board with full power to participate in its deliberations and decisions with respect to petitions filed under the provisions of this section. An informal record containing in substance the evidence, contentions and arguments presented at the hearing shall be made. All members of the augmented Tax Review Board shall consider such evidence, contentions and arguments, and the decision thereon shall be made by a majority vote of the augmented Board. If the Board shall find that the application of the allocation formula subjects the corporation to taxation on a greater portion of its capital stock, surplus and undivided profits than is reasonably attributable to its business within this State:
 - a. If the corporation shall employ in its books of account a detailed allocation of receipts and expenditures which reflects more clearly than the applicable allocation formula or alternative formulas prescribed by this section the portion of the capital stock, surplus and undivided profits attributable to the business within this State, application for permission to base the return upon the taxpayer's books of account shall be considered by the Tax Review Board. The Board shall be authorized to permit such separate accounting method in lieu of applying the applicable allocation formula if the Board deems such method proper as best reflecting the portion of the capital stock, surplus and undivided profits attributable to this State.
 - b. If the corporation shall show that any other method of allocation than the applicable allocation formula or alternative formulas prescribed by this section reflects more clearly the portion of the capital stock, surplus and undivided profits attributable to the business within this State, application for permission to base the return upon such other method shall be considered by the Tax Review Board. The application shall be accompanied by a statement setting forth in detail, with full explanations, the method the taxpayer believes will more nearly reflect the portion of its capital stock, surplus and undivided profits attributable to the business within this State. If the Board shall conclude that the allocation formula and the alternative formulas prescribed by this section allocate to this State a greater portion of the capital stock, surplus and undivided profits of the corporation than is reasonably attributable to business within this State, it shall

determine the allocable portion by such other method as it shall find best calculated to assign to this State for taxation the portion reasonably attributable to its business within this State.

There shall be a presumption that the appropriate allocation formula reasonably attributes to this State the portion of the corporation's capital stock, surplus and undivided profits reasonably attributable to its business in this State and the burden shall rest upon the corporation to show the contrary. The relief herein authorized shall be granted by the Board only in cases of clear, cogent and convincing proof that the petitioning taxpayer is entitled thereto. No corporation shall use any alternative formula or method other than the applicable allocation formula provided by statute in making a franchise tax report or return to this State except upon order in writing of the Board and any return in which any alternative formula or other method other than the applicable allocation formula prescribed by statute is used without the permission of the Board, shall not be a lawful return.

When the Board determines, pursuant to the provisions of this Article, that an alternative formula or other method more accurately reflects the portion of the capital stock, surplus and undivided profits allocable to North Carolina and renders its decision with regard thereto, the corporation shall allocate its capital stock, surplus and undivided profits for future years in accordance with such determination and decision of the Board so long as the conditions constituting the basis upon which the decision was made remain unchanged or until such time as the business method of operation of the corporation changes. Provided, however, that the Secretary of Revenue may, in his discretion, with respect to any subsequent year, require the corporation to furnish information relating to its property, operations and activities.

A corporation which proposes to do business in this State may file a petition with the Board setting forth the facts upon which it contends that the applicable allocation formula will allocate a greater portion of the corporation's capital stock, surplus and undivided profits to North Carolina than will be reasonably attributable to its proposed business within the State. Upon a proper showing in accordance with the procedure described above for determination by the Board, the Board may authorize such corporation to allocate its capital stock, surplus and undivided profits to North Carolina on the basis prescribed by the Board under the provisions of this section for such future years as the conditions constituting the basis upon which the Board's decision is made remain unchanged and the business operations of the corporation continue to conform to the statement of proposed methods of business operations presented by the corporation to the Board.

When the Secretary of Revenue asserts liability under the formula adjustment decision of the Tax Review Board, an aggrieved taxpayer may pay the tax under protest and bring a civil action for recovery under the provisions of G.S. 105-241.4.

- (3) The proportion of the total capital stock, surplus and undivided profits of each such corporation so allocated shall be deemed to be the proportion of the total capital stock, surplus and undivided profits of each such corporation used in connection with its business in this State and liable for annual franchise tax under the provisions of this section.

(d) After determining the proportion of its total capital stock, surplus and undivided profits as set out in subsection (c) of this section, which amount so determined shall in no case be less than fifty-five percent (55%) of the appraised value as determined for ad valorem taxation of all the real and tangible personal property in this State of each such corporation plus the total appraised value of intangible property returned for taxation of intangible personal property as herein specified nor less than its total actual investment in tangible property in this State, every corporation taxed under this section shall annually pay to the Secretary of Revenue, at the time the report and statement are due, a franchise or privilege tax, which is hereby levied at the rate of one dollar and fifty cents (\$1.50) per one thousand dollars (\$1,000) of the total amount of capital stock, surplus and undivided profits as herein provided. The tax imposed in this section shall in no case be less than ten dollars (\$10.00) and shall be for the privilege of carrying on, doing business, and/or the continuance of articles of incorporation or domestication of each such corporation in this State. Appraised value of tangible property including real estate shall be the ad valorem valuation for the calendar year next preceding the due date of the franchise tax return. Appraised value of intangible property shall be the total gross valuation required to be reported for intangible tax purposes on April 15 coincident with or next preceding the due date of the franchise tax return. The term "total actual investment in tangible property" as used in this section shall be construed to mean the total original purchase price or consideration to the reporting taxpayer of its tangible properties, including real estate, in this State plus additions and improvements thereto less reserve for depreciation as permitted for income tax purposes, and also less any indebtedness incurred and existing by virtue of the purchase of any real estate and any permanent improvements made thereon. In computing "total actual investment in tangible personal property" there shall also be deducted reserves for the entire cost of any air-cleaning device or sewage or waste treatment plant, including waste lagoons, and pollution abatement equipment purchased or constructed and installed which reduces the amount of air or water pollution resulting from the emission of air contaminants or the discharge of sewage and industrial wastes or other polluting materials or substances into the outdoor atmosphere or into streams, lakes, or rivers, upon condition that the corporation claiming such deduction shall furnish to the Secretary a certificate from the Department of Natural Resources and Community Development certifying that said Department has found as a fact that the air-cleaning device, waste treatment plant or pollution abatement equipment purchased or constructed and installed as above described has actually been constructed and installed and that such device, plant or equipment complies with the requirements of said Environmental Management Commission with respect to such devices, plants or equipment, that such device, plant or equipment is being effectively operated in accordance with the terms and conditions set forth in the permit, certificate of approval, or other document of approval issued by the Environmental Management Commission and that the primary purpose thereof is to reduce air or water pollution resulting from the emission of air contaminants or the discharge of sewage and waste and not merely incidental to other purposes and functions. The cost of constructing facilities of any private or public utility built for the purpose of providing sewer service to residential and outlying areas shall be treated as deductible for the purposes of this section; the deductible liability allowed by this section shall apply only with respect to such pollution abatement plants or equipment constructed or installed on or after January 1, 1955.

(e) Any corporation which changes its income year, and files a "short period" income tax return pursuant to G.S. 105-130.15 shall file a franchise tax return in accordance with the provisions of this section in the manner and as

of the date specified in subsection (a) of this section. Such corporation shall be entitled to deduct from the total franchise tax computed (on an annual basis) on such return the amount of franchise tax previously paid which is applicable to the period subsequent to the beginning of the new income year.

(f) The report, statement and tax required by this section shall be in addition to all other reports required or taxes levied and assessed in this State.

(g) Counties, cities and towns shall not levy a franchise tax on corporations taxed under this section.

(h) Repealed by Session Laws 1981 (Reg. Sess., 1982), c. 1211, s. 5. (1939, c. 158, s. 210; 1941, c. 50, s. 4; 1943, c. 400, s. 3; 1945, c. 708, s. 3; 1947, c. 501, s. 3; 1951, c. 643, s. 3; 1953, c. 1302, s. 3; 1955, c. 1100, s. 2¹/₂; c. 1350, s. 17; 1957, c. 1340, s. 3; 1959, c. 1259, s. 3; 1963, c. 1169, s. 1; 1967, c. 286; c. 892, ss. 10, 11; c. 1110, s. 2; 1973, c. 476, s. 193; c. 695, s. 17; c. 1262, s. 23; c. 1287, s. 3; 1975, c. 764, s. 2; 1977, c. 771, s. 4; 1981, c. 704, s. 18; c. 855, s. 3; 1981 (Reg. Sess., 1982), c. 1211, s. 5; 1985, c. 656, s. 40; 1985 (Reg. Sess., 1986), c. 826, s. 6.)

Section Set Out Twice. — The section above is effective for franchise taxes due before March 15, 1987. For this section as amended effective for franchise taxes due on or after March 15, 1987, see the following section, also numbered 105-122.

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective June 30, 1986, deleted a proviso reading "Provided, that the basis for the franchise tax on all corporations, eighty percent (80%) of whose outstanding capital stock is owned by

persons or corporations to whom or to which such stock was issued prior to January 1, 1935, in part payment or settlement of their respective deposits in any closed bank of the State of North Carolina, shall be one half the appraised value as determined for ad valorem taxation of the real and tangible personal property of such corporation in this State for the calendar year next preceding the date on which report and statement is due under the provisions of this section" at the end of the second sentence of subsection (d).

§ 105-122. (Effective for franchise taxes due on or after March 15, 1987) Franchise or privilege tax on domestic and foreign corporations.

(a) Every corporation, domestic and foreign, incorporated, or, by an act, domesticated under the laws of this State or doing business in this State, except as otherwise provided in this Article or schedule, shall, on or before the fifteenth day of the third month following the end of its income year, annually, make and deliver to the Secretary of Revenue in such form as he may prescribe a full, accurate and complete report and statement signed by either its president, vice-president, treasurer, assistant treasurer, secretary or assistant secretary, containing such facts and information as may be required by the Secretary of Revenue as shown by the books and records of the corporation at the close of such income year.

There shall be annexed to the return required by this subsection the affirmation of the officer signing the return in the following form: "Under penalties prescribed by law, I hereby affirm that to the best of my knowledge and belief this return, including any accompanying schedules and statements, is true and complete. If prepared by a person other than taxpayer, his affirmation is based on all information of which he has any knowledge."

(b) Every such corporation taxed under this section shall determine the total amount of its issued and outstanding capital stock, surplus and undivided profits; no reservation or allocation from surplus or undivided profits shall be allowed other than for definite and accrued legal liabilities, except as herein provided; taxes accrued, dividends declared and reserves for deprecia-

tion of tangible assets as permitted for income tax purposes shall be treated as deductible liabilities. There shall also be treated as a deductible liability reserves for the entire cost of any air-cleaning device or sewage or waste treatment plant, including waste lagoons, and pollution abatement equipment purchased or constructed and installed which reduces the amount of air or water pollution resulting from the emission of air contaminants or the discharge of sewage and industrial wastes or other polluting materials or substances into the outdoor atmosphere or streams, lakes, or rivers, upon condition that the corporation claiming such deductible liability shall furnish to the Secretary a certificate from the Department of Natural Resources and Community Development certifying that said Environmental Management Commission has found as a fact that the air-cleaning device, waste treatment plant or pollution abatement equipment purchased or constructed and installed as above described has actually been constructed and installed and that such plant or equipment complies with the requirements of said Environmental Management Commission with respect to such devices, plants or equipment, that such device, plant or equipment is being effectively operated in accordance with the terms and conditions set forth in the permit, certificate of approval, or other document of approval issued by the Environmental Management Commission and that the primary purpose thereof is to reduce air or water pollution resulting from the emission of air contaminants or the discharge of sewage and waste and not merely incidental to other purposes and functions. The cost of purchasing and installing equipment or constructing facilities for the purpose of recycling or resource recovering of or from solid waste or for the purpose of reducing the volume of hazardous waste generated shall be treated as deductible for the purposes of this section upon condition that the corporation claiming such deductible liability shall furnish to the Secretary a certificate from the Department of Human Resources certifying that the Department of Human Resources has found as a fact that the equipment or facility has actually been purchased, installed or constructed, that it is in conformance with all rules and regulations of the Department of Human Resources, and the recycling or resource recovering is the primary purpose of the facility or equipment. The cost of constructing facilities of any private or public utility built for the purpose of providing sewer service to residential and outlying areas shall be treated as deductible for the purposes of this section; the deductible liability allowed by this section shall apply only with respect to such pollution abatement plants or equipment constructed or installed on or after January 1, 1955. Treasury stock shall not be considered in computing the capital stock, surplus and undivided profits as the basis for franchise tax, but shall be excluded proportionately from said capital stock, surplus and undivided profits as the case may be upon the basis and to the extent of the cost thereof. In the case of an international banking facility, the capital base shall be reduced by the excess of the amount as of the end of the taxable year of all assets of an international banking facility which are employed outside the United States over liabilities of the international banking facility owed to foreign persons. For purposes of such reduction, foreign persons shall have the same meaning as defined in G.S. 105-130.5(b) (13)d.

Every corporation doing business in this State which is a parent, subsidiary, or affiliate of another corporation shall add to its capital stock, surplus and undivided profits all indebtedness owed to or endorsed or guaranteed by a parent, subsidiary or affiliated corporation as a part of its capital used in its business and as a part of the base for franchise tax under this section. The term "indebtedness" as used in this paragraph shall include all loans, credits, goods, supplies or other capital of whatsoever nature furnished by a parent, subsidiary, or affiliated corporation. The terms "parent," "subsidiary," and "affiliate" as used in this paragraph shall have the meaning specified in G.S.

105-130.6. If any part of the capital of the creditor corporation is capital borrowed from a source other than a parent, subsidiary or affiliate, the debtor corporation, which is required under this paragraph to include in its tax base the amount of debt by reason of being a parent, subsidiary, or affiliate of the said creditor corporation, may deduct from the debt thus included a proportionate part determined on the basis of the ratio of such borrowed capital as above specified of the creditor corporation to the total assets of the said creditor corporation. Further, in case the creditor corporation as above specified is also taxable under the provisions of this section, such creditor corporation shall be allowed to deduct from the total of its capital, surplus and undivided profits the amount of any debt owed to it by a parent, subsidiary or affiliated corporation to the extent that such debt has been included in the tax base of said parent, subsidiary or affiliated debtor corporation reporting for taxation under the provisions of this section.

- (c)(1) After ascertaining and determining the amount of its capital stock, surplus and undivided profits, as provided herein, every corporation permitted to allocate and apportion its net income for income tax purposes under the provisions of Article 4 of this Chapter shall apportion said capital stock, surplus and undivided profits to this State through use of the fraction computed for apportionment of its business income under said Article.

Provided, that although a corporation is authorized by the Tax Review Board to apportion its business income by use of an alternative formula or method, the corporation may not use such alternative formula or method for apportioning its capital stock, surplus and undivided profits unless specifically authorized to do so by order of the Tax Review Board.

Provided, further, that a corporation which is required to pay an income tax to this State on its entire net income shall apportion its entire capital stock, surplus and undivided profits to this State.

- (2) If any corporation believes that the method of allocation or apportionment hereinbefore described as administered by the Secretary of Revenue has operated or will so operate as to subject it to taxation on a greater portion of its capital stock, surplus and undivided profits than is reasonably attributable to business within the State, it shall be entitled to file with the Tax Review Board a petition setting forth the facts upon which its belief is based and its argument with respect to the application of the allocation formula. This petition shall be filed in such form and within such time as the Tax Review Board may prescribe. The Board shall grant a hearing thereon. At least three members of the Tax Review Board shall attend any hearing pursuant to such petition. In such cases the Tax Review Board's membership shall be augmented by the addition of the Secretary of Revenue, who shall sit as a member of said Board with full power to participate in its deliberations and decisions with respect to petitions filed under the provisions of this section. An informal record containing in substance the evidence, contentions and arguments presented at the hearing shall be made. All members of the augmented Tax Review Board shall consider such evidence, contentions and arguments, and the decision thereon shall be made by a majority vote of the augmented Board. If the Board shall find that the application of the allocation formula subjects the corporation to taxation on a greater portion of its capital stock, surplus and undivided profits than is reasonably attributable to its business within this State:
- a. If the corporation shall employ in its books of account a detailed allocation of receipts and expenditures which reflects more

clearly than the applicable allocation formula or alternative formulas prescribed by this section the portion of the capital stock, surplus and undivided profits attributable to the business within this State, application for permission to base the return upon the taxpayer's books of account shall be considered by the Tax Review Board. The Board shall be authorized to permit such separate accounting method in lieu of applying the applicable allocation formula if the Board deems such method proper as best reflecting the portion of the capital stock, surplus and undivided profits attributable to this State.

- b. If the corporation shall show that any other method of allocation than the applicable allocation formula or alternative formulas prescribed by this section reflects more clearly the portion of the capital stock, surplus and undivided profits attributable to the business within this State, application for permission to base the return upon such other method shall be considered by the Tax Review Board. The application shall be accompanied by a statement setting forth in detail, with full explanations, the method the taxpayer believes will more nearly reflect the portion of its capital stock, surplus and undivided profits attributable to the business within this State. If the Board shall conclude that the allocation formula and the alternative formulas prescribed by this section allocate to this State a greater portion of the capital stock, surplus and undivided profits of the corporation than is reasonably attributable to business within this State, it shall determine the allocable portion by such other method as it shall find best calculated to assign to this State for taxation the portion reasonably attributable to its business within this State.

There shall be a presumption that the appropriate allocation formula reasonably attributes to this State the portion of the corporation's capital stock, surplus and undivided profits reasonably attributable to its business in this State and the burden shall rest upon the corporation to show the contrary. The relief herein authorized shall be granted by the Board only in cases of clear, cogent and convincing proof that the petitioning taxpayer is entitled thereto. No corporation shall use any alternative formula or method other than the applicable allocation formula provided by statute in making a franchise tax report or return to this State except upon order in writing of the Board and any return in which any alternative formula or other method other than the applicable allocation formula prescribed by statute is used without the permission of the Board, shall not be a lawful return.

When the Board determines, pursuant to the provisions of this Article, that an alternative formula or other method more accurately reflects the portion of the capital stock, surplus and undivided profits allocable to North Carolina and renders its decision with regard thereto, the corporation shall allocate its capital stock, surplus and undivided profits for future years in accordance with such determination and decision of the Board so long as the conditions constituting the basis upon which the decision was made remain unchanged or until such time as the business method of operation of the corporation changes. Provided, however, that the Secretary of Revenue may, in his discretion, with respect to any subsequent year, require the corporation to furnish information relating to its property, operations and activities.

A corporation which proposes to do business in this State may file a petition with the Board setting forth the facts upon which it contends that the applicable allocation formula will allocate a greater portion of the corporation's capital stock, surplus and undivided profits to North Carolina than will be reasonably attributable to its proposed business within the State. Upon a proper showing in accordance with the procedure described above for determination by the Board, the Board may authorize such corporation to allocate its capital stock, surplus and undivided profits to North Carolina on the basis prescribed by the Board under the provisions of this section for such future years as the conditions constituting the basis upon which the Board's decision is made remain unchanged and the business operations of the corporation continue to conform to the statement of proposed methods of business operations presented by the corporation to the Board.

When the Secretary of Revenue asserts liability under the formula adjustment decision of the Tax Review Board, an aggrieved taxpayer may pay the tax under protest and bring a civil action for recovery under the provisions of G.S. 105-241.4.

- (3) The proportion of the total capital stock, surplus and undivided profits of each such corporation so allocated shall be deemed to be the proportion of the total capital stock, surplus and undivided profits of each such corporation used in connection with its business in this State and liable for annual franchise tax under the provisions of this section.

(d) After determining the proportion of its total capital stock, surplus and undivided profits as set out in subsection (c) of this section, which amount so determined shall in no case be less than fifty-five percent (55%) of the appraised value as determined for ad valorem taxation of all the real and tangible personal property in this State of each such corporation plus the total appraised value of intangible property returned for taxation of intangible personal property as herein specified nor less than its total actual investment in tangible property in this State, every corporation taxed under this section shall annually pay to the Secretary of Revenue, at the time the report and statement are due, a franchise or privilege tax, which is hereby levied at the rate of one dollar and fifty cents (\$1.50) per one thousand dollars (\$1,000) of the total amount of capital stock, surplus and undivided profits as herein provided. The tax imposed in this section shall in no case be less than twenty-five dollars (\$25.00) and shall be for the privilege of carrying on, doing business, and/or the continuance of articles of incorporation or domestication of each such corporation in this State. Appraised value of tangible property including real estate shall be the ad valorem valuation for the calendar year next preceding the due date of the franchise tax return. Appraised value of intangible property shall be the total gross valuation required to be reported for intangible tax purposes on April 15 coincident with or next preceding the due date of the franchise tax return. The term "total actual investment in tangible property" as used in this section shall be construed to mean the total original purchase price or consideration to the reporting taxpayer of its tangible properties, including real estate, in this State plus additions and improvements thereto less reserve for depreciation as permitted for income tax purposes, and also less any indebtedness incurred and existing by virtue of the purchase of any real estate and any permanent improvements made thereon. In computing "total actual investment in tangible personal property" there shall also be deducted reserves for the entire cost of any air-cleaning device or sewage or waste treatment plant, including waste lagoons, and pollution abatement equipment purchased or constructed and installed which reduces

the amount of air or water pollution resulting from the emission of air contaminants or the discharge of sewage and industrial wastes or other polluting materials or substances into the outdoor atmosphere or into streams, lakes, or rivers, upon condition that the corporation claiming such deduction shall furnish to the Secretary a certificate from the Department of Natural Resources and Community Development certifying that said Department has found as a fact that the air-cleaning device, waste treatment plant or pollution abatement equipment purchased or constructed and installed as above described has actually been constructed and installed and that such device, plant or equipment complies with the requirements of said Environmental Management Commission with respect to such devices, plants or equipment, that such device, plant or equipment is being effectively operated in accordance with the terms and conditions set forth in the permit, certificate of approval, or other document of approval issued by the Environmental Management Commission and that the primary purpose thereof is to reduce air or water pollution resulting from the emission of air contaminants or the discharge of sewage and waste and not merely incidental to other purposes and functions. The cost of constructing facilities of any private or public utility built for the purpose of providing sewer service to residential and outlying areas shall be treated as deductible for the purposes of this section; the deductible liability allowed by this section shall apply only with respect to such pollution abatement plants or equipment constructed or installed on or after January 1, 1955.

(e) Any corporation which changes its income year, and files a "short period" income tax return pursuant to G.S. 105-130.15 shall file a franchise tax return in accordance with the provisions of this section in the manner and as of the date specified in subsection (a) of this section. Such corporation shall be entitled to deduct from the total franchise tax computed (on an annual basis) on such return the amount of franchise tax previously paid which is applicable to the period subsequent to the beginning of the new income year.

(f) The report, statement and tax required by this section shall be in addition to all other reports required or taxes levied and assessed in this State.

(g) Counties, cities and towns shall not levy a franchise tax on corporations taxed under this section.

(h) Repealed by Session Laws 1981 (Reg. Sess., 1982), c. 1211, s. 5. (1939, c. 158, s. 210; 1941, c. 50, s. 4; 1943, c. 400, s. 3; 1945, c. 708, s. 3; 1947, c. 501, s. 3; 1951, c. 643, s. 3; 1953, c. 1302, s. 3; 1955, c. 1100, s. 2¹/₂; c. 1350, s. 17; 1957, c. 1340, s. 3; 1959, c. 1259, s. 3; 1963, c. 1169, s. 1; 1967, c. 286; c. 892, ss. 10, 11; c. 1110, s. 2; 1973, c. 476, s. 193; c. 695, s. 17; c. 1262, s. 23; c. 1287, s. 3; 1975, c. 764, s. 2; 1977, c. 771, s. 4; 1981, c. 704, s. 18; c. 855, s. 3; 1981 (Reg. Sess., 1982), c. 1211, s. 5; 1985, c. 656, s. 40; 1985 (Reg. Sess., 1986), c. 826, s. 6; c. 854, s. 1.)

Section Set Out Twice. — The section above is effective for franchise taxes due on or after March 15, 1987. For this section as in effect for franchise taxes due before March 15, 1987, see the preceding section, also numbered 105-122.

Effect of Amendments. —

Session Laws 1985 (Reg. Sess., 1986), c. 826, s. 6, effective June 30, 1986, deleted a proviso reading "Provided, that the basis for the franchise tax on all corporations, eighty percent (80%) of whose outstanding capital stock is owned by persons or corporations to whom or to

which such stock was issued prior to January 1, 1935, in part payment or settlement of their respective deposits in any closed bank of the State of North Carolina, shall be one half the appraised value as determined for ad valorem taxation of the real and tangible personal property of such corporation in this State for the calendar year next preceding the date on which report and statement is due under the provisions of this section" at the end of the second sentence of subsection (d).

Session Laws 1985 (Reg. Sess., 1986), c. 854, s. 1, effective for franchise taxes due on or after

March 15, 1987, substituted "twenty-five dollars (\$25.00)" for "ten dollars (\$10.00)" in the second sentence of subsection (d).

§ 105-123. New corporations.

(a) No corporation shall be permitted to do business in this State without paying the franchise tax levied in this Article. When a corporation is incorporated, domesticated or commences business in this State, it shall on or before the sixtieth day following the date of its incorporation, domestication or commencement of business in this State make and deliver to the Secretary of Revenue in such form as he may prescribe a full, accurate and complete return and statement signed by either its president, vice-president, treasurer, assistant treasurer, secretary or assistant secretary containing such facts and information as may be required by the Secretary of Revenue in the administration of the tax levied under this Article. There shall be annexed to the return the affirmation of the officer signing the same, which shall be in the form prescribed in G.S. 105-122.

Every corporation subject to the provisions of this section shall pay a franchise tax of twenty-five dollars (\$25.00) which shall be due at the time the return is due and which shall be for the period from date of incorporation, domestication or commencement of business in this State through the last day of the then current income year. In no case shall such period exceed 53 weeks.

(1939, c. 158, s. 211; 1945, c. 708, s. 3; 1967, c. 286; c. 1110, s. 2; 1973, c. 476, s. 193; 1985 (Reg. Sess., 1986), c. 854, s. 2.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective January 1, 1987, and applicable to franchise tax returns of

corporations that file articles of incorporation or applications for certificates of authority on or after that date, substituted "twenty-five dollars (\$25.00)" for "ten dollars (\$10.00)" in the second paragraph of subsection (a).

§ 105-125. Corporations not mentioned.

None of the taxes levied in this Article shall apply to charitable, religious, fraternal, benevolent, scientific or educational corporations, not operating for a profit; nor to insurance companies; nor to mutual ditch or irrigation associations, mutual or cooperative telephone associations or companies, mutual canning associations, cooperative breeding associations, or like organizations or associations of a purely local character deriving receipts solely from assessments, dues, or fees collected from members for the sole purpose of meeting expenses; nor to cooperative marketing associations operating solely for the purpose of marketing the products of members or other farmers, which operations may include activities which are directly related to such marketing activities, and turning back to them the proceeds of sales, less the necessary operating expenses of the association, including interest and dividends on capital stock on the basis of the quantity of product furnished by them; nor to production credit associations organized under the act of Congress known as the Farm Credit Act of 1933; nor to business leagues, boards of trade, clubs organized and operated exclusively for pleasure, recreation and other nonprofitable purposes, civic leagues operated exclusively for the promotion of social welfare, or chambers of commerce and merchants' associations not organized for profit, and no part of the net earnings of which inures to the benefit

of any private stockholder, individual or other corporations; nor to corporations or organizations, such as condominium associations, homeowner associations or cooperative housing corporations not organized for profit, the membership of which is limited to the owners or occupants of residential units in the condominium, housing development, or cooperative housing corporation, and operated exclusively for the management, operation, preservation, maintenance or landscaping of the common areas and facilities owned by such corporation or organization or its members situated contiguous to such houses, apartments or other dwellings or for the management, operation, preservation, maintenance and repair of such houses, apartments or other dwellings owned by the corporation or organization or its members, but only if no part of the net earnings of such corporation or organization inures (other than through the performance of related services for the members of such corporation or organization) to the benefit of any member of such corporation or organization or other person. In addition, absent a specific provision to the contrary, the taxes levied in this Article do not apply to any organization that is exempt from federal income tax under the Code.

Provided, that each such corporation must, upon request by the Secretary of Revenue, establish in writing its claim for exemption from said provisions. The provisions of G.S. 105-122 and 105-123 shall apply to electric light, power, gas, water, Pullman, sleeping and dining car, express, telegraph, telephone, motor bus, and truck corporations to the extent and only to the extent that the franchise taxes levied in G.S. 105-122 and 105-123 exceed the franchise taxes levied in other sections of this Article or schedule; except that the provisions of G.S. 105-122 and 105-123 shall not apply to businesses taxed under G.S. 105-120.1. The exemptions in this section shall apply only to those corporations specially mentioned, and no other.

Provided, that any corporation doing business in North Carolina which in the opinion of the Secretary of Revenue of North Carolina, qualifies as a "regulated investment company" under section 851 of the Code or as a "real estate investment trust" under the provisions of section 856 of the Code and which files with the North Carolina Department of Revenue its election to be treated as a "regulated investment company" or as a "real estate investment trust," shall in determining its basis for franchise tax be allowed to deduct the aggregate market value of its investments in the stocks, bonds, debentures, or other securities or evidences of debt of other corporations, partnerships, individuals, municipalities, governmental agencies or governments. (1939, c. 158, s. 213; 1951, c. 937, s. 3; 1955, c. 1313, s. 1; 1957, c. 1340, s. 3; 1963, c. 601, s. 3; c. 1169, s. 1; 1967, c. 1110, s. 2; 1971, c. 820, s. 3; c. 833, s. 1; 1973, c. 476, s. 193; c. 1053, s. 2; c. 1287, s. 3; 1975, c. 591, s. 1; 1983, c. 28, s. 2; c. 713, s. 67; 1985 (Reg. Sess., 1986), c. 826, s. 4.)

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective June 30, 1986, substituted "Code" for "Internal Revenue

Code referred to in G.S. 105-130.3" at the end of the last sentence of the first paragraph.

ARTICLE 4

Schedule D. Income Tax.

DIVISION I. CORPORATION INCOME TAX.

§ 105-130.2. Definitions.

For the purpose of this Division, and unless otherwise required by the context:

- (1) "Code" means the Internal Revenue Code as enacted as of January 1, 1986, and includes any provisions enacted as of that date which become effective after that date.

(1939, c. 158, s. 302; 1941, c. 50, s. 5; 1955, c. 1331, s. 2; 1957, c. 1340, s. 4; 1963, c. 1169, s. 2; 1967, c. 1110, s. 3; 1973, c. 476, s. 193; 1983, c. 713, ss. 68, 82; 1985, c. 656, s. 7; 1985 (Reg. Sess., 1986), c. 853, s. 1.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, ef-

fective for taxable years beginning on or after January 1, 1986, substituted "January 1, 1986" for "December 31, 1984" in subdivision (1)

§ 105-130.5. Adjustments to federal taxable income in determining State net income.

(a) The following additions to federal taxable income shall be made in determining State net income:

- (1) Taxes based on or measured by net income by whatever name called and excess profits taxes;
- (2) Interest paid in connection with income exempt from taxation under this Division;
- (3) The contributions deduction allowed by the Code;
- (4) Interest income earned on bonds and other obligations of other states or their political subdivisions, less allowable amortization on any bond acquired on or after January 1, 1963;
- (5) The amount by which gains have been offset by the capital loss carryover allowed under the Code. All gains recognized on the sale or other disposition of assets must be included in determining State net income or loss in the year of disposition;
- (6) The net operating loss deduction allowed by the Code; and
- (7) Special deductions allowable under sections 241 to 247, inclusive, of the Code.
- (8) Depreciation or amortization claimed under the Code in connection with facilities for the handicapped as such facilities are defined in subdivision (10) of subsection (b) of this section, provided the cost of such facilities has been previously deducted for State income tax purposes.
- (9) Payments to or charges by a parent, subsidiary or affiliated corporation in excess of fair compensation in all intercompany transactions of any kind whatsoever pursuant to the Revenue Laws of this State.
- (10) The amount of property taxes allowed under Division IV of this Article during the taxable year as a credit against the taxpayer's income tax. A corporation that apports part of its income to this

State shall make the addition required by this subdivision after it determines the amount of its income that is apportioned and allocated to this State and shall not apply to this credit the apportionment factor used by it in determining the amount of its apportioned income.

- (11) The amount by which the percentage depletion allowance allowed by sections 613 and 613A of the Code for mines, oil and gas wells, and other natural deposits exceeds the cost depletion allowance for these items under the Code, except as otherwise provided herein. This subdivision does not apply to depletion deductions for clay, gravel, phosphate rock, lime, shells, stone, sand, feldspar, gemstones, mica, talc, lithium compounds, tungsten, coal, peat, olivine, pyrophyllite, and other solid minerals or rare earths extracted from the soil or waters of this State. Corporations required to apportion income to North Carolina shall first add to federal taxable income the amount of all percentage depletion in excess of cost depletion that was subtracted from the corporation's gross income in computing its federal income taxes and shall then subtract from the taxable income apportioned to North Carolina the amount by which the percentage depletion allowance allowed by sections 613 and 613A of the Code for solid minerals or rare earths extracted from the soil or waters of this State exceeds the cost depletion allowance for these items.

(1967, c. 1110, s. 3; 1969, cc. 1113, 1124; 1971, c. 820, s. 1; c. 1206, s. 1; 1973, c. 1287, s. 4; 1975, c. 764, s. 4; 1977, 2nd Sess., c. 1200, s. 1; 1979, c. 179, s. 2; c. 801, s. 32; 1981, c. 704, s. 20; c. 855, s. 1; 1983, c. 61; c. 713, ss. 70-73, 82, 83; 1985, c. 720, s. 1; c. 791, s. 43; 1985 (Reg. Sess., 1986), c. 825.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. —

The 1985 (Reg. Sess., 1986), amendment, effective for taxable years beginning on or after January 1, 1986, added the second sentence of subdivision (a)(10).

§ 105-130.11. Conditional and other exemptions.

(a) Except as provided in subsections (b) and (c), the following organizations and any organization that is exempt from federal income tax under the Code are exempt from the tax imposed under this Division.

- (1) Fraternal beneficiary societies, orders or associations

a. Operating under the lodge system or for the exclusive benefit of the members of a fraternity itself operating under the lodge system, and

b. Providing for the payment of life, sick, accident, or other benefits to the members of such society, order or association, or their dependents;

- (2) Every building and loan associations [association], and savings and loan associations subject to tax under Article 8D of this Chapter; and any cooperative banks without capital stock organized and operated for mutual purposes and without profit, and electric and telephone membership corporations organized under Chapter 117 of the General Statutes;

- (3) Cemetery corporations and corporations organized for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual;

- (4) Business leagues, chambers of commerce, merchants' associations, or boards of trade not organized for profit, and no part of the net earnings of which inures to the benefit of any private stockholder or individual;
- (5) Civic leagues or organizations not organized for profit, but operated exclusively for the promotion of social welfare;
- (6) Clubs organized and operated exclusively for pleasure, recreation, and other nonprofitable purposes, no part of the net earnings of which inures to the benefit of any private stockholder or member;
- (7) Farmers' or other mutual hail, cyclone, or fire insurance companies, mutual ditch or irrigation companies, mutual or cooperative telephone companies, or like organizations of a purely local character the income of which consists solely of assessments, dues and fees collected from members for the sole purpose of meeting expenses;
- (8) Farmers', fruit growers', or like organizations organized and operated as sales agents for the purpose of marketing the products of members and turning back to them the proceeds of sales, less the necessary selling expenses, on the basis of the quantity of product furnished by them;
- (9) Mutual associations formed under G.S. 54-111 through 54-128 to conduct agricultural business on the mutual plan and marketing associations organized under G.S. 54-129 through 54-158.

Nothing in this subdivision shall be construed to exempt any cooperative, mutual association or other organization from an income tax on net income which has not been refunded to patrons on a patronage basis and distributed either in cash, stock, certificates, or in some other manner that discloses to each patron the amount of his patronage refund. Provided, in arriving at net income for purposes of this subdivision, no deduction shall be allowed for dividends paid on capital stock. Patronage refunds made after the close of the taxable year and on or before the fifteenth day of the ninth month following the close of such year shall be considered as made on the last day of such taxable year to the extent the allocations are attributable to income derived before the close of such year; provided, that no stabilization or marketing organization which handles agricultural products for sale for producers on a pool basis shall be deemed to have realized any net income or profit in the disposition of a pool or any part of a pool until all of the products in that pool shall have been sold and the pool shall have been closed; provided, further, that a pool shall not be deemed closed until the expiration of at least 90 days after the sale of the last remaining product in that pool. Such cooperatives and other organizations shall file an annual information return with the Secretary of Revenue on forms to be furnished by the Secretary and shall include therein the names and addresses of all persons, patrons and/or shareholders, whose patronage refunds amount to ten dollars (\$10.00) or more; and

- (10) Insurance companies paying the tax on gross premiums as specified in G.S. 105-228.5.
- (11) Corporations or organizations, such as condominium associations, homeowner associations, or cooperative housing corporations not organized for profit, the membership of which is limited to the owners or occupants of residential units in the condominium, housing development or cooperative housing corporation, and operated exclusively for the management, operation, preservation, maintenance or landscaping of the common areas and facilities owned by such corporation or organization or its members situated contiguous to such houses,

apartments or other dwellings or for the management, operation, preservation, maintenance and repair of such houses, apartments or other dwellings owned by the corporation or organization or its members, but only if no part of the net earnings of such corporation or organization inures (other than through the performance of related services for the members of such corporation or organization) to the benefit of any member of such corporation or organization or other person.

(b) Organizations described in subdivision (1), (3), (4), (5), (6), (7), (8) or (9) of subsection (a) of this section shall be subject to the tax provided for in G.S. 105-130.3 to the following extent:

Gross income derived by any organization from any trade or business the conduct of which is not substantially related (aside from the need of the organization for income) to the exercise or performance of those functions constituting the basis for its exemption in subsection (a) of this section, less all deductions allowed by this Division directly connected with carrying on such trade or business and less one thousand dollars (\$1,000); provided, this paragraph does not apply to interest, royalties, dividends or rents unless this income is determined to be "unrelated business taxable income" under the Code; provided further, this paragraph shall not apply to any trade or business (i) in which substantially all the work in carrying on such trade or business is performed for the organization without compensation; or (ii) which is the selling of merchandise, substantially all of which is given to it; (iii) which is carried on by an organization described in G.S. 105-130.11(a)(3) primarily for the convenience of its members, students, patients or employees. Provided further, this paragraph shall not apply to net income derived from research (i) performed by a college, university or hospital; or (ii) performed for the United States, its instrumentalities or any state or political subdivision thereof; or (iii) performed by an organization operated primarily for the purpose of carrying on fundamental research, the results of which are freely available to the general public.

(1939, c. 158, s. 314; 1945, c. 708, s. 4; c. 752, s. 3; 1949, c. 392, s. 3; 1951, c. 937, s. 1; 1955, c. 1313, s. 1; 1957, c. 1340, s. 4; 1959, c. 1259, s. 4; 1963, c. 1169, s. 2; 1967, c. 1110, s. 3; 1973, c. 476, s. 193; c. 1053, s. 4; 1975, c. 19, s. 28; c. 591, s. 2; 1981, c. 450, s. 2; 1983, c. 28, s. 1; c. 31; 1985 (Reg. Sess., 1986), c. 826, s. 5.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective June 30,

1986, substituted "Code" for "Internal Revenue Code referred to in G.S. 105-130.3" in the introductory language of subsection (a) and in the second paragraph of subsection (b).

DIVISION II. INDIVIDUAL INCOME TAX.

§ 105-135. Definitions.

For the purpose of this Division, and unless otherwise required by the context:

- (15) The word "Code" means the Internal Revenue Code as enacted as of January 1, 1986, and includes any provisions enacted as of that date which become effective after that date. (1939, c. 158, s. 302; 1941, c. 50, s. 5; 1955, c. 1331, s. 2; 1957, c. 1340, s. 4; 1963, c. 1169, s. 2; 1967, c. 1110, s. 3; 1969, c. 1075, s. 4; 1973, c. 476, s. 193; 1977, c. 657, s. 5;

c. 900, s. 5; 1979, c. 801, s. 36; 1983, c. 195; c. 713, ss. 75, 82; 1985, c. 656, s. 7; 1985 (Reg. Sess., 1986), c. 853, s. 1.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, ef-

fective for taxable years beginning on or after January 1, 1986, substituted "January 1, 1986" for "December 31, 1984" in subdivision (15).

§ 105-141. "Gross income" defined.

Legal Periodicals. —

For note, "Stone v. Lynch: North Carolina

Takes a Different Approach to Defining Gift," see 64 N.C.L. Rev. 677 (1986).

§ 105-144.2. Sale of principal residence of taxpayer — Non-recognition of gain.

(i) Individual Whose Tax Home is Outside of United States. — The running of any period of time specified in subsection (a) or (c) of this section (other than the two years referred to in paragraph (4) of subsection (c)) shall be suspended during the time the taxpayer (or his spouse if the old residence and new residence are each used by the taxpayer and his spouse as their principal residence) has a tax home (as defined in section 911 (d)(3) of the Code) outside of the United States after the date of the sale of the old residence; except that any such period of time as so suspended shall not extend beyond the date four years after the date of the sale of the old residence.

(1957, c. 1340, s. 4; 1973, c. 1287, s. 5; 1975, c. 551, s. 1; 1977, c. 657, s. 5; 1979, c. 179, s. 2; 1981 (Reg. Sess., 1982), c. 1208, ss. 1-3; 1983, c. 713, s. 82; 1985, c. 85; 1985 (Reg. Sess., 1986), c. 826, s. 7.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective June 30, 1986, substituted "911 (d)(3)" for "913 (j)(1)(B)" near the middle of subsection (i).

§ 105-147. Deductions.

In computing net income there shall be allowed as deductions the following items:

(13) In lieu of any depreciation allowance pursuant to this section, at the option of the taxpayer, an allowance with respect to the amortization, based on a period of 60 months, of the cost of:

- a. Any air-cleaning device, sewage or waste treatment plant, including waste lagoons and pollution abatement equipment purchased or constructed and installed which reduces the amount of air or water pollution resulting from the discharge of sewage and industrial wastes or other polluting materials or substances into streams, lakes, or rivers, or the emission of air contaminants into the outdoor atmosphere. The deduction provided herein shall apply to the facilities or equipment of private or public utilities built and installed primarily for the purpose of providing sewer service to residential and outlying areas. The deduction provided for the items enumerated in this paragraph shall be allowed by the Secretary only upon the condition that the person or firm

claiming such allowance shall furnish to the Secretary a certificate from the Department of Natural Resources and Community Development certifying that said Environmental Management Commission has found as a fact that the waste treatment plant, air-cleaning device, or air or water pollution abatement equipment purchased or constructed and installed as above described has actually been constructed and installed and that such plant or equipment complies with the requirements of said Environmental Management Commission with respect to such plants or equipment, that such plant, device, or equipment is being effectively operated in accordance with the terms and conditions set forth in the permit, certificate of approval, or other document of approval issued by the Environmental Management Commission, and that the primary purpose thereof is to reduce air or water pollution resulting from the emission of air contaminants or the discharge of sewage and waste and not merely incidental to other purposes and functions.

- b. Purchasing and installing equipment or constructing facilities for the purpose of recycling or resource recovering of or from solid waste, or for the purpose of reducing the volume of hazardous waste generated. The deduction provided for the items enumerated in this paragraph shall be allowed by the Secretary of Revenue only upon the condition that the person claiming such allowance shall furnish to the Secretary a certificate from the Department of Human Resources certifying that the Department of Human Resources has found as a fact that the equipment or facility has actually been purchased, installed or constructed, that it is in conformance with all rules and regulations of the Department of Human Resources, and that recycling or resource recovering is the primary purpose of the facility or equipment.

The deduction herein provided for shall also be allowed as to plants or equipment constructed or installed before January 1, 1955, but only with respect to the undepreciated value of such plants or equipment.

- c. Repealed by Session Laws 1985 (Reg. Sess., 1986), c. 826, s. 8, effective June 30, 1986.
- d. Any equipment mandated by the Occupational Safety and Health Act, including the cost of planning, acquiring, constructing, modifying, and installing said equipment.

The term "equipment mandated by the Occupational Safety and Health Act" has the same meaning as in G.S. 105-130.10A.

(1939, c. 158, s. 322; 1941, c. 50, s. 5; 1943, c. 400, s. 4; c. 668; 1945, c. 708, s. 4; c. 752, s. 3; 1947, c. 501, s. 4; c. 894; 1949, c. 392, s. 3; 1951, c. 643, s. 4; c. 937, s. 4; 1953, c. 1031, s. 1; c. 1302, s. 4; 1955, c. 1100, s. 1; c. 1331, s. 1; cc. 1332, 1342; c. 1343, s. 1; 1957, c. 1340, ss. 4, 8; 1959, c. 1259, s. 4; 1961, c. 201, s. 1; c. 1148; 1963, c. 1169, s. 2; 1965, c. 1048; 1967, cc. 259, 550; c. 892, s. 6; c. 1110, s. 3; c. 1252, s. 2; 1969, cc. 725, 1082, 1123; c. 1175, s. 2; 1971, c. 1087, s. 2; c. 1206, s. 2; 1973, c. 476, s. 193; c. 1053, s. 5; c. 1262, s. 23; c. 1282; c. 1287, s. 5; c. 1338; 1975, c. 236, s. 1; c. 559, s. 1; c. 661, s. 1; c. 764, s. 5; 1977, c. 487; c. 657, s. 5; c. 771, s. 4; c. 890, ss. 1, 2; c. 900, s. 1; 1979, c. 179, s. 2; c. 659; c. 776, s. 2; c. 801, ss. 41-47; 1981, c. 653, s. 1; c. 704, s. 17; c. 899, s. 1; c. 957; c. 973, ss. 1, 2; 1981 (Reg. Sess., 1982), c. 1177, s. 2; c. 1205, ss. 2, 3; c. 1211, s. 4; 1983, c. 155, s. 1; c. 303, s. 1; c. 706, s. 1; c. 713, ss. 77, 78, 82, 84; c. 793, s. 4; 1983 (Reg. Sess., 1984), c. 1072; 1985, c. 88; c. 444, s. 2; c. 720, s. 2; 1985 (Reg. Sess., 1986), c. 826, s. 8.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, ef-

fective June 30, 1986, deleted paragraph (13)c, which read "Rehabilitating certain certified historic structures, but only to the extent allowed by section 191 of the Code."

§ 105-149. Exemptions.

(a) There shall be deducted from the net income the following exemptions:

- (1) In the case of a single individual who is not a head of household as defined in G.S. 105-135(8), a personal exemption of one thousand one hundred dollars (\$1,100). In the case of a single individual who is a head of household, as defined in G.S. 105-135(8), a personal exemption of two thousand two hundred dollars (\$2,200).
- (2) In the case of a married couple living together, two thousand two hundred dollar (\$2,200) exemption to the spouse having the larger adjusted gross income and one thousand one hundred dollar (\$1,100) exemption to the other spouse; provided that the spouse having the larger income may by agreement with the other spouse allow that spouse to claim the two thousand two hundred dollar (\$2,200) exemption in which case the spouse having the larger adjusted gross income must file a return and claim only the one thousand one hundred dollar (\$1,100) exemption.
- (2a) In the case of an individual who qualifies as "head of household" as defined in subdivision (8) of G.S. 105-135, two thousand two hundred dollars (\$2,200), but the "head of household" exemption shall not be allowable to a married individual living with his or her spouse except as provided in subsection (c)(2) of this section. The "head of household" exemption shall be in lieu of and not in addition to the exemptions established in subdivisions (1), (2), (4), (6) and (7) of subsection (a). Only one "head of household" exemption shall be allowable with respect to any one household, as the term "household" is defined in subdivision (8) of G.S. 105-135, and no individual shall be entitled to more than one "head of household" exemption.
- (3) In the case of a married couple living together, the spouse who does not claim the two thousand two hundred dollar (\$2,200) exemption as provided in (a)(2), one thousand one hundred dollars (\$1,100).
- (4) In the case of a widow or widower having minor child or children, natural or adopted, two thousand two hundred dollars (\$2,200).
- (5) For taxable years, beginning on or between January 1, 1980, and December 31, 1980, seven hundred dollars (\$700.00) for each dependent (as defined below) whose gross income for the calendar year in which the taxable year of the taxpayer begins is less than one thousand dollars (\$1,000), or who is a child of the taxpayer either under 19 years of age or a student regularly enrolled for full-time study in a school, college, or other institution of learning. For taxable years beginning on and after January 1, 1981, eight hundred dollars (\$800.00) for each dependent (as defined below) whose gross income for the calendar year in which the taxable year of the taxpayer begins is less than one thousand dollars (\$1,000), or who is a child of the taxpayer either under 19 years of age or a student regularly enrolled for full-time study in a school, college, or other institution of learning. For the purpose of the preceding sentence, the term "child" means an individual who is a son or daughter (natural or adopted), or a stepson or stepdaughter of the taxpayer.

An additional exemption of six hundred sixty dollars (\$660.00) for a dependent (as defined in this subdivision) who is a full-time student at an accredited college or university or other institution of higher learning under such rules or regulations as may be prescribed by the Secretary of Revenue. For the purposes of this paragraph, the words "full-time student" shall mean a dependent enrolled in full-time study on the last day of the income year or enrolled for full-time study for a period of at least five months (whether or not consecutive) during the income year.

For the purposes of this subsection, the term "dependent" means any of the following individuals over half of whose support, for the calendar year in which the taxable year of the taxpayer begins, was received from the taxpayer:

- a. A son or daughter (or a descendant of either), a stepson, or stepdaughter, a brother or sister (including a brother or sister of the half blood), a stepbrother, stepsister, father or mother (or an ancestor of either), a stepfather, a stepmother, a son or daughter of a brother or sister, a brother or sister of the father or mother, a son-in-law, a daughter-in-law, a father-in-law, a mother-in-law, a brother-in-law, or a sister-in-law of the taxpayer;
- b. An individual who was a member of the same household as the taxpayer;
- c. A former member of the same household as the taxpayer or an individual who otherwise qualifies as a dependent of the taxpayer, who for the taxable year of such taxpayer receives institutional care required by reason of a physical or mental disability.

The exemption provided in this subdivision for children of taxpayers shall be allowed only to the person claiming the two thousand two hundred dollar (\$2,200) exemption provided in subdivision (2) of this subsection except, however, that where husband and wife are divorced and have children of their marriage for which they would otherwise be entitled to an exemption hereunder, the parent furnishing the chief support of his (or her) child during the income year shall be entitled to said exemption, irrespective of whether said parent has custody of said child or children or is head of the household during said year.

For the purpose of determining the chief support of an individual other than a son or daughter (natural or adopted) or a stepson or stepdaughter of the taxpayer, over one half of the support of the individual for the calendar year shall be treated as received from the taxpayer if:

- a. No one individual contributed over half of such support;
- b. Over half of such support was received from individuals each of whom, but for the fact that he did not contribute over half of such support, would have been entitled to claim such individual as a dependent for a taxable year beginning in such calendar year;
- c. The taxpayer contributed over ten percent (10%) of such support; and
- d. Each individual in paragraph b (other than the taxpayer) who contributed over ten percent (10%) of such support files a written declaration (in such manner and form as the Secretary of Revenue may prescribe) that he will not claim such individual as a dependent for any taxable year beginning in such calendar year.

Nothing in this subdivision shall be construed to allow one spouse to claim an exemption for the other spouse under this subdivision.

- (6) In the case of an individual who has died during the income year, the same exemptions which would have been allowable to such individual under this subsection had the individual lived the entire income year.
- (7) In the case of a divorced person having the sole custody of a minor child or children and receiving no alimony for the support of himself or herself, nor support for a child, or children, two thousand two hundred dollars (\$2,200).
- (8) In the case of any person who is blind, such person shall be entitled to an additional exemption of one thousand one hundred dollars (\$1,100) in addition to all other exemptions allowed by law. Provided, such person shall submit to the Department of Revenue a certificate from a physician, an optometrist or from the Department of Human Resources certifying that such condition exists.
- (8a) In the case of hemophiliacs meeting the criteria herein contained, such persons shall be entitled to an additional exemption of one thousand one hundred dollars (\$1,100) in addition to all other exemptions provided by law. Eligible hemophiliacs shall be those who submit to the Division of Health Services of the Department of Human Resources a certificate from a physician or county health department, certifying that their condition is medically characterized as moderate or severe in the case of deficiencies of Factor VII or Factor IX, or in the case of deficiencies in Factors I — VIII or Factors X — XIII certifying that their condition causes physical or financial conditions similar to those resulting from Factor VIII or Factor IX deficiencies; and who attach a supporting statement to their North Carolina income tax return, including verification that said certificate has been obtained and submitted to the Division of Health Services of the Department of Human Resources.

An additional exemption of one thousand one hundred dollars (\$1,100) is allowed in addition to all other exemptions provided by law, for each dependent (as defined in subdivision (a)(5) above), who is a hemophiliac meeting the criteria set out in the above paragraph. The Division of Health Services of the Department of Human Resources is directed to develop said certificate and inform physicians and county health departments of its availability.

- (8b) In the case of any person who is deaf, such person shall be entitled to an additional exemption of one thousand one hundred dollars (\$1,100) in addition to all other exemptions provided by law. For purposes of this subdivision, an individual is deaf only if his average loss in the speech frequencies (500 to 2000 Hertz) in the better ear is 86 decibels (I.S.O.) or worse. Provided, such person shall submit to the Department of Revenue a certificate from a physician certifying that such condition exists.
- (8c) In the case of persons suffering from chronic irreversible renal disease, whose condition requires that they utilize dialysis in connection with the amelioration of that condition, such persons shall be entitled to an additional exemption of one thousand one hundred dollars (\$1,100) in addition to all other exemptions provided by law. Persons eligible for this exemption shall be those who submit to the Division of Health Services of the Department of Human Resources a certificate from a physician or county health department certifying that their condition is such that dialysis is required, as above provided, and who attach a supporting statement to their North Carolina income tax return, including verification that said certificate has been obtained and submitted to the Division of Health Services of the Department of Human Resources.

An additional exemption of one thousand one hundred dollars (\$1,100) is allowed in addition to all other exemptions provided by law, for each dependent (as defined in subdivision (a) above) who suffers from chronic irreversible renal disease and who meets the criteria set out in the above paragraph. The Division of Health Services of the Department of Human Resources is directed to develop said certificate and inform physicians and county health departments of its availability.

- (8d) An exemption of one thousand one hundred dollars (\$1,100) for an individual who has one of the following conditions or whose dependent has one of these conditions:
- a. Paraplegia;
 - b. Amputation of both legs above the knee; or
 - c. A disability that requires the person to use a wheelchair to move about and to function effectively.

This exemption is in addition to all other exemptions allowed by this subsection. To claim this exemption, a taxpayer must attach to his tax return on which he claims the exemption a statement from a physician certifying that the individual or dependent for whom the exemption is claimed has one of the conditions listed above.

- (8e) In the case of persons with cystic fibrosis meeting the criteria herein contained, such persons shall be entitled to an additional exemption of one thousand one hundred dollars (\$1,100) in addition to all other exemptions provided by law. Eligible persons with cystic fibrosis shall be those who submit to the Division of Health Services of the Department of Human Resources a certificate from a physician or county health department certifying that such condition exists.

An additional exemption of one thousand one hundred dollars (\$1,100) is allowed in addition to all other exemptions provided by law for each dependent as defined above, who has cystic fibrosis and meets the criteria as set out above.

- (8f) In the case of an individual who has an open neural tube defect or whose dependent has an open neural tube defect, an additional exemption of one thousand one hundred dollars (\$1,100) for that individual or dependent. This exemption is in addition to all other exemptions allowed by this subsection. To claim this exemption, a taxpayer must submit to the Division of Health Services of the Department of Human Resources a certificate from a physician or local health department certifying that the individual or dependent for whom the exemption is claimed has an open neural tube defect. Upon receipt of a valid certificate, the Division will send the taxpayer a verification form which the taxpayer must attach to the tax return on which the exemption is claimed. The Division shall develop the certificate and verification form and shall inform physicians and local health departments of the availability of the certificate.

- (8g) In the case of an individual who has multiple sclerosis or whose dependent has multiple sclerosis, an additional exemption of one thousand one hundred dollars (\$1,100) for that individual or dependent. This exemption is in addition to all other exemptions allowed by this subsection. To claim this exemption, a taxpayer must attach to his tax return on which he claims the exemption a statement from a physician or county health department certifying that the individual or dependent for whom the exemption is claimed has multiple sclerosis.

- (8h) In the case of an individual whose dependent has a severe head injury and is in either a persistent vegetative state or in a severely

disabled condition as assessed by the Glasgow Outcome Scale, an exemption on one thousand one hundred dollars (\$1,100) for that dependent. This exemption is in addition to all other exemptions allowed by this subsection. To claim this exemption, the taxpayer must attach to his tax return on which he claims the exemption a statement from a physician certifying that the dependent for whom the exemption is claimed has a severe head injury and is in either a persistent vegetative state or in a severely disabled condition as assessed by the Glasgow Outcome Scale.

- (9) In the case of an individual who has reached the age of 65 years on or before the last day of the taxable year, an exemption of one thousand one hundred dollars (\$1,100) in addition to all other exemptions allowed by this section.
- (10) In the case of each severely retarded person over half of whose support for the taxable year has been provided by a parent or guardian, there shall be allowed an exemption of two thousand two hundred dollars (\$2,200) in addition to all other exemptions allowed by this subsection. For the purposes of this subdivision, "severely retarded" shall mean a person whose intelligence quotient falls below 40.

In order to qualify for such exemption the parents or guardian of said persons shall provide the Department of Revenue with a statement verifying the condition of said persons from any medical doctor licensed to practice in North Carolina or any medical doctor who has graduated from a medical college approved by the Board of Medical Examiners of the State of North Carolina and holds a license granted by any state of the United States or the District of Columbia or practicing psychologist or psychological examiner licensed to practice in North Carolina or any practicing psychologist or psychological examiner licensed or certified as a psychologist or psychological examiner by another state of the United States or the District of Columbia.

(1939, c. 158, s. 324; 1941, c. 50, s. 5; 1943, c. 400, s. 4; 1945, c. 708, s. 4; 1947, c. 501, s. 4; 1949, c. 392, s. 3; c. 1173; 1951, c. 643, s. 4; 1957, c. 1340, s. 4; 1959, c. 1259, s. 4; 1963, c. 1169, s. 2; 1967, c. 716, s. 2; c. 1110, s. 3; 1969, c. 1075, s. 4; 1971, c. 1087, s. 1; 1973, c. 468, ss. 1, 2; c. 476, ss. 143, 193; c. 1287, s. 5; 1975, c. 489, ss. 1, 2; c. 739, s. 1; 1977, c. 309, ss. 1-4; cc. 898, 1101; 1979, c. 801, ss. 48-66; 1983 (Reg. Sess., 1984), c. 1075, s. 1; 1985, cc. 174, 513, 568; 1985 (Reg. Sess., 1986), c. 909.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective for taxable years beginning on or after January 1, 1986, rewrote subdivision (a)(8d).

§ 105-151. Tax credits for income taxes paid to other states by individuals.

Legal Periodicals. —

For note, "Stone v. Lynch: North Carolina

Takes a Different Approach to Defining Gift," see 64 N.C.L. Rev. 677 (1986).

§ 105-151.12. Credit for certain real property donations.

Legal Periodicals. — For article, "The battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislations, Private

Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

DIVISION IV. INCOME TAX CREDITS FOR PROPERTY TAXES.

§ 105-163.02. Definitions.

For the purposes of this Division and unless otherwise required by the context:

- (7) "Manufacturer" means a taxpayer who is regularly engaged, at a manufacturing or processing plant, mill, or factory in this State, in the mechanical or chemical conversion or transformation of materials or substances into new products for sale. The term does not include delicatessens, cafes, cafeterias, restaurants, and other similar retailers that are principally engaged in the retail sale of foods prepared by them for consumption on or off their premises.

(1977, 2nd Sess., c. 1200, s. 3; 1985, c. 656, ss. 15, 19; 1985 (Reg. Sess., 1986), c. 947, s. 2.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective for taxable years beginning on or after January 1, 1986, rewrote subdivision (7).

§ 105-163.06. Income tax credit for property taxes paid by manufacturers on their inventories.

(a) Credit. — Every manufacturer in this State is allowed a credit against the tax imposed by this Article equal to forty percent (40%) of the amount of property taxes paid by the manufacturer during the taxable year upon the portion of its inventories that consists of raw materials, goods in process, and finished goods that are manufactured by it and are located either at an establishment of the manufacturer or at a retail outlet of the manufacturer on the premises of its manufacturing plant. A manufacturer who claims a tax credit under this subsection may not claim a credit under G.S. 105-163.03 or receive a reduction in the property tax rate under G.S. 105-277(i) for the inventory for which a credit is claimed under this subsection.

(b) One-Year Limit. — Except for a carry-over of a credit of a prior year's property taxes, a credit allowed under this section applies only to one year's property taxes. (1985, c. 656, ss. 13(3), 23.1; 1985 (Reg. Sess., 1986), c. 947, s. 1.)

Editor's Note. — Session Laws 1985, c. 656, s. 55 provides: "This act shall be known as the 'Tax Reduction Act of 1985'."

Section 56 of Session Laws 1985, c. 656 provides that the act does not affect the rights or liabilities of the State or a taxpayer arising under a section amended or repealed by the act before its amendment or repeal, nor affect the right to any refund or credit of a tax, such as

the franchise tax credit under § 105-120.2(d) or § 105-122(d) that would otherwise have been available under a section amended or repealed by the act before its amendment or repeal.

Effect of Amendments. — The 1985 amendment by c. 656, s. 23.1, effective for taxable years beginning on or after January 1, 1987, substituted "forty percent (40%)" for "twenty percent (20%)" in subsection (a).

Session Laws 1985 (Reg. Sess., 1986), c. 947, s. 1, effective for taxable years beginning on or after January 1, 1986, substituted the language beginning "the portion of its inventories" for "its inventories located at an establishment or at a retail outlet of the manufacturer on the premises of an establishment" at

the end of the first sentence of subsection (a) and added "or receive a reduction in the property tax rate under G.S. 105-277(i) for the inventory for which a credit is claimed under this subsection" at the end of the second sentence of subsection (a).

ARTICLE 4A.

Withholding of Income Taxes from Wages and Filing of Declarations of Estimated Income and Payment of Income Tax by Individuals.

§ 105-163.1. Definitions.

As used in this Article,

- (11) "Code" means the Internal Revenue Code as enacted as of January 1, 1986, and includes any provisions enacted as of that date which become effective after that date.

(1959, c. 1259, s. 1; 1967, c. 716, s. 3; 1973, c. 476, s. 193; 1977, c. 657, s. 5; 1979, c. 801, s. 70; 1983, c. 713, ss. 79, 82; 1985, c. 394, s. 1; c. 656, s. 7; 1985 (Reg. Sess., 1986), c. 853, s. 1.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, ef-

fective for taxable years beginning on or after January 1, 1986, substituted "January 1, 1986" for "December 31, 1984" in subdivision (11).

§ 105-163.1A. Ordained or licensed clergyman may elect to be considered self-employed.

An ordained or licensed clergyman who performs services for a church of any religious denomination may file an election with the Secretary and the church he serves to be considered self-employed instead of an employee of the church. Wages paid by a church to a clergyman who elects to be considered self-employed are not subject to withholding. A church shall withhold taxes from a clergyman's wages until the clergyman files an election with it under this section. (1985, c. 394, s. 2; 1985 (Reg. Sess., 1986), c. 826, s. 9.)

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective June 30,

1986, substituted "Secretary" for "secretary" in the first sentence.

ARTICLE 4C.

*Filing of Declarations of Estimated Income Tax and
Installment Payments of Estimated Income Tax by
Corporations.*

§ 105-163.42: Repealed by Session Laws 1985 (Reg. Sess., 1986), c. 820, effective June 27, 1986.

ARTICLE 5.

Schedule E. Sales and Use Tax.

DIVISION II. TAXES LEVIED.

Part 1. Retail Sales Tax.

§ 105-164.4. Imposition of tax; retailer.

There is hereby levied and imposed, in addition to all other taxes of every kind now imposed by law, a privilege or license tax upon every person who engages in the business of selling tangible personal property at retail, renting or furnishing tangible personal property or the renting and furnishing of rooms, lodgings and accommodations to transients, in this State, the same to be collected and the amount to be determined by the application of the following rates against gross sales and rentals, to wit:

- (1) At the rate of three percent (3%) of the sales price of each item or article of tangible property when sold at retail in this State, the tax to be computed on total net taxable sales as defined herein but for the purpose of computing the amount due the State each and every taxable retail sale, or retail sales upon which the tax has been collected, or the amount of tax actually collected, whichever be greater and whether or not erroneously collected, shall be included in the computation of tax due the State. Provided, however, that in the case of the sale of any aircraft, railway locomotive, railway car or the sale of any motor vehicle or boat, the tax shall be only at the rate of two percent (2%) of the sales price, but at no time shall the maximum tax with respect to any one such aircraft, railway locomotive, railway car or motor vehicle or boat, including all accessories attached thereto at the time of delivery thereof to the purchaser, be in excess of three hundred dollars (\$300.00).

The separate sale of a new motor vehicle chassis and a new motor vehicle body to be installed thereon, whether by the same retailer or by different retailers shall be subject only to the tax herein prescribed with respect to a single motor vehicle. No tax shall be imposed upon a body mounted on the chassis of a motor vehicle which temporarily enters the State for the purpose of having such body mounted thereon by the manufacturer thereof.

Notwithstanding G.S. 105-164.3(16) and regardless whether the seller is a retailer of motor vehicles, the sales price of a motor vehicle is the gross sales price of the motor vehicle less any allowance given for a motor vehicle taken in trade as part of the consideration for the purchased motor vehicle.

The tax levied under this section applies to all retail sales of motor vehicles regardless whether the seller is engaged in business as a retailer of motor vehicles or whether a tax on the sale of the vehicle has previously been paid under this Article. A purchaser of a motor vehicle from a retailer shall pay the tax imposed under this Article to the retailer, who is liable for collecting and remitting the tax to the Secretary. A purchaser of a motor vehicle is liable for payment of the tax imposed by this Article if the seller is not a retailer. The purchaser shall pay the tax to the Commissioner of Motor Vehicles when applying for a certificate of title for the vehicle. When property is transferred by an individual to a partnership or corporation, and no gain or loss arises as provided by Section 351 or Section 721 of the Code, such transfer is not a sale for the purpose of this subdivision if the transfer is incident to the organization of the partnership or corporation.

When applying for a certificate of title, a purchaser of a motor vehicle from a seller who is not a retailer shall certify in writing the sales price of the purchased motor vehicle. A purchaser who knowingly makes a false certification of the sales price is guilty of a misdemeanor.

The Commissioner of Motor Vehicles may not issue a certificate of title for a motor vehicle sold by a seller who is not a retailer unless the tax imposed by this section is paid when the purchaser of the vehicle applies for a certificate of title. The Commissioner shall remit taxes collected by him under this subsection to the Secretary.

Persons who lease or rent motor vehicles shall collect and remit the tax imposed by this Article on the separate retail sale of a motor vehicle in addition to the tax imposed on the proceeds from the lease or rental of the motor vehicle.

Provided further, the tax shall be only at the rate of one percent (1%) of the sales price on the following items:

- a. Horses or mules by whomsoever sold.
- b. Semen to be used in the artificial insemination of animals.
- c. Sales of fuel, other than electricity or piped natural gas, to farmers to be used by them for any farm purposes other than preparing food, heating dwellings and other household purposes. The quantity of fuel purchased or used at any one time shall not in any manner be a determinative factor as to whether any sale or use of fuel is or is not subject to the one percent (1%) rate of tax imposed herein.
- d. Sales of fuel, other than electricity or piped natural gas, to manufacturing industries and manufacturing plants for use in connection with the operation of such industries and plants other than sales of fuels to be used for residential heating purposes. The quantity of fuel purchased used at any one time shall not in any manner be a determinative factor as to whether any sale or use of fuel is or is not subject to the one percent (1%) rate of tax imposed herein.
- e. Sales of fuel, other than electricity or piped natural gas, to commercial laundries or to pressing and dry-cleaning establishments for use in machinery used in the direct performance of the laundering or the pressing and cleaning service.
- f. Sales to freezer locker plants of wrapping paper, cartons and supplies consumed directly in the operation of such plant.

Provided further, the tax shall be only at the rate of one percent (1%) of the sales price, subject to a maximum tax of eighty dollars (\$80.00) per article, on the following items:

- g. Sales of machines and machinery, whether animal or motor drawn or operated, and parts and accessories for such machines and machinery to farmers for use by them in the planting, cultivating, harvesting or curing of farm crops, and sales of machines and machinery and parts and accessories for such machines and machinery to dairy operators, poultry farmers, egg producers, and livestock farmers for use by them in the production of dairy products, poultry, eggs or livestock.

The term "machines and machinery" as used in this subdivision is defined as follows:

The term shall include all vehicular implements, designed and sold for any use defined in this subdivision, which are operated, drawn or propelled by motor or animal power, but shall not include vehicular implements which are operated wholly by hand, and shall not include any motor vehicles required to be registered under Chapter 20 of the General Statutes.

The term shall include all nonvehicular implements and mechanical devices designed and sold for any use defined in this subdivision, which have moving parts, or which require the use of any motor or animal power, fuel, or electricity in their operation but shall not include nonvehicular implements which have no moving parts and are operated wholly by hand.

The term shall also include metal flues sold for use in curing tobacco, whether such flues are attached to handfired furnaces or used in connection with mechanical burners.

- h. Sales of mill machinery or mill machinery parts and accessories to manufacturing industries and plants, and sales to contractors and subcontractors purchasing mill machinery or mill machinery parts and accessories for use by them in the performance of contracts with manufacturing industries and plants, and sales to subcontractors purchasing mill machinery or mill machinery parts and accessories for use by them in the performance of contracts with general contractors who have contracts with manufacturing industries and plants. As used in this paragraph, the term "manufacturing industries and plants" does not include delicatessens, cafes, cafeterias, restaurants, and other similar retailers that are principally engaged in the retail sale of foods prepared by them for consumption on or off their premises.
- i. Sales of central office equipment and switchboard and private branch exchange equipment to telephone companies regularly engaged in providing telephone service to subscribers on a commercial basis, and sales to these companies of prewritten computer programs used in providing telephone service to their subscribers.
- j. Sales to commercial laundries or to pressing and dry cleaning establishments of machinery used in the direct performance of the laundering or the pressing and cleaning service and of parts and accessories thereto.
- k. Sales to freezer locker plants of machinery used in the direct operation of said freezer locker plant and of parts and accessories thereto.
- l. Sales of broadcasting equipment and parts and accessories thereto and towers to commercial radio and television companies which are under the regulation and supervision of the Federal Communications Commission.

- m. Sales to farmers of bulk tobacco barns and racks and all parts and accessories thereto and similar apparatus used for the curing and drying of any farm produce.
- n. Sales to farmers of commercially manufactured swine, livestock, or poultry equipment or facilities and accessories thereto. The sale of the total number of poultry cages to be served by the same automatic feeder, automatic waterer, or automatic egg collector constitutes the sale of a single article that is separate and distinct from a feeder, waterer, or egg collector.
- o. Sales to farmers of grain, feed or soybean storage facilities and accessories thereto, whether or not dryers are attached, and all similar apparatus and accessories thereto for the storage of grain, feed or soybeans.
- p. Repealed by Session Laws 1983, c. 805, s. 2, effective July 1, 1983.
- q. Sales of containers to farmers or producers for use in the planting, producing, harvesting, curing, marketing, packaging, sale, or transporting or delivery of their products when such containers do not go with and become part of the sale of their products at wholesale or retail.

(1957, c. 1340, s. 5; 1959, c. 1259, s. 5; 1961, c. 826, s. 2; 1963, c. 1169, ss. 3, 11; 1967, c. 1110, s. 6; c. 1116; 1969, c. 1075, s. 5; 1971, c. 887, s. 1; 1973, c. 476, s. 193; c. 1287, s. 8; 1975, c. 752; 1977, c. 903; 1977, 2nd Sess., c. 1218; 1979, c. 17, s. 1; c. 22; c. 48, s. 1; c. 527, s. 1; c. 801, s. 73; 1981, c. 984, ss. 1, 2; 1981 (Reg. Sess., 1982), cc. 1207, 1273; 1983, c. 510; c. 713, ss. 89, 93; c. 805, ss. 1, 2; 1983 (Reg. Sess., 1984), c. 1065, ss. 1, 2; c. 1097, ss. 6, 13; 1985, c. 704; 1985 (Reg. Sess., 1986), c. 925; c. 1005.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. —

Session Laws 1985 (Reg. Sess., 1986), c. 925, effective with respect to transfers occurring on

or after September 1, 1986, added the last sentence of the fourth paragraph of subdivision (1).

Session Laws 1985 (Reg. Sess., 1986), c. 1005, effective July 14, 1986, added the last sentence of subdivision (1)h.

CASE NOTES

V. LEASES AND RENTALS.

Monthly Equipment and Maintenance Charges. — Where a corporation that designed, manufactured, leased and sold computers and other business machines and equipment, in leasing such machines and equipment, required lessees to agree to pay both a

"monthly equipment charge" and a "base monthly maintenance charge," both charges were part of the gross proceeds derived from the renting of machines and equipment within the contemplation of this section. *Sperry Corp. v. Lynch*, 76 N.C. App. 327, 332 S.E.2d 757, cert. denied, 314 N.C. 669, 336 S.E.2d 401 (1985).

Part 4. General Provisions.

§ 105-164.12A. Electric golf cart and battery charger considered a single article.

The sale of an electric golf cart and a battery charger that is not physically attached to the golf cart is considered the sale of a single article of tangible personal property in imposing tax under this Article if the battery charger is designed to recharge the golf cart and is sold to the purchaser of the golf cart when the golf cart is sold. (1985 (Reg. Sess., 1986), c. 901.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 901, s. 2 makes this section effective July 1, 1986.

DIVISION III. EXEMPTIONS AND EXCLUSIONS.

§ 105-164.13. Retail sales and use tax.

The sale at retail, the use, storage or consumption in this State of the following tangible personal property is specifically exempted from the tax imposed by this Article:

Agricultural Group.

- (1) Commercial fertilizer on which the inspection tax is paid and lime and land plaster used for agricultural purposes whether the inspection tax is paid or not.
- (2) Seeds; remedies, vaccines, medications, litter materials, and feeds for livestock and poultry; rodenticides, insecticides, herbicides, fungicides, and pesticides for livestock, poultry, and agriculture; defoliants for use on cotton or other crops; plant growth inhibitors, regulators, or stimulators for agriculture including systemic and contact or other sucker control agents for tobacco and other crops.
- (3) Products of forests and mines in their original or unmanufactured state when such sales are made by the producer in the capacity of producer.
- (4) Cotton, tobacco, peanuts or other farm products sold to manufacturers for further manufacturing or processing.
- (4a) Baby chicks and poults sold for commercial poultry or egg production.
- (4b) Products of a farm sold in their original state by the producer of the products if the producer is not primarily a retail merchant.
- (4c) Materials used in the construction, repair, or improvement of any enclosure or structure specifically designed, constructed, and used for commercial purposes for housing, raising, or feeding livestock or poultry or for housing equipment necessary for these activities, including work space used solely for these commercial activities.

Industrial Group.

- (5) Manufactured products produced and sold by manufacturers or producers to other manufacturers, producers, or registered wholesale or

retail merchants, for the purpose of resale except as modified by Division I, G.S. 105-164.3, subdivision (23). Provided, however, this exemption shall not extend to or include retail sales to users or consumers not for resale.

- (6) Ice, whether sold by the manufacturer, producer, wholesale or retail merchant.
- (7) Sales of products of waters in their original or unmanufactured state when such sales are made by the producer in the capacity of producer. Fish and seafoods are likewise exempt when sold by the fisherman in that capacity.
- (8) Sales of tangible personal property to a manufacturer which enters into or becomes an ingredient or component part of tangible personal property which is manufactured.
- (9) Sales of boats, fuel oil, lubricating oils, machinery, equipment, nets, rigging, paints, parts, accessories, and supplies to persons for use by them principally in commercial fishing operations within the meaning of G.S. 113-152, except when the property is for use by persons principally to take fish for recreation or personal use or consumption. As used in this subdivision, "fish" is defined as in G.S. 113-129(7).
- (10) Sales to commercial laundries or to pressing and dry cleaning establishments of articles or materials used for the identification of garments being laundered or dry cleaned, wrapping paper, bags, hangers, starch, soaps, detergents, cleaning fluids and other compounds or chemicals applied directly to the garments in the direct performance of the laundering or the pressing and cleaning service.

Motor Fuels Group.

- (11) Gasoline or other motor fuel on which the tax levied in G.S. 105-434 and/or G.S. 105-435 of the General Statutes is due and has been paid, and the fact that a refund of the tax levied by either of said sections is made pursuant to the provisions of Subchapter V of Chapter 105 shall not make the sale or the seller of such fuels subject to the tax levied by this Article.

Medical Group.

- (12) Therapeutic, prosthetic, or artificial devices, such as pulmonary respirators or medical beds, that are designed for individual personal use to correct or alleviate physical illness, disease, or incapacity and that are sold on the written prescription of a physician, dentist, or other professional person licensed to prescribe, and crutches, artificial limbs, artificial eyes, hearing aids, false teeth, eyeglasses ground on prescription of a physician or an optometrist, and orthopedic appliances designed to be worn by the purchaser or user. This subdivision does not apply to a motor vehicle.
- (13) Medicines sold on prescription of physicians, dentists, or veterinarians.

Printed Materials Group.

- (14) Holy Bibles; public school books on the adopted list, the selling price of which is fixed by State contract.

- (14a) Printed material which is sold by a printer to a purchaser within or without this State, when such printed material is delivered in this State to a common carrier or to the United States Postal Service for delivery to the purchaser or the purchaser's designees outside this State, if the purchaser does not thereafter use the printed material in this State.

Transactions Group.

- (15) Accounts of purchasers, representing taxable sales, on which the tax imposed by this Article has been paid, that are found to be worthless and actually charged off for income tax purposes may, at corresponding periods, be deducted from gross sales, provided, however, they must be added to gross sales if afterwards collected.
- (16) Sales of used articles other than motor vehicles taken in trade, or a series of trades, as a credit or part payment on the sale of a new article, provided the tax levied in this Article is paid on the gross sales price of the new article. In the interpretation of this subsection, new article shall be taken to mean the original stock in trade of the merchant, and shall not be limited to newly manufactured articles. The resale of articles other than motor vehicles repossessed by the vendor shall likewise be exempt from gross sales taxable under this Article.

Exempt Status Group.

- (17) Sales which a state would be without power to tax under the limitations of the Constitution or laws of the United States or under the Constitution of this State.

Unclassified Group.

- (18) Funeral expenses, including coffins and caskets, not to exceed one thousand five hundred dollars (\$1,500). All other funeral expenses, including gross receipts for services rendered, shall be taxable at the rate of three percent (3%). However, "services rendered" shall not include those services which have been taxed pursuant to G.S. 105-164.4(4), or to those services performed by any beautician, cosmetologist, hairdresser or barber employed by or at the specific direction of the family or personal representative of a deceased; and "funeral expenses" and "services rendered" shall not include death certificates procured by or at the specific direction of the family or personal representative of a deceased. Where coffins, caskets or vaults are purchased direct and a separate charge is paid for services, the provisions of this subdivision shall apply to the total for both.
- (19) Sales by concession stands operated by the State prison system within the confines of the prisons where such sales are made to prison inmates and guards therein while on duty.
- (20) Sales by blind merchants operating under supervision of the Department of Human Resources.
- (21) The lease or rental of motion picture films used for exhibition purposes where the lease or rental of such property is an established business or part of an established business or the same is incidental or germane to said business of the lessee.

- (22) The lease or rental of films, motion picture films, transcriptions and recordings to radio stations and television stations operating under a certificate from the Federal Communications Commission.
- (23) Sales of wrapping paper, labels, wrapping twine, paper, cloth, plastic bags, cartons, packages and containers, cores, cones or spools, wooden boxes, baskets, coops and barrels, including paper cups, napkins and drinking straws and like articles sold to manufacturers, producers and retailers, when such materials are used for packaging, shipment or delivery of tangible personal property which is sold either at wholesale or retail and when such articles constitute a part of the sale of such tangible personal property and are delivered with it to the customer.
- (24) Sales of fuel and other items of tangible personal property for use or consumption by or on ocean-going vessels which ply the high seas in interstate or foreign commerce in the transport of freight and/or passengers for hire exclusively, when delivered to an officer or agent of such vessel for the use of such vessel; provided, however, that sales of fuel and other items of tangible personal property made to officers, agents, members of the crew or passengers of such vessels for their personal use shall not be exempted from payment of the sales tax.
- (25) Sales by merchants on the Cherokee Indian Reservation when such merchants are authorized to do business on the Reservation and are paying the tribal gross receipts levy to the Tribal Council.
- (26) Lunches to school children when such sales are made within school buildings and are not for profit.
- (27) Meals and food products served to students in dining rooms regularly operated by State or private educational institutions or student organizations thereof.
- (28) Sales of newspapers by newspaper street vendors and by newspaper carriers making door-to-door deliveries and sales of magazines by magazine vendors making door-to-door sales.
- (29) Sales to the North Carolina Museum of Art of paintings and other objects or works of art for public display, the purchases of which are financed in whole or in part by gifts or donations.
- (30) Sales from vending machines when sold by the owner or lessee of said machines at a price of one cent (1¢) per sale.
- (31) Sales of meals not for profit to elderly and incapacitated persons by charitable or religious organizations not operated for profit which are entitled to the refunds provided by G.S. 105-164.14(b), when such meals are delivered to the purchasers at their places of abode.
- (32) Sales of motor vehicles, as defined in G.S. 105-164.3(8a), to nonresident purchasers for immediate transportation to and use in another state in which such vehicles are required to be registered, provided the seller obtains from the purchaser and furnishes to the Secretary of Revenue an affidavit stating the name and address of the purchaser, the state in which the vehicle will be registered and operated, the make, model, and serial number of the vehicle, and such other information as the Secretary may require, and provided further that no exemption shall be allowed unless the affidavit is filed with the seller's sales and use tax report for the month during which the sale is made and such report is timely filed. For sales made by a seller who is not a retailer, this exemption applies if the purchaser furnishes the Secretary an affidavit containing the information otherwise required from a retailer within 45 days of the date of the sale.
- (33) Tangible personal property purchased solely for the purpose of export to a foreign country for exclusive use or consumption in that or

some other foreign country, either in the direct performance or rendition of professional or commercial services, or in the direct conduct or operation of a trade or business, all of which purposes are actually consummated, or purchased by the government of a foreign country for export which purpose is actually consummated. "Export" shall include the acts of possessing and marshalling such property, by either the seller or the purchaser, for transportation to a foreign country, but shall not include devoting such property to any other use in North Carolina or the United States. "Foreign country" shall not include any territory or possession of the United States.

In order to qualify for this exemption, an affidavit of export indicating compliance with the terms and conditions of this exemption, as prescribed by the Secretary of Revenue, must be submitted by the purchaser to the seller, and retained by the seller to evidence qualification for the exemption.

If the purposes qualifying the property for exemption are not consummated, the purchaser shall be liable for the tax which was avoided by the execution of the aforesaid affidavit as well as for applicable penalties and interest and the affidavit shall contain express provision that the purchaser has recognized and assumed such liability.

The principal purpose of this exemption is to encourage the flow of commerce through North Carolina ports that is now moving through out-of-state ports. However, it is not intended that property acquired for personal use or consumption by the purchaser, including gifts, shall be exempt hereunder.

- (34) Sales of items by a nonprofit civic, charitable, educational, scientific or literary organization when the net proceeds of the sales will be given or contributed to the State of North Carolina or to one or more of its agencies or instrumentalities, or to one or more nonprofit charitable organizations, one of whose purposes is to serve as a conduit through which such net proceeds will flow to the State or to one or more of its agencies or instrumentalities.
- (35) Sales by a nonprofit civic, charitable, educational, scientific, literary or fraternal organization continuously chartered or incorporated within North Carolina for at least two years when such sales are conducted only upon an annual basis for the purpose of raising funds for its activities, and when the proceeds thereof are actually used for such purposes; provided, however, that no such sale shall be exempt if not actually consummated within 60 days after the first solicitation of any sale made during said organization's annual sales period.
- (36) Advertising supplements and any other printed matter ultimately to be distributed with or as part of a newspaper.
- (37) Spirituous liquor. This exemption does not prohibit the levy of sales and use taxes on mixed beverages. As used in this subdivision, the terms "spirituous liquor" and "mixed beverage" have the same meanings as in G.S. 18B-101(14) and G.S. 18B-101(10) respectively.
- (38) Food and other items lawfully purchased with coupons issued under the Food Stamp Program, 7 U.S.C. § 51, and supplemental foods lawfully purchased with a food instrument issued under the Special Supplemental Food Program, 42 U.S.C. § 1786.
- (39) Sales of paper, ink, and other tangible personal property to commercial printers and commercial publishers for use as ingredient or component parts of free circulation publications, and sales by printers of free circulation publications to the publishers of these publications. As used in this subdivision, the term "free circulation publications" means shoppers' guides that:

- (1) Are published on a periodic basis at recurring intervals;
- (2) Are mailed or are distributed house-to-house, by street distributors, in racks, or in any other manner at other locations without charge to the recipient;
- (3) Contain advertising of a general nature; and
- (4) Make space available to all advertisers for the purpose of inducing readers to purchase the goods and services of the advertisers.

The term does not include house organs or trade, professional, or similar types of publications. The ratio of news to advertising in a publication is not a factor in determining whether the publication is a free circulation publication.

- (40) Sales to the Department of Transportation. (1957, c. 1340, s. 5; 1959, c. 670; c. 1259, s. 5; 1961, c. 826, s. 2; cc. 1103, 1163; 1963, c. 1169, ss. 7-9; 1965, c. 1041; 1967, c. 756; 1969, c. 907; 1971, c. 990; 1973, c. 476, s. 143; c. 708, s. 1; cc. 1064, 1076; c. 1287, s. 8; 1975, 2nd Sess., c. 982; 1977, c. 771, s. 4; 1977, 2nd Sess., c. 1219, s. 43.6; 1979, c. 46, ss. 1, 2; c. 156, s. 1; c. 201; c. 625, ss. 1, 2; c. 801, ss. 74, 75; 1979, 2nd Sess., c. 1099, s. 1; 1981, cc. 14, 207, 982; 1983, c. 156; c. 570, s. 21; c. 713, ss. 91, 92; c. 873; c. 887; 1983 (Reg. Sess., 1984), c. 1071, s. 1; 1985, c. 114, s. 4; c. 555; c. 656, ss. 24, 25; 1985 (Reg. Sess., 1986), c. 953; c. 973; c. 982, s. 2.)

Effect of Amendments. —

Session Laws 1985 (Reg. Sess., 1986), c. 953, effective August 1, 1986, deleted "farms," following "Products of" in subdivision (3) and added subdivision (4b).

Session Laws 1985 (Reg. Sess., 1986), c. 973,

effective August 1, 1986, added subdivision (4c).

Session Laws 1985 (Reg. Sess., 1986), c. 982, s. 2, effective August 1, 1986, added subdivision (40).

§ 105-164.14. Certain refunds authorized.

(c) Upon receipt of timely applications for refund, the Secretary of Revenue shall make refunds annually to all governmental entities, as hereinafter defined, of sales and use tax paid under this Article, except under G.S. 105-164.4(4a), by said governmental entities on direct purchases of tangible personal property. Sales and use tax liability indirectly incurred by such governmental entities on building materials, supplies, fixtures and equipment which shall become a part of or annexed to any building or structure being erected, altered or repaired which is owned or leased by such governmental entities shall be construed as sales or use tax liability incurred on direct purchases by such governmental entities, and such entities may obtain refunds of such taxes indirectly paid. The refund provisions contained in this subsection shall not apply to any governmental entities not specifically named herein. In order to receive the refund herein provided for, governmental entities shall file a written request for said refund within six months of the close of the fiscal year of the governmental entities seeking said refund, and such request for refund shall be substantiated by such records, receipts and information as the Secretary may require. No refunds shall be made on applications not filed within the time allowed by this section and in such manner as the Secretary may otherwise require. The term "governmental entities," for the purposes of this subsection, shall mean all counties, incorporated cities and towns, water and sewer authorities created and existing under the provisions of Chapter 162A of the General Statutes, lake authorities created by a board of county commissioners pursuant to an act of the General Assembly, sanitary districts, regional councils of governments created pursuant to G.S.

160A-470, area mental health, mental retardation, and substance abuse authorities (other than single-county area authorities) established pursuant to Article 4 of Chapter 122C of the General Statutes, district health departments, regional planning and economic development commissions created pursuant to G.S. 158-14, regional economic development commissions created pursuant to G.S. 158-8, regional planning commissions created pursuant to G.S. 153A-391, metropolitan sewerage districts and metropolitan water districts in this State.

(1957, c. 1340, s. 5; 1961, c. 826, s. 2; 1963, cc. 169, 1134; 1965, c. 1006; 1967, c. 1110, s. 6; 1969, c. 1298, s. 1; 1971, cc. 89, 286; 1973, c. 476, s. 193; 1977, c. 895, s. 1; 1979, c. 47; c. 801, ss. 77, 79-82; 1983, c. 594, s. 1; c. 891, s. 13; 1983 (Reg. Sess., 1984), c. 1097, s. 7; 1985, cc. 431, 523; 1985 (Reg. Sess., 1986), c. 863, s. 5.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective August 1, 1986, substituted "area mental health, mental retardation, and substance

abuse authorities (other than single-county area authorities) established pursuant to Article 4 of Chapter 122C of the General Statutes" for "area mental health boards (other than single-county boards) established pursuant to Article 2F of Chapter 122 of the General Statutes" in the last sentence of subsection (c).

DIVISION IV. REPORTING AND PAYMENT.

§ 105-164.16. Report and payment of taxes.

(b) General Reporting Periods. — Returns of taxpayers who are required to report on a monthly or quarterly basis are due within 15 days after the end of each monthly or quarterly period. Returns of taxpayers who are required to report on a semimonthly basis are due within 10 days after the end of each semimonthly period.

A taxpayer who is consistently liable for less than twenty-five dollars (\$25.00) a month in State and local sales and use taxes may, with the approval of the Secretary, file a return on a quarterly basis. A taxpayer who is consistently liable for at least twenty thousand dollars (\$20,000) a month in State and local sales and use taxes shall, when directed to do so by the Secretary, file a return on a semimonthly basis. All other taxpayers shall file a return on a monthly basis. Quarterly reporting periods end on the last day of March, June, September, and December; monthly reporting periods end on the last day of the month; and semimonthly reporting periods end on the 15th of each month and the last day of each month.

The Secretary shall monitor the amount of tax remitted by a taxpayer and shall direct a taxpayer who consistently remits at least twenty thousand dollars (\$20,000) each month to file a return on a semimonthly basis. In determining the amount of tax due from a taxpayer for a reporting period the Secretary shall consider the total amount due from all places of business owned or operated by the same person as the amount due from that person.

A taxpayer who is directed to remit sales and use taxes on a semimonthly basis but who is unable to gather the information required to submit a complete return for either the first reporting period or both the first and second semimonthly reporting periods may, upon written authorization by the Secretary, file an estimated return for that first reporting period or both periods on the basis prescribed by the Secretary. Once a taxpayer is authorized to file an estimated return for the first period or both periods, the taxpayer may continue to file an estimated return for the first or both periods until the Secre-

tary, by written notification, revokes the taxpayer's authorization to do so. When filing a return for the second semimonthly reporting period, a taxpayer who files an estimated return for the first period but not both periods shall remit the amount of tax due for both the first and second reporting periods, less the amount he remitted with his estimated return.

A taxpayer who files an estimated return for both periods is considered to have been granted an extension for both the first and second reporting periods. Notwithstanding G.S. 105-164.19, if a taxpayer who files an estimated return for both periods files a reconciling return for those periods within ten days of the due date of the return for the second period and any underpayment of estimated taxes remitted with the reconciling return is less than ten percent (10%) of the amount of taxes due for both the first and second reporting periods, no interest shall be charged. Otherwise, a taxpayer who files an estimated return for both periods shall be charged interest at the statutory rate from the due date of the return for the first reporting period to the date the reconciling return is filed.

(1957, c. 1340, s. 5; 1967, c. 1110, s. 6; 1973, c. 476, s. 193; 1979, c. 801, s. 83; 1983 (Reg. Sess., 1984), c. 1097, s. 14; 1985, c. 656, s. 26; 1985 (Reg. Sess., 1986), c. 1007.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, ef-

fective August 1, 1986, and applicable to reporting periods on or after that date, substituted "semimonthly" for "bimonthly" throughout subsection (b) and added the last two paragraphs of subsection (b).

ARTICLE 6.

Schedule G. Gift Taxes.

§ 105-197. When return required; due date of return.

Anyone who, during the calendar year, gives to a donee a gift of a future interest or one or more gifts whose total value exceeds the amount of the annual exclusion set in G.S. 105-188(d) shall file a gift tax return, under oath or affirmation, with the Secretary of Revenue on a form prescribed by the Secretary. A return is due on or before April 15th following the end of the calendar year. (1939, c. 158, s. 609; 1955, c. 22, s. 1; 1973, c. 1287, s. 9; 1985 (Reg. Sess., 1986), c. 821.)

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective June 27, 1986, and applicable to returns filed for the

1986 calendar year and thereafter, rewrote this section.

ARTICLE 7.

*Schedule H. Intangible Personal Property.***§ 105-206. When taxes due and payable; date lien attaches; nonresidents; forms for returns; extensions.**

CASE NOTES

Fact that an executor is a fiduciary under this section and § 105-207, relating to the filing of returns and the payment of tax, does not mean that every provision in the intangible tax article which speaks of fiduciaries must

be construed to apply to executors, no matter how tortured a construction would result. *Blumenthal v. Lynch*, — N.C. —, 340 S.E.2d 358 (1986).

§ 105-207. Fiduciaries to pay taxes.

CASE NOTES

Fact that an executor is a fiduciary under this section and § 105-206, relating to the filing of returns and the payment of tax, does not mean that every provision in the intangible tax article which speaks of fiduciaries must be construed to apply to executors, no matter how tortured a construction would result. *Blumenthal v. Lynch*, — N.C. —, 340 S.E.2d 358 (1986).

Duty of Executor to Pay Tax. — Though it is the estate's assets and not the personal assets of the executor himself that are subject to

tax, it is the executor who is charged with the duty and responsibility of paying the intangibles tax. *Blumenthal v. Lynch*, — N.C. —, 340 S.E.2d 358 (1986).

Executor Is Not Entitled to Charitable Exemption. — To be covered by the charitable exemption, the party must be an "organization." An executor is not an "organization," much less a "charitable organization" entitled to exemption under the first paragraph of § 105-212. *Blumenthal v. Lynch*, — N.C. —, 340 S.E.2d 358 (1986).

§ 105-212. Institution exempted; conditional and other exemptions.

None of the taxes levied in this Article or schedule shall apply to religious, educational, charitable or benevolent organizations not conducted for profit, nor to trusts established for religious, educational, charitable or benevolent purposes where none of the property or the income from the property owned by such trust may inure to the benefit of any individual or any organization conducted for profit, nor to any funds, evidences of debt, or securities held irrevocably in a charitable remainder trust meeting the requirements of section 664 of the Code or in a pooled income fund meeting the requirements of section 642(c)(5) of the Code, nor to any funds held irrevocably in trust exclusively for the maintenance and care of places of burial; nor to any funds, evidences of debt, or securities held irrevocably in pension, profit-sharing, stock bonus, or annuity trusts, or combinations thereof, established by employers for the purpose of distributing both the principal and income thereof exclusively to eligible employees, or the beneficiaries of such employees, if such trusts qualify for exemption from income tax under the provisions of G.S. 105-161(f)(1)a; nor to any funds, evidences of debt or securities held irrevocably in a pension, profit-sharing, stock bonus or annuity plan established by an employer for the benefit of his employees or for himself and his employees if such plan qualifies for exemption from income tax under the provisions of G.S.

105-141(b)(19); nor to any funds, evidences of debt, or securities held in an individual retirement account described in section 408(a) of the Code, or an individual retirement annuity described in section 408(b) of the Code, if such individual retirement account or individual retirement annuity is exempt from income tax under the provisions of G.S. 105-161(f)(1)c or 105-141(b)(19). Insurance companies reporting premiums to the Commissioner of Insurance of this State and paying a tax thereon under the provisions of Article 8B. Schedule I-B shall not be subject to the provisions of G.S. 105-201, 105-202 and 105-203, building and loan associations and savings and loan associations paying a tax under the provisions of Article 8D of Chapter 105 of the General Statutes shall not be subject to the provisions of G.S. 105-201, 105-202 and 105-203; State credit unions organized pursuant to the provisions of Subchapter III, Chapter 54, paying the supervisory fees required by law, shall not be subject to any of the taxes levied in this Article or schedule; banks, banking associations and trust companies shall not be subject to the tax levied in this Article or schedule on evidences of debt held by them when said evidences of debt represent investment of funds on deposit with such banks, banking associations and trust companies: Provided, that each such institution must, upon request by the Secretary of Revenue, establish in writing its claim for exemption as herein provided. The exemption in this section shall apply only to those institutions, and only to the extent, specifically mentioned, and no other.

Any corporation or trust doing business in North Carolina which in the opinion of the Secretary of Revenue of North Carolina qualifies as a "regulated investment company" under section 851 of the Code or as a "real estate investment trust" under the provisions of section 856 of the Code and which files with the North Carolina Department of Revenue its election to be treated as a "regulated investment company" or "real estate investment trust," shall not be subject to any of the taxes levied in this Article or schedule.

If any intangible personal property held or controlled by a fiduciary domiciled in this State is so held or controlled for the benefit of a nonresident or nonresidents, or for the benefit of any organization exempt under this section for the tax imposed by this Article, such intangible personal property shall be partially or wholly exempt from taxation and under the provisions of this Article in the ratio which the net income distributed or distributable to such nonresident, nonresidents or organization, derived from such intangible personal property during the calendar year for which the taxes levied by this Article are imposed, bears to the entire net income derived from such intangible personal property during such calendar year. "Net income" shall be deemed to have the same meaning that it has in the income tax article. Where the intangible personal property for which this exemption is claimed is held or controlled with other property as a unit, allocation of appropriate deductions from gross income shall be made to that part of the entire gross income which is derived from the intangible personal property by direct method to the extent practicable; and otherwise by such other method as the Secretary of Revenue shall find to be reasonable: Provided, that each fiduciary claiming the exemption provided in this paragraph shall, upon the request of the Secretary of Revenue, establish in writing its claim to such exemption. No provisions of law shall be construed as exempting trust funds or trust property from the taxes levied by this Article except in the specific cases covered by this section.

As used in this section, the term "Code" means the Internal Revenue Code as enacted as of January 1, 1986, and includes any provisions enacted as of that date which become effective after that date. (1939, c. 158, s. 714; 1943, c. 400, s. 8; 1945, c. 708, s. 8; 1947, c. 501, s. 7; 1951, c. 937, s. 2; 1957, c. 1340, ss. 7, 9; 1967, c. 1110, s. 13; 1971, c. 827; 1973, c. 476, s. 193; c. 1287, s. 11; 1975,

c. 559, s. 7; 1979, c. 179, s. 4; c. 801, ss. 86, 87; c. 1009; 1983, c. 713, ss. 67, 80, 82; 1985, c. 656, ss. 7, 35; 1985 (Reg. Sess., 1986), c. 853, s. 1.)

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective for taxable years beginning on or after

January 1, 1986, substituted "January 1, 1986" for "December 31, 1984" in the last paragraph.

CASE NOTES

An estate itself is not a charitable, religious, educational, or benevolent organization. *Blumenthal v. Lynch*, — N.C.—, 340 S.E.2d 358 (1986).

Executor Is Not Entitled to Charitable Exemption. — To be covered by the charitable exemption, the party must be an "organization." An executor is not an "organization," much less a "charitable organization" entitled to exemption under the first paragraph of § 105-212. *Blumenthal v. Lynch*, — N.C.—, 340 S.E.2d 358 (1986).

Argument that if assets in the hands of executor were not totally exempt from the time of the decedent's death, they became exempt either (1) when charitable foundation became the only remaining beneficiary not to have received its distribution, or (2) when the taxes and debts were paid, on the theory that at

those points in time the administration of the estate became "passive" as opposed to "active" and thus divisible into nonexempt and exempt periods, was without merit, as the period of administration is indivisible for intangibles tax purposes. *Blumenthal v. Lynch*, — N.C.—, 340 S.E.2d 358 (1986).

The fiduciary exemption contained in this section, etc. —

The fiduciary exemption of the third paragraph of this section is unavailable in respect of intangibles held and controlled by any personal representative of a resident decedent at any time during administration of the estate. The fiduciary exemption simply has no application to a decedent's estate in the process of administration. *Blumenthal v. Lynch*, — N.C.—, 340 S.E.2d 358 (1986).

ARTICLE 8B.

Schedule I-B. Taxes upon Insurance Companies.

§ 105-228.3. To whom this Article shall apply.

The provisions of this Article shall apply to every person, firm, corporation, association, society, or order operating in this State, hereinafter to be referred to as insurance company, which contracts or offers on his, their, or its account to issue any policy or contract for annuities or insurance as defined in G.S. 58-3, or to exchange or issue reciprocal or interinsurance contracts, or to function as a rate-making bureau or association, advisory organization, joint underwriting or joint reinsurance organization, or to serve as an underwriters agency. Said provisions shall likewise apply to any person, firm or corporation who or which shall be a broker, organizer, manager, or agent, whether local, special or general, of any insurance company, and to self-insurers under the provisions of the Workers' Compensation Act. (1945, c. 752, s. 2; 1985 (Reg. Sess., 1986), c. 928, s. 12.)

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 8, 1986, inserted "advisory organization, joint under-

writing or joint reinsurance organization" near the end of the first sentence.

§ 105-228.5. (Effective for taxable years beginning prior to January 1, 1988) Taxes measured by gross premiums.

Every insurance company shall pay to the Commissioner of Insurance, at the time and rates provided in this section, a tax measured by gross premiums from business done in this State during the preceding calendar year.

Gross premiums from business done in this State in the case of life insurance and annuity contracts, including any supplemental contracts thereto providing for disability benefits, accidental death benefits, or other special benefits, shall for the purposes of the taxes levied in this section mean any and all premiums collected in the calendar year (other than for contracts for reinsurance) for policies the premiums on which are paid by or credited to persons, firms or corporations resident in this State, or in the case of group policies for any contracts of insurance covering persons resident within this State, with no deduction for considerations paid for annuity contracts which are subsequently returned except as below specified, and with no other deduction whatsoever except for premiums returned under one or more of the following conditions: premiums refunded on policies rescinded for fraud or other breach of contract; premiums which were paid in advance on life insurance contracts and subsequently refunded to the insured, premium payer, beneficiary or estate; and in the case of group annuity contracts the premiums returned by reason of a change in the composition of the group covered. Said gross premiums shall be deemed to have been collected for the amounts as provided in the policy contracts for the time in force during the year, whether satisfied by cash payment, notes, loans, automatic premium loans, applied dividend or in any other manner whatsoever, except in the case of premiums waived by any of said companies pursuant to a contract for waiver of premium in case of disability.

An insurer, in computing its premium taxes, shall pay premium taxes on a premium for the purchase of annuities at the time the premium is collected, instead of at the time the contract holder elects to commence annuity benefits.

Every insurer, in computing the premium tax, shall exclude from the gross amount of premiums all premiums received on or after July 1, 1973, from policies or contracts, issued in connection with the funding of a pension, annuity or profit-sharing plan, qualified or exempt under sections 401, 403, 404, 408 or 501 of the Code as defined in G.S. 105-135(15) and the gross amount of all such premiums shall be exempt from the tax levied by this section.

Gross premiums from business done in this State in the case of contracts for fire insurance, casualty insurance, and any other type of insurance except life and annuity contracts as above specified, including contracts of insurance required to be carried by the Workers' Compensation Act, shall for the purposes of the taxes levied in this section mean any and all premiums written during the calendar year, or the equivalent thereof in the case of self-insurers under the Workers' Compensation Act, for contracts covering property or risks in this State, other than for contracts of reinsurance, whether such premiums are designated as premiums, deposits, premium deposits, policy fees, membership fees, or assessments. Gross premiums shall be deemed to have been written for the amounts as provided in the policy contracts, new and renewal, becoming effective during the year irrespective of the time or method of making payment or settlement for such premiums, and with no deduction for dividends whether returned in cash or allowed in payment or reduction of premiums or for additional insurance, and without any other deduction except for return of premiums, deposits, fees or assessments for adjustment of policy rates or for cancellation or surrender of policies.

In determining the amount of gross premiums from business in this State all gross premiums received in this State, or credited to policies written or procured in this State, or derived from business written in this State shall be deemed to be for contracts covering persons, property or risks resident or located in this State except for such premiums as are properly reported and properly allocated as being received from business done in some other nation, territory, state or states, and except for premiums from policies written in federal areas for persons in military service who pay premiums by assignment of service pay.

The tax rate to be applied to gross premiums collected on contracts applicable to liabilities under the Workers' Compensation Act shall be two and five-tenths percent (2.5%). The tax rate to be applied to gross premiums collected on annuities and all other insurance contracts issued by insurers shall be one and seventy-five hundredths percent (1.75%). The tax rate to be applied to amounts collected on contracts of insurance applicable to fire and lightning coverage (except marine and automobile policies) shall be one percent (1%) in addition to the one and seventy-five hundredths percent (1.75%) tax.

If the Commissioner finds, after a hearing held in accordance with G.S. 58-9.2, that in all or any part of this State, any amount or kind of insurance authorized by G.S. 58-72(4) through G.S. 58-72(22) is not readily available in the voluntary market and that the public interest requires the availability of that insurance, he may designate that insurance as a depressed line of insurance. The gross premium tax rate imposed on a line of insurance determined by the Commissioner to be a depressed line of insurance may be reduced to encourage the marketing of that depressed line. The Commissioner shall determine in December whether reduced rates in effect shall be continued for the next calendar year. In no event shall aggregate tax reductions under this paragraph for any taxable year exceed five percent (5%) of the gross premium tax revenues collected under this section during the immediately preceding fiscal year.

An insurance company domiciled in this State is entitled to a credit against the premium taxes imposed by this section for fifty percent (50%) of any retaliatory taxes paid to other states.

The taxes levied herein measured by premiums shall be in lieu of all other taxes upon insurance companies except: fees and licenses under this Article, or as specified in Chapter 58 of the General Statutes of North Carolina as amended; taxes imposed by Chapter 118 of the General Statutes of North Carolina; taxes imposed by Article 5 of Chapter 105 of the General Statutes of North Carolina as amended; and ad valorem taxes upon real property and personal property owned in this State.

For the tax above levied as measured by gross premiums the president, secretary, or other executive officer of each insurance company doing business in this State shall within the first 15 days of March in 1946 and in each year thereafter file with the Commissioner of Insurance a full and accurate report of the total gross premiums as above defined collected in this State during the preceding calendar year. The report shall be in such form and contain such information as the Commissioner of Insurance may specify, and the report shall be verified by the oath of the company official transmitting the same or by some principal officer at the home or head office of the company or association in this country. At the time of making such report the taxes above levied with respect to the gross premiums shall be paid to the Commissioner of Insurance. The provisions above shall likewise apply as to reports and taxes for any firm, corporation, or association exchanging reciprocal or interinsurance contracts, and said reports and taxes shall be transmitted by their attorneys-in-fact.

Insurance companies with a premium tax liability of ten thousand dollars (\$10,000) or more for business done in North Carolina during the immediately preceding year shall remit an amount equal to at least twenty-seven and one-half percent ($27\frac{1}{2}\%$) of the premium tax liability in the immediately preceding taxable year on or before April 15 of the taxable year and an amount equal to at least twenty-seven and one-half percent ($27\frac{1}{2}\%$) of the premium tax liability in the immediately preceding taxable year on or before July 15 of the taxable year.

In addition each company required to make the installment payments required under this section shall submit, to the Commissioner of Insurance on or before October 15 of the taxable year, a document of estimated tax which shall state estimated gross premium receipts from business done in this State for the taxable year, estimated premium taxes, and any other information required by the Commissioner of Insurance. At the time the declaration of estimated tax is submitted, the company shall remit an amount such that on or before October 15 of the taxable year seventy-five percent (75%) of the estimated premiums tax for the taxable year has been remitted to the Commissioner of Insurance. The company shall remit the balance by the following March 15 in the same manner provided in this section for annual returns.

For taxable years beginning on or after January 1, 1988, the second installment payment shall be due on or before June 15 of the taxable year.

If a company does not meet the installment payment requirement of this section, the Commissioner of Insurance shall assess a penalty on underpayments that is equal to the interest rate adopted by the Secretary of Revenue under G.S. 105-241.1(i). Any overpayment shall be credited to the company and applied against the taxes imposed upon the company under this Article.

The provisions as to reports and taxes as measured by gross premiums shall not apply to farmers' mutual assessment fire insurance companies above specified, to corporations organized under Chapter 57, or to fraternal orders or societies that do not operate for a profit and do not issue policies on any person except members.

With respect to the taxes levied in this section on the equivalent of premiums of self-insurers under the provisions of the Workers' Compensation Act, the reports required herein shall be transmitted to and the taxes collected by the Insurance Commissioner as provided in G.S. 97-100(j). (1945, c. 752, s. 2; 1947, c. 501, s. 8; 1951, c. 643, s. 8; 1955, c. 1313, s. 5; 1957, c. 1340, s. 12; 1959, c. 1211; 1961, c. 783; 1963, c. 1096; 1969, c. 1221; 1973, cc. 142, 1019; 1975, c. 143; c. 559, s. 8; 1979, c. 714, s. 2; 1983, c. 713, s. 81; 1985, c. 119, s. 3; c. 719, ss. 1, 2; 1985 (Reg. Sess., 1986), c. 1031, ss. 1-5.)

Section Set Out Twice. — The section above is effective for taxable years beginning prior to January 1, 1988. For this section as amended effective for taxable years beginning on or after January 1, 1988, see the following section, also numbered 105-228.5.

Editor's Note. — Section 5.2 of Session Laws 1985 (Reg. Sess., 1986), c. 1031 provides that not later than for the taxable year 1988, the General Assembly will reexamine insurance premium taxes with a view to making the changes revenue neutral.

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment by c. 1031, ss. 1 to 5, effective with respect to taxable years beginning on and after January 1, 1986, rewrote the first paragraph, added a new third paragraph, rewrote the present seventh paragraph, added the present eighth and ninth paragraphs, and added the present twelfth through fifteenth paragraphs.

§ 105-228.5. (Effective for taxable years beginning on or after January 1, 1988) Taxes measured by gross premiums.

The only taxes upon insurance companies shall be: fees and licenses under this Article, or as specified in Chapter 58 of the General Statutes of North Carolina as amended; taxes imposed by Chapter 118 of the General Statutes of North Carolina; taxes imposed by Article 5 of Chapter 105 of the General Statutes of North Carolina as amended; and ad valorem taxes upon real property and personal property owned in this State. (1945, c. 752, s. 2; 1947, c. 501, s. 8; 1951, c. 643, s. 8; 1955, c. 1313, s. 5; 1957, c. 1340, s. 12; 1959, c. 1211; 1961, c. 783; 1963, c. 1096; 1969, c. 1221; 1973, cc. 142, 1019; 1975, c. 143; c. 559, s. 8; 1979, c. 714, s. 2; 1983, c. 713, s. 81; 1985, c. 119, s. 3; c. 719, ss. 1, 2; 1985 (Reg. Sess., 1986), c. 1031, s. 5.1.)

Section Set Out Twice. — The section above is effective for taxable years beginning on or after January 1, 1988. For this section as in effect for taxable years beginning prior to January 1, 1988, see the preceding section, also numbered 105-228.5.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1031, s. 5.1, which, effective for taxable years beginning on or after January 1, 1988, repeals all but one paragraph of this section and repeals § 105-228.6, provides: "This section does not affect the rights or liabilities of the State, a taxpayer, or other persons arising under these sections before their repeal, nor does it affect the right to any refund of a tax that would otherwise have been available before the repeal."

Section 5.2 of Session Laws 1985 (Reg. Sess., 1986), c. 1031 provides that not later than for the taxable year 1988, the General Assembly will reexamine insurance premium taxes with a view to making the changes revenue neutral.

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, by c. 1031, ss. 1 to 5, effective with respect to taxable years beginning on and after January 1, 1986, in this section as it read prior to the amendment by Session Laws 1985 (Reg. Sess., 1986), c. 1031, S. 5.1, rewrote the first paragraph, added a new third paragraph, rewrote the seventh paragraph, added the eighth and ninth paragraphs, and added the twelfth through fifteenth paragraphs.

The 1985 (Reg. Sess., 1986) amendment by c. 1031, s. 5.1, effective for taxable years beginning on or after January 1, 1988, deleted all but one paragraph of this section, and at the beginning of that paragraph substituted "The only taxes upon insurance companies shall be" for "The taxes levied herein measured by premiums shall be in lieu of all other taxes upon insurance companies except."

§ 105-228.6: Repealed by Session Laws 1985 (Reg. Sess., 1986), c. 1031, s. 5.1, effective for taxable years beginning on or after January 1, 1988.

For this section as in effect for taxable years beginning prior to January 1, 1988, see the main volume.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1031, s. 5.1, which effective for taxable years beginning on or after January 1, 1988, repeals all but one paragraph of

§ 105-228.5 and repeals this section, provides: "This section does not affect the rights or liabilities of the State, a taxpayer, or other persons arising under these sections before their repeal, nor does it affect the right to any refund of a tax that would otherwise have been available before the repeal."

§ 105-228.5 is set out twice. See section headings for effective dates.

§ 105-228.6 has a delayed repeal date. See notes for date.

§ 105-228.7. Registration fees for agents, brokers and others.

Every manager, organizer, adjuster, broker, or agent representing in this State any insurance company, and every motor vehicle damage appraiser as defined in G.S. 58-39.4(o), shall apply for and obtain an annual certificate of registration or license from the Commissioner of Insurance in accordance with G.S. 58-40 or G.S. 58-40.1. There shall be no additional fee charged for affixing a seal. The following table indicates the annual fees for the respective certificates or licenses:

Insurance agent	
(local for each company represented)	\$10.00
General agent or manager, for each company represented	12.00
Special agent or organizer, for each company represented	10.00
Insurance broker	5.00
Nonresident broker	50.00
Insurance adjuster	
(other than adjuster for hail damage to crops)	50.00
Insurance adjuster for hail damage to crops	10.00
Motor vehicle damage appraiser	50.00
Company cancellation of agent	
license (paid by company)	5.00
Surplus lines individual	50.00
Surplus lines corporate	25.00
Persons licensed under G.S. 58-41.5	25.00
G.S. Chapter 57 agent	10.00
G.S. Chapter 57B agent	10.00

The above fees shall be in lieu of any and all other license fees. Fees paid by a company on behalf of a person who is licensed to represent the company shall be paid to the Commissioner on a quarterly or monthly basis, in the discretion of the Commissioner.

In cases where temporary license may be issued pursuant to law the fee for a temporary certificate shall be at the same rates as above specified, and any amounts so paid for temporary license may be credited against the fees required for issuance of the annual license or certificate.

Any person not registered who is required by law or administrative rule to secure a license shall, upon application for registration, pay to the Commissioner of Insurance a fee of ten dollars (\$10.00). In the event additional licensing for other lines of insurance is requested, a fee of ten dollars (\$10.00) shall be paid to the Commissioner upon application for registration for each additional line of insurance. The requirement for an examination or a registration fee does not apply to agents for domestic farmers' mutual assessment fire insurance companies or associations specified in G.S. 105-228.4.

In the event a certificate issued under this section is lost or destroyed the Commissioner of Insurance for a fee of one dollar (\$1.00) may certify to its issuance, giving number, date, and form, which may be used by the original party named thereon in lieu of the annual certificate. There shall be no charge for the seal attached to such certification. (1945, c. 752, s. 2; 1947, c. 1023, s. 2; 1949, c. 958, s. 2; 1951, c. 105, s. 2; 1955, c. 1313, s. 5; 1971, c. 757, s. 9; 1983, c. 790, ss. 1-4; 1985, c. 484, ss. 8, 9; 1985 (Reg. Sess., 1986), c. 928, s. 9.)

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective September 1, 1986, added the last five

entries to the schedule in the first paragraph and rewrote the next-to-last paragraph.

ARTICLE 9.

*Schedule J. General Administration; Penalties
and Remedies.*

§ 105-236. Penalties.

Except as otherwise provided in this Subchapter, and subject to the provisions of G.S. 105-237, the following penalties shall be applicable:

(10) Failure to File Informational Returns. —

- a. For failure to file a partnership or a fiduciary informational return when such returns are due to be filed, there shall be assessed as a tax against the delinquent five dollars (\$5.00) per month or fraction thereof of such delinquency, such tax, however, in the aggregate not to exceed the sum of twenty-five dollars (\$25.00). When assessed against a fiduciary, the tax herein provided shall be paid by the fiduciary and shall not be passed on to the trust or estate. No tax may be assessed against the delinquent when it is a partnership as defined under Section 6231(a) (1) (B) of the Code and no penalty could be assessed as provided by Rev. Proc. 84-35, except that for the purpose of Section 3.01 of that procedure "the Department of Revenue" is substituted for "the Internal Revenue Service".
- b. For failure to file timely statements of payments to another person or persons with respect to wages, dividends, rents or interest paid to such other person or persons, there shall be assessed as to a tax a penalty of one dollar (\$1.00) for each statement not filed on time, the aggregate of such penalties for each tax year not to exceed one hundred dollars (\$100.00), and in addition thereto, if the Secretary shall request the payor to file such statements and shall set a date on or before such statements shall be filed, and the payor shall fail to file such statements within such time, the amounts claimed on payor's income tax return as deductions for salaries and wages, or rents or interest shall be disallowed to the extent that the payor failed to comply with the Secretary's request with respect to such statements.

(1939, c. 158, s. 907; 1943, c. 1302, s. 7; 1959, c. 1259, s. 8; 1963, c. 1169, s. 6; 1967, c. 1110, s. 9; 1973, c. 476, s. 193; c. 1287, s. 13; 1979, c. 156, s. 2; 1985, c. 114, s. 11; 1985 (Reg. Sess., 1986), c. 983.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective for taxable years beginning on or after January 1, 1986, added the last sentence of subdivision (10)a.

§ 105-230. Charter canceled for failure to report.

CASE NOTES

Duty of Officers to Corporation. — While corporate officers in North Carolina are not trustees, their fiduciary duty to the corporation is a high one; this includes a duty not to continue to incur ordinary business obligations on

behalf of the corporation when they have knowledge that the corporation's charter has been suspended. *Pierce Concrete, Inc. v. Cannon Realty & Constr. Co.*, 77 N.C. App. 411, 335 S.E.2d 30 (1985).

§ 105-231. Penalty for exercising corporate functions after cancellation or suspension of charter.

CASE NOTES

Duty of Officers to Corporation. — While corporate officers in North Carolina are not trustees, their fiduciary duty to the corporation is a high one; this includes a duty not to continue to incur ordinary business obligations on behalf of the corporation when they have knowledge that the corporation's charter has been suspended. *Pierce Concrete, Inc. v. Cannon Realty & Constr. Co.*, 77 N.C. App. 411, 335 S.E.2d 30 (1985).

Use of Corporate Name as Shield. — The law will not permit a corporate officer to create obligations in the name of the corporation, knowing the acts are without authority and invalid, and then be permitted to use the corporate name as a shield against creditors. *Pierce Concrete, Inc. v. Cannon Realty & Constr. Co.*, 77 N.C. App. 411, 335 S.E.2d 30 (1985).

§ 105-241.4. Action to recover tax paid.

CASE NOTES

Cited in *Blumenthal v. Lynch*, — N.C. —, 340 S.E.2d 358 (1986).

§ 105-267. Taxes to be paid; suits for recovery of taxes.

CASE NOTES

Cited in *Blumenthal v. Lynch*, — N.C. —, 340 S.E.2d 358 (1986).

**SUBCHAPTER II. LISTING, APPRAISAL, AND
ASSESSMENT OF PROPERTY AND
COLLECTION OF TAXES ON
PROPERTY.**

ARTICLE 11.

Short Title, Purpose, and Definitions.

§ 105-273. Definitions.

When used in this Subchapter (unless the context requires a different meaning):

- (8a) "Inventories" means goods held for sale in the regular course of business by manufacturers and retail and wholesale merchants. As to manufacturers, the term includes raw materials, goods in process, and finished goods, as well as other materials or supplies that are consumed in manufacturing or processing, or that accompany and become a part of the sale of the property being sold. The term does not include fuel used in manufacturing or processing, nor does it include materials or supplies not used directly in manufacturing or processing. As to retail and wholesale merchants, the term includes, in addition to articles held for sale, packaging materials that accompany and become a part of the sale of the property being sold.
- (10a) "Manufacturer" means a taxpayer who is regularly engaged, at a manufacturing or processing plant, mill, or factory in this State, in the mechanical or chemical conversion or transformation of materials or substances into new products for sale. The term does not include delicatessens, cafes, cafeterias, restaurants, and other similar retailers that are principally engaged in the retail sale of foods prepared by them for consumption on or off their premises.
- (13a) "Retail Merchant" means a taxpayer who is regularly engaged in the sale of tangible personal property, acquired by a means other than manufacture, processing, or producing by the merchant, to users or consumers. For the purpose of the classification in G.S. 105-277(i), the term includes a manufacturer who holds property for sale that it did not manufacture or who holds finished goods for sale at a location other than its establishment.
- (19) "Wholesale Merchant" means a taxpayer who is regularly engaged in the sale of tangible personal property, acquired by a means other than manufacture, processing, or producing by the merchant, to other retail or wholesale merchants for resale or to manufacturers for use as ingredient or component parts of articles being manufactured for sale. For the purpose of the classification in G.S. 105-277(i), the term includes a manufacturer who holds property for sale that it did not manufacture or who holds finished goods for sale at a location other than its establishment. (1939, c. 310, s. 2; 1971, c. 806, s. 1; 1973, c. 695, ss. 14, 15; 1985, c. 656, s. 20; 1985 (Reg. Sess., 1986), c. 947, ss. 3, 4.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective for taxable years beginning on or after January 1, 1986, rewrote subdivision (8a) and added subdivisions (10a), (13a) and (19).

ARTICLE 12.

Property Subject to Taxation.

§ 105-274. Property subject to taxation.

CASE NOTES

Taxation of Personal Property of Non-residents, etc. —

When personal property belonging to a non-resident has acquired a taxable situs in this State, this State may tax that nonresident's property without violating the provisions of the Fourteenth Amendment of the United States Constitution. In re Bassett Furn. Indus., Inc., — N.C. App. —, 339 S.E.2d 16 (1986).

Situs Essential for Tax Exaction. — Taxable tangible personal property must have acquired a tax situs in this State, for situs is an absolute essential for tax exaction. In re Bassett Furn. Indus., Inc., — N.C. App. —, 339 S.E.2d 16 (1986).

Situs of personal property for tax purposes is determined by the legislature, and the legislature may provide different rules for

different kinds of property and may change the rules from time to time. In re Bassett Furn. Indus., Inc., — N.C. App. —, 339 S.E.2d 16 (1986).

A jet aircraft hangared in Rockingham County, North Carolina for approximately one year by a nonresident corporation having no principal place of business in this State, under the stipulated facts and evidence, was "situated" or "more or less permanently located" in Rockingham County on January 1, 1984, and therefore had a tax situs in Rockingham County on that date. The fact that the airplane happened to be physically located at a Virginia airport on January 1, 1984, did not defeat taxation by Rockingham County. In re Bassett Furn. Indus., Inc., — N.C. App. —, 339 S.E.2d 16 (1986).

§ 105-275. Property classified and excluded from the tax base.

The following classes of property are hereby designated special classes under authority of Article V, Sec. 2(2), of the North Carolina Constitution and shall not be listed, appraised, assessed, or taxed:

(16) Household Personal Property. — As used in this subdivision, the term "household personal property" means personal property that is used by the owner of the property for a purpose other than the production of income and is not used in connection with a business. The term includes household furnishings, clothing, pets, lawn tools, and lawn equipment. The term does not include motor vehicles, mobile homes, boats, or airplanes.

(1939, c. 310, s. 303; 1961, c. 1169, s. 8; 1967, c. 1185; 1971, c. 806, s. 1; c. 1121, s. 3; 1973, cc. 290, 451; c. 476, s. 128; c. 484; c. 695, s. 1; c. 790, s. 1; cc. 904, 962, 1028, 1034, 1077; c. 1262, s. 23; c. 1264, s. 1; 1975, cc. 566, 755; c. 764, s. 6; 1977, c. 771, s. 4; c. 782, s. 2; c. 1001, ss. 1, 2; 1977, 2nd Sess., c. 1200, s. 4; 1979, c. 200, s. 1; 1979, 2nd Sess., c. 1092; 1981, c. 86, s. 1; 1981 (Reg. Sess., 1982), c. 1244, ss. 1, 2; 1983, c. 643, ss. 1, 2; c. 693; 1983 (Reg. Sess., 1984), c. 1060; 1985, c. 510, s. 1; c. 656, s. 37; 1985 (Reg. Sess., 1986), c. 982, s. 18.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, ef-

fective for taxable years beginning on or after January 1, 1987, rewrote subdivision (16), which formerly related to dogs owned and held by individuals for their personal use.

CASE NOTES

**IV. PROPERTY WAREHOUSED FOR
TRANSSHIPMENT OUTSIDE
STATE.****Goods Held for Transshipment to Tax-
payer Stores. —**

Warehoused goods held for transshipment to

taxpayer's customers are within the exempted class under subdivision (10) of this section, but goods held for transshipment to taxpayer stores were outside the exempted class and were therefore subject to taxation. In re K-Mart Corp., — N.C. App. —, 340 S.E.2d 752 (1986).

**§ 105-277. Property classified for taxation at reduced
rates; certain deductions.**

(a) **Agricultural Products in Storage.** — Any agricultural product held in storage in North Carolina by any manufacturer or processor for manufacturing or processing, which product is of such nature as customarily to require storage and processing for periods of more than one year in order to age or condition the product for manufacture, is hereby designated a special class of property under authority of Article V, Sec. 2(2), of the North Carolina Constitution. Agricultural products so classified shall be taxed uniformly as a class in each local taxing unit at sixty percent (60%) of the rate levied for all purposes upon real property and other tangible personal property by the taxing unit in which the products are listed for taxation.

(b) **Peanuts.** — Peanuts held in storage in North Carolina in the year following the year in which grown are hereby designated a special class of property under authority of Article V, Sec. 2(2), of the North Carolina Constitution. Peanuts so classified shall be taxed uniformly as a class in each local taxing unit at twenty percent (20%) of the rate levied for all purposes upon real property and other tangible personal property by the taxing unit in which the peanuts are listed for taxation.

(c) **Baled Cotton.** — Cotton in bales held in North Carolina for manufacturing or processing in this State is hereby designated a special class of property under authority of Article V, Sec. 2(2), of the North Carolina Constitution. Baled cotton so classified shall be taxed uniformly as a class in each local taxing unit at fifty percent (50%) of the rate levied for all purposes upon real property and other tangible personal property by the taxing unit in which the cotton is listed for taxation.

(d) All bona fide indebtedness incurred in the purchase of fertilizer and fertilizer materials owing by a taxpayer as principal debtor may be deducted from the total value of all fertilizer and fertilizer materials as are held by such taxpayer for his own use in agriculture during the current year. Provided, further, that from the total value of cotton stored in this State there may be deducted by the owner thereof all bona fide indebtedness incurred directly for the purchase of said cotton and for the payment of which the cotton so purchased is pledged as collateral.

(e) **Vinous and Other Fruit Products.** — Any vinous or other fruit product held in storage in North Carolina by any manufacturer or processor for manufacturing or processing, which product is of such nature as customarily to require storage and processing for periods of more than one year in order to age or condition the product for sale and consumption, is hereby designated a special class of property under authority of Article V, Sec. 2(2), of the North Carolina Constitution. Vinous and other fruit products so classified shall be taxed uniformly as a class in each local taxing unit at sixty percent (60%) of the rate levied for all purposes upon real property and other tangible personal property by the taxing unit in which the products are listed for taxation.

(f) Repealed by Session Laws 1977, c. 869, s. 1, effective January 1, 1978.

(g) Buildings equipped with a solar energy heating or cooling system, or both, are hereby designated a special class of property under authority of Article V, Sec. 2(2) of the North Carolina Constitution. Such buildings shall be assessed for taxation in accordance with each county's schedules of value for buildings equipped with conventional heating or cooling systems and no additional value shall be assigned for the difference in cost between a solar energy heating or cooling system and a conventional system typically found in the county. As used in this classification, the term "system" includes all controls, tanks, pumps, heat exchangers and other equipment used directly and exclusively for the conversion of solar energy for heating or cooling. The term "system" does not include any land or structural elements of the building such as walls and roofs nor other equipment ordinarily contained in the structure.

(h) Private Water Companies. — Contributions in aid of construction and acquisition adjustments. In assessing the property of any private water company, there shall be excluded that portion of the investment of the company represented by contributions in aid of construction and by acquisition adjustments which is designated a special class of property under Article V, Sec. 2(2) of the Constitution. "Investment," "contributions in aid of construction" and "acquisition adjustment" shall have the meanings as those terms are defined in the Uniform System of Accounts specified by the North Carolina Utilities Commission for use by such private water company.

(i) Inventories of Retail and Wholesale Merchants. — Inventories owned by retail and wholesale merchants are designated a special class of property pursuant to Article V, Sec. 2(2) of the North Carolina Constitution and are taxable at eighty percent (80%) of the rate levied on other tangible personal property by the taxing unit in which the property is situated. (1947, c. 1026; 1955, c. 697, s. 1; 1961, c. 1169, ss. 6, 7, 7¹/₂; 1963, c. 940; 1971, c. 806, s. 1; 1973, c. 511, s. 4; c. 695, s. 2; 1975, c. 578; 1977, c. 869, s. 1; c. 965; 1979, c. 605, s. 1; 1985, c. 656, ss. 52, 52.1; 1985 (Reg. Sess., 1986), c. 947, s. 5.)

Editor's Note. — Session Laws 1985, c. 656, s. 55 provides: "This act shall be known as the 'Tax Reduction Act of 1985'."

Section 56 of Session Laws 1985, c. 656 provides that the act does not affect the rights or liabilities of the State or a taxpayer arising under a section amended or repealed by the act before its amendment or repeal, nor affect the right to any refund or credit of a tax, such as the franchise tax credit under § 105-120.2(d) or § 105-122(d) that would otherwise have been available under a section amended or repealed by the act before its amendment or repeal.

Effect of Amendments. — The 1985 amendment by c. 656, s. 52, effective for taxable years beginning on or after January 1, 1986, added subsection (i).

The 1985 amendment by c. 656, s. 52.1, effective for taxable years beginning on or after January 1, 1987, substituted "eighty percent (80%)" for "ninety percent (90%)" in subsection (i).

The 1985 (Reg. Sess., 1986) amendment by c. 947, s. 5, effective for taxable years beginning on or after January 1, 1986, rewrote subsection (i).

CASE NOTES

Subsection (a) Held to Discriminate against Railroads. —

In suits alleging discriminatory taxation of real and personal property in violation of § 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 (the 4-R Act), codified at 49

U.S.C. § 11503 (1982), the trial court was correct in considering as a factor in its finding of tax discrimination the fact that under this section stored tobacco inventories were taxed at only 60% of fair market value. *Clinchfield R.R. v. Lynch*, 784 F.2d 545 (4th Cir. 1986).

§ 105-277A. Reimbursement for partial exclusion of retailers' and wholesalers' inventories.

(a) The Secretary of Revenue shall reimburse taxing units for the partial property tax exclusion provided for retailers' and wholesalers' inventories as provided in this section. As soon as practicable after January 1 of 1987, the Secretary shall distribute to each taxing unit the unit's per capita share of the sum of nine million six hundred thousand dollars (\$9,600,000). As soon as practicable after January 1 of 1988, the Secretary shall distribute to each taxing unit the unit's per capita share of the sum of twenty million eight hundred thousand dollars (\$20,800,000). Thereafter, as soon as practicable after January 1 of each year the Secretary shall distribute to each taxing unit the unit's per capita share of the sum distributed to all taxing units the previous year, plus or minus an amount that equals the product of the sum distributed the previous year and the percentage by which State disposable personal income has increased or decreased during the most recent 12-month period for which State personal income data has been compiled by the Bureau of Economic Analysis of the United States Department of Commerce.

To make the per capita distributions required by this section, the Secretary shall first allocate the sum to be distributed among the counties on a per capita basis. The Secretary shall then compute a per capita distributable amount for each county by dividing the amount allocated to a county by the total population of the county, plus the population of any incorporated towns and cities located in the county. Each taxing unit in a county, including the county itself, shall receive the product of the population of the taxing unit and the per capita distributable amount for that county. The Secretary shall use the most recent annual population estimates certified by the State Budget Officer in determining the population of taxing units.

As used in this subsection, the term "taxing unit" means a unit that levied a property tax for the fiscal year beginning July 1 of the year preceding the date a distribution is made under this section.

(b) A city or county that receives funds under this section and that collects taxes for another taxing unit shall distribute part of the taxes received by it to the taxing unit for which it collects tax. The distribution shall be made on the basis of the proportionate amount of ad valorem taxes levied, for the most recent fiscal year beginning July 1, by the city or county and by all the taxing units for which the city or county collects tax. This distribution shall be made as soon as practicable after a city or county receives funds from the State under this section.

(1985, c. 656, s. 53; 1985 (Reg. Sess., 1986), c. 947, ss. 7, 8.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 (Reg.

Sess., 1986) amendment, effective for taxable years beginning on or after January 1, 1986, added the last paragraph of subsection (a) and rewrote subsection (b).

§ 105-277.1. Property classified for taxation at reduced valuation.

(a) The following class of property is designated a special class of property under Article V, Sec. 2(2) of the North Carolina Constitution and shall be assessed for taxation as follows. The first twelve thousand dollars (\$12,000) in assessed value of real property, or a mobile home, owned by a North Carolina resident and occupied by the owner as his permanent residence shall not be assessed for taxation if, as of January 1 of the year for which the benefit of this section is claimed:

- (1) The owner is either 65 years of age or older or is totally and permanently disabled; and
- (2) The owner's disposable income for the preceding calendar year did not exceed eleven thousand dollars (\$11,000); and
- (3) The owner makes the required application.

For married applicants residing with their spouses, the disposable income of both spouses must be included, whether or not the property is in both names.

(b) Definitions. — When used in this section, the following definitions shall apply:

- (1) An "owner" of property means a person who holds legal or equitable title to the property, either individually or as a tenant by the entirety, a joint tenant, a tenant in common, a life estate or an estate for the life of another. Property owned and occupied by husband and wife as tenants by the entirety shall be entitled to the full benefit of this classification notwithstanding that only one of them meets the age or disability requirements herein provided. If the residence is a mobile home and is jointly owned by husband and wife, it shall be treated as property held by the entirety. When property is owned by two or more persons other than husband and wife and one or more of such owners qualifies for this classification, each qualifying owner shall be entitled to the full amount of the exclusion not to exceed his or her proportionate share of the valuation of the property. No part of an exclusion available to one co-owner may be claimed by any other co-owner and in no event shall the total exclusion allowed to a qualifying residence (including the household personal property therein) exceed twelve thousand dollars (\$12,000).
- (2) "Disposable income" means adjusted gross income as defined for North Carolina income tax purposes in G.S. 105-141.3 plus all other moneys received from every source other than gifts or inheritances received from a spouse, lineal ancestors, or lineal descendants.
- (2a) Repealed by Session Laws 1985 (Reg. Sess., 1986), c. 982, s. 20.
- (3) "Permanent residence" means legal residence. It includes the dwelling, the dwelling site, not to exceed one acre, and related improvements. The dwelling may be a single family residence, a unit in a multi-family residential complex or a mobile home. Notwithstanding the occupancy requirements of this classification, an otherwise qualified applicant shall not lose the benefit of the exclusion because of a temporary absence from his or her permanent residence for reasons of health, or because of an extended absence while confined to a rest home or nursing home, so long as the residence is unoccupied or occupied by the applicant's spouse or other dependent.
- (4) A "totally and permanently disabled person" means one who has a physical or mental impairment which substantially precludes him from obtaining gainful employment and such impairment appears reasonably certain to continue without substantial improvement throughout his lifetime.

(c) Application. — Applications for the exclusions provided by this section are to be filed during the regular listing period, but, shall be accepted at any time up to and through April 15 of the calendar year for which they are to be effective. When property is owned by two or more persons other than husband and wife and one or more of them qualifies for this exclusion, each such owner shall apply separately for his or her proportionate share of the exclusion.

- (1) Elderly Applicants. — Persons 65 years of age or older may apply for this exclusion by entering the appropriate information on a form made available by the tax supervisor under G.S. 105-282.1.
- (2) Disabled Applicants. — Persons who are totally and permanently disabled may apply for this exclusion by (i) entering the appropriate information on a form made available by the tax supervisor under G.S. 105-282.1 and (ii) furnishing acceptable proof of their disability. Such proof shall be in the form of a certificate from a physician licensed to practice medicine in North Carolina or from a governmental agency authorized to determine qualification for disability benefits. After a disabled applicant has qualified for this classification, he or she shall not be required to furnish an additional certificate unless the applicant's disability is reduced to the extent that the applicant could no longer be certified for the taxation at reduced valuation. (1971, c. 932, s. 1; 1973, c. 448, s. 1; 1975, c. 881, s. 2; 1977, c. 666, s. 1; 1979, c. 356, s. 1; c. 846, s. 1; 1981, c. 54, s. 1; c. 1052, s. 1; 1985, c. 656, ss. 44, 45; 1985 (Reg. Sess., 1986), c. 982, ss. 19, 20.)

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective for taxable years beginning on or after

January 1, 1987, rewrote subsection (a) and deleted subdivision (b)(2a), relating to household personal property.

§ 105-277.2. Agricultural, horticultural and forestland — Definitions.

CASE NOTES

Statutory Scheme is Tax Deferment. —
The statutory scheme for taxation of property qualifying for present use value treatment as

defined in this section and § 105-277.3 is a tax deferment. *In re Parker*, 76 N.C. App. 447, 333 S.E.2d 749 (1985).

§ 105-277.3. Agricultural, horticultural and forestland — Classifications.

CASE NOTES

Statutory Scheme is Tax Deferment. —
The statutory scheme for taxation of property qualifying for present use value treatment as

defined in § 105-277.2 and this section is a tax deferment. *In re Parker*, 76 N.C. App. 447, 333 S.E.2d 749 (1985).

§ 105-277.6. Agricultural, horticultural and forestland — Appraisal; computation of deferred tax.

CASE NOTES

This section mandates that true value schedule and use value schedule be determined separately. In re Parker, 76 N.C. App. 447, 333 S.E.2d 749 (1985).

Under the plain language of this section, the

board of county commissioners was required to adopt a separate market value schedule and use value schedule. In re Parker, 76 N.C. App. 447, 333 S.E.2d 749 (1985).

§ 105-278.9: Repealed by Session Laws 1985 (Reg. Sess., 1986), c. 982, s. 21, effective for taxable years beginning on or after January 1, 1987.

§ 105-282.1. Applications for property tax exemption or exclusion.

(a) Every owner of property claiming exemption or exclusion from property taxes under the provisions of this Subchapter has the burden of establishing that the property is entitled thereto. Except as otherwise provided below, every owner claiming exemption or exclusion hereunder shall annually, during the regular listing period, file an application therefor with the tax supervisor of the county in which the property would be subject to taxes if taxable. For the year 1974, the application may be filed not later than May 31, 1974. If the property covered by the application is located within a municipality, that fact shall be shown on the application. Each such application shall be submitted on a form approved by the Department of Revenue. The forms shall be made available by the tax supervisor.

- (1) The United States government, the State of North Carolina and the counties and municipalities of the State are exempted from the requirement that owners file applications for exemption.
 - (2) Owners of the special classes of property excluded from taxation under G.S. 105-275(5), (15), (16), (26), or (31), or exempted under G.S. 105-278.2 are not required to file applications for the exclusion of that property.
 - (3) After an owner of property entitled to exemption under G.S. 105-277.1, 105-278.3, 105-278.4, 105-278.5, 105-278.6, 105-278.7, or 105-278.8 or exclusion under G.S. 105-275(3), (7) or (12) or G.S. 105-278 has applied for exemption and the exemption has been approved, such owner shall not be required to file applications in subsequent years except in the following circumstances:
 - a. New or additional property is acquired or improvements are added or removed, necessitating a change in the valuation of the property, or
 - b. There is a change in the use of the property or the qualifications or eligibility of the taxpayer necessitating a review of the exemption.
 - (4) Nothing in this section shall be construed to relieve any governmental unit or private owner of the duty of listing for taxation property that is not entitled to exemption.
- (1973, c. 695, s. 8; c. 1252; 1981, c. 54, ss. 2, 3; c. 86, s. 2; c. 915; 1985 (Reg. Sess., 1986), c. 982, s. 22.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 (Reg.

Sess., 1986) amendment, effective for taxable years beginning on or after January 1, 1987, rewrote subdivision (a)(2).

CASE NOTES

Right to Appeal. — The plain intent and thrust of subsection (b) of this section and §§ 105-322 and 105-324 is to permit a property owner, as a matter of right, to appeal to the

Property Tax Commission upon a county or municipal board denying its application for an exemption. In re K-Mart Corp., — N.C. App. —, 340 S.E.2d 752 (1986).

ARTICLE 13.

Standards for Appraisal and Assessment.

§ 105-283. Uniform appraisal standards.

CASE NOTES

To find the true value of property subject to conservation easements, the Commission must determine the market value prior to the granting of the easements and then reduce that value by applying a damage factor caused by the granting of the conservation

easements. Determining the highest and best use of the property prior to the granting of the easement is a critical part of the appraisal process. Rainbow Springs Partnership v. County of Macon, — N.C. App. —, 339 S.E.2d 681 (1986).

ARTICLE 14.

Time for Listing and Appraising Property for Taxation.

§ 105-285. Date as of which property is to be listed and appraised.

CASE NOTES

Stated in In re Bassett Furn. Indus., Inc., — N.C. App. —, 339 S.E.2d 16 (1986).

ARTICLE 15.

Duties of Department and Property Tax Commission as to Assessments.

§ 105-290. Appeals to Property Tax Commission.

CASE NOTES

Showing Required to Have Valuation Set Aside. — In order for a taxpayer to have

valuation set aside, he must show more than a failure to follow the statutory procedures. It is

not enough for the taxpayer to show that the means adopted by the tax supervisor were wrong; he must also show that the result arrived at is substantially greater than the true value in money of the property assessed, i.e., that the valuation was unreasonably high. In re Highlands Dev. Corp., — N.C. App. —, 342 S.E.2d 588 (1986).

Where taxpayers failed to show how they were aggrieved by the valuation of other owners' property, the Commission properly refused to allow them to appeal those valuations as a class action. In re Highlands Dev. Corp., — N.C. App. —, 342 S.E.2d 588 (1986).

ARTICLE 16.

County Listing, Appraisal, and Assessing Officials.

§ 105-296. Powers and duties of tax supervisor.

CASE NOTES

Stated in In re Bassett Furn. Indus., Inc., — N.C. App. —, 339 S.E.2d 16 (1986).

ARTICLE 17.

Administration of Listing.

§ 105-304. Place for listing tangible personal property.

CASE NOTES

III. SITUS.

A. In General.

Situs is an absolute essential, etc. —

Taxable tangible personal property must have acquired a tax situs in this State, for situs is an absolute essential for tax exaction. In re Bassett Furn. Indus., Inc., — N.C. App. —, 339 S.E.2d 16 (1986).

When Personal Property of Nonresident May Be Taxed. — When personal property belonging to a nonresident has acquired a taxable situs in this State, this State may tax that nonresident's property without violating the provisions of the Fourteenth Amendment of the United States Constitution. In re Bassett Furn. Indus., Inc., — N.C. App. —, 339 S.E.2d 16 (1986).

It is for the legislature to determine, etc. —

The situs of personal property for purposes of

taxation is determined by the legislature, and the legislature may provide different rules for different kinds of property and may change the rules from time to time. In re Bassett Furn. Indus., Inc., — N.C. App. —, 339 S.E.2d 16 (1986).

A jet aircraft hangered in Rockingham County, North Carolina, for approximately one year by a nonresident corporation having no principal place of business in this State, under the stipulated facts and evidence, was "situated" or "more or less permanently located" in Rockingham County on January 1, 1984, and therefore had a tax situs in Rockingham County on that date. The fact that the airplane happened to be physically located at a Virginia airport on January 1, 1984, did not defeat taxation by Rockingham County. In re Bassett Furn. Indus., Inc., — N.C. App. —, 339 S.E.2d 16 (1986).

§ 105-309. What the abstract shall contain.

(a) Each person whose duty it is to list property for taxation shall file each year with the tax supervisor or proper list taker a tax list or abstract showing, as of the date prescribed by G.S. 105-285(b), the information required by this section. Subject to the provisions of subdivisions (a)(1) and (a)(2), below, each person whose duty it is to list property for taxation shall file a separate abstract.

- (1) Tenants by the entirety shall file a single abstract listing the real property so held, together with all personal property they own jointly.
- (2) Tenants in common shall file a single abstract listing the real property so held, together with all personal property that they own jointly, unless, as provided in G.S. 105-302(c)(9), the tax supervisor allows them to list their undivided interests in the real property on separate abstracts.

(b) Each abstract shall show the taxpayer's name; residence address; and, if required by the tax supervisor or list taker, business address.

- (1) An individual trading under a firm name shall show his name and address and also the name and address of his business firm.
- (2) An unincorporated association shall show both the name and address of the association and the names and addresses of its principal officers.
- (3) A partnership shall show both the name and address of the partnership and the names and addresses of its full partners.

(c) Each tract, parcel, or lot of real property owned or controlled in the county shall be listed in accordance with the following instructions:

- (1) Real property not divided into lots shall be described by giving:
 - a. The township in which located.
 - b. The total number of acres in the tract, or, if smaller than one acre, the dimensions of the parcel.
 - c. The tract name (if any), the names of at least two adjoining landowners, a reference to the tract's designation on any map maintained in the office of the tax supervisor or on file in the office of the register of deeds, or some other description sufficient to identify and locate the property by parol testimony.
 - d. If applicable, the number of acres of:
 1. Cleared land;
 2. Woods and timberland;
 3. Land containing mineral or quarry deposits;
 4. Land susceptible of development for waterpower;
 5. Wasteland.
 - e. The portion of the tract or parcel located within the boundaries of any municipality.
- (2) Real property divided into lots shall be described by giving:
 - a. The township in which located.
 - b. The dimensions of the lot.
 - c. The location of the lot, including its street number (if any).
 - d. The lot's designation on any map maintained in the office of the tax supervisor or on file in the office of the register of deeds, or some description sufficient to identify and locate the property by parol testimony.
 - e. The portion of the lot located within the boundaries of any municipality.
- (3) In conjunction with the listing of any real property under subdivisions (c)(1) and (c)(2), above, there shall be given a short description of any buildings and other improvements thereon that belong to the owner of the land.

- (4) Buildings and other improvements having a value in excess of one hundred dollars (\$100.00) that have been acquired, begun, erected, damaged, or destroyed since the time of the last appraisal of property shall be described.
- (5) If some person other than the owner of a tract, parcel, or lot shall own any buildings or other improvements thereon or separate rights (such as mineral, quarry, timber, waterpower, or other rights) therein, that fact shall be specified on the abstract on which the land is listed, together with the name and address of the owner of the buildings, other improvements, or rights.
 - a. Buildings, other improvements, and separate rights owned by a taxpayer with respect to the lands of another shall be listed separately and identified so as to indicate the name of the owner thereof and the tract, parcel, or lot on which the buildings or other improvements are situated or to which the separate rights appertain.
 - b. In accordance with the provisions of G.S. 105-302(c)(11), buildings or other improvements or separate rights owned by a taxpayer with respect to the lands of another may be listed either in the name of the owner of the buildings, other improvements, or rights, or in the name of the owner of the land.
- (d) Personal property shall be listed to indicate the township and municipality, if any, in which it is taxable and shall be itemized by the taxpayer in such detail as may be prescribed by an abstract form approved by the Department of Revenue. Personal property shall also be listed to indicate which property, if any, is subject to a tax credit under Division IV of Article 4 of this Chapter.
- (1) Whenever the tax supervisor or list takers shall deem it necessary to obtain complete listings, they may require taxpayers to submit additional information, inventories, and itemized lists of personal property.
- (2) At the request of the tax supervisor or list taker, the taxpayer shall furnish any information he may have with respect to the true value of the personal property he is required to list.
- (e) At the end of the abstract each person whose duty it is to list property for taxation shall sign the affirmation required by G.S. 105-310.
- (f) The following information shall appear on each abstract, or on an information sheet distributed with the abstract. (The abstract or sheet must include the address and telephone number of the tax supervisor below the notice required by this subsection):

"PROPERTY TAX RELIEF FOR ELDERLY AND PERMANENTLY DISABLED PERSONS.

North Carolina excludes from property taxes the first twelve thousand dollars (\$12,000) in assessed value of certain property owned by North Carolina residents aged 65 or older or totally and permanently disabled whose disposable income does not exceed eleven thousand dollars (\$11,000). The exclusion covers real property, or a mobile home, occupied by the owner as his permanent residence. Disposable income includes all moneys received other than gifts or inheritances received from a spouse, lineal ancestors, or lineal descendants.

If you received this exclusion in (tax supervisor insert previous year), you do not need to apply again unless you have changed your permanent residence. If you received the exclusion in (tax supervisor insert previous year) and your

disposable income in (tax supervisor insert previous year) was above eleven thousand dollars (\$11,000), you must notify the tax supervisor. If you received the exclusion in (tax supervisor insert previous year) because you were totally and permanently disabled and you are no longer totally and permanently disabled, you must notify the tax supervisor. If the person receiving the exemption in (tax supervisor insert previous year) has died, the person required by law to list the property must notify the tax supervisor. Failure to make any of the notices required by this paragraph before April 15 will result in penalties and interest.

If you did not receive the exclusion in (tax supervisor insert previous year) but are now eligible, you may obtain a copy of an application from the tax supervisor. It must be filed by April 15."

(g) Any person who fails to give the notice required by G.S. 105-309(f) shall not only be subject to loss of the exemption, but also to the penalties provided by G.S. 105-312, and also if willful to the penalty provided in G.S. 105-310. For the purpose of determining whether a penalty is levied, whenever a taxpayer has received an exemption under G.S. 105-277.1 for one taxable year but the property of taxpayer is not eligible for the exemption the next year, notice given of that fact to the tax supervisor on or before April 15 shall be considered as timely filed. (1939, c. 310, s. 900; 1941, c. 221, s. 1; 1953, c. 970, s. 6; 1955, c. 34; 1971, c. 806, s. 1; 1973, c. 448, s. 2; c. 476, s. 193; 1975, c. 881, s. 3; 1977, c. 666, s. 2; 1979, c. 846, s. 2; 1981, c. 54, ss. 4-6; c. 1052, s. 1; 1985, c. 656, ss. 47, 51; 1985 (Reg. Sess., 1986), c. 947, s. 9; c. 982, s. 23.)

Effect of Amendments. —

Session Laws 1985 (Reg. Sess., 1986), c. 947, s. 9, effective for taxable years beginning on or after January 1, 1986, added the second sentence of subsection (d).

Session Laws 1985 (Reg. Sess., 1986), c. 982,

s. 23, effective for taxable years beginning on or after January 1, 1987, rewrote subsection (f), relating to notice regarding property tax relief for elderly and permanently disabled persons.

ARTICLE 19.

Administration of Real and Personal Property Appraisal.

§ 105-317. Appraisal of real property; adoption of schedules, standards, and rules.

CASE NOTES

To find the true value of property subject to conservation easements, the Commission must determine the market value prior to the granting of the easements and then reduce that value by applying a damage factor caused by the granting of the conservation easements. Determining the highest and best use of the property prior to the granting of the easement is a critical part of the appraisal process. *Rainbow Springs Partnership v. County*

of Macon, — N.C. App. —, 339 S.E.2d 681 (1986).

Failure to consider, etc. —

Subdivision (a)(1) of this section is directory, and failure to consider each and every indicia of value recited in the statute does not vitiate the appraisal. *In re Highlands Dev. Corp.*, — N.C. App. —, 342 S.E.2d 588 (1986).

Cited in *In re Parker*, 76 N.C. App. 477, 333 S.E.2d 749 (1985).

ARTICLE 20.

*Approval, Preparation, and Disposition of Records.***§ 105-320. Tax receipts; preparation.**

(a) No taxing unit shall adopt a tax receipt form until it has been approved by the Department of Revenue, and no tax receipt form shall be approved unless it shows at least the following information:

- (1) The name and mailing address of the taxpayer charged with taxes.
- (2) The assessment of the taxpayer's real property listed for unit-wide taxation.
- (3) The assessment of the taxpayer's personal property listed for unit-wide taxation.
- (4) The total assessed value of the taxpayer's real and personal property listed for unit-wide taxation.
- (5) The total assessed value of the taxpayer's real and personal property listed for taxation in any special district or subdivision of the unit.
- (6) The rate of tax levied for each unit-wide purpose, the total rate levied for all unit-wide purposes, and the rate levied by or for any special district or subdivision of the unit in which the taxpayer's property is subject to taxation. (In lieu of showing this information on the tax receipt, it may be furnished on a separate sheet of paper, properly identified, at the time the official receipt is delivered upon payment).
- (7) The amount of ad valorem tax due by the taxpayer for unit-wide purposes.
- (8) The amount of ad valorem tax due by the taxpayer to any special district or subdivision of the unit.
- (9) The amount of dog license tax due by the taxpayer.
- (10) The amount of penalties, if any, imposed under the provisions of G.S. 105-312.
- (11) The total amount of all taxes and penalties due by the taxpayer to the unit and to special districts and subdivisions of the unit.
- (12) The amount of discount allowed for prepayment of taxes under the provisions of G.S. 105-360.
- (13) The amount of interest charged for late payment of taxes under the provisions of G.S. 105-360.
- (14) The total assessed value of the inventory of a manufacturer subject to the income tax credit in G.S. 105-163.06 and the amount of ad valorem taxes due by the manufacturer on its inventory subject to that credit.
- (15) The total assessed value of livestock and poultry of a producer subject to the income tax credit in G.S. 105-163.05 and the amount of ad valorem taxes due by the producer on its livestock and poultry subject to that credit.
- (16) The total assessed value of farm machinery, attachments, and repair parts of individual owners and Subchapter "S" corporations engaged in farming subject to the income tax credit in G.S. 105-163.07 and the amount of ad valorem taxes due by an individual farmer or a Subchapter "S" corporation engaged in farming on farm machinery, attachments, and repair parts subject to that credit.

(b) Instead of being shown on the tax receipt, the information required in subdivisions (14), (15), and (16) of subsection (a) may be shown on a separate sheet furnished to the affected taxpayers.

(c) The governing body of the county or municipality shall designate the person or persons who shall compute and prepare the tax receipt for all taxes charged upon the tax records. (1939, c. 310, s. 1102; 1961, c. 380; 1971, c. 806, s. 1; 1973, c. 476, s. 193; 1985, c. 656, s. 23; 1985 (Reg. Sess., 1986), c. 947, s. 6.)

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective for taxable years beginning on or after January 1, 1986, rewrote subdivisions (a)(14)

and (a)(15), added subdivision (a)(16), inserted a new subsection (b), and redesignated former subsection (b) as subsection (c).

ARTICLE 21.

Review and Appeals of Listings and Valuations.

§ 105-322. County board of equalization and review.

CASE NOTES

Right to Appeal. — The plain intent and thrust of this section and §§ 105-282.1(b) and 105-324 is to permit a property owner, as a matter of right, to appeal to the Property Tax

Commission upon a county or municipal board denying its application for an exemption. In re K-Mart Corp., — N.C. App. —, 340 S.E.2d 752 (1986).

§ 105-324. Appeals to Property Tax Commission from listing and valuation decisions of boards of equalization and review and boards of county commissioners.

CASE NOTES

Right to Appeal. — The plain intent and thrust of this section and §§ 105-282.1(b) and 105-322 is to permit a property owner, as a matter of right, to appeal to the Property Tax

Commission upon a county or municipal board denying its application for an exemption. In re K-Mart Corp., — N.C. App. —, 340 S.E.2d 752 (1986).

ARTICLE 23.

Public Service Companies.

§ 105-342. Notice, hearing, and appeal.

CASE NOTES

Discriminatory Taxation of Railroads. — In suits alleging discriminatory taxation of real and personal property in violation of § 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 (the 4-R Act), codified at 49 U.S.C. § 11503 (1982), the counties had the burden of establishing facts sufficient for the court to find levels of assessment for business personal property different from the levels

stipulated for real property. *Clinchfield R.R. v. Lynch*, 784 F.2d 545 (4th Cir. 1986).

In suits alleging discriminatory taxation of real and personal property in violation of § 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 (the 4-R Act), codified at 49 U.S.C. § 11503 (1982), the trial court was correct in considering as a factor in its finding of tax discrimination the fact that under

§ 105-277 stored tobacco inventories were field R.R. v. Lynch, 784 F.2d 545 (4th Cir. 1986).
taxed at only 60% of fair market value. Clinch-

ARTICLE 24.

Review and Enforcement of Orders.

§ 105-345.2. Record on appeal; extent of review.

CASE NOTES

Applied in In re Parker, 76 N.C. App. 477, 333 S.E.2d 749 (1985); Rainbow Springs Partnership v. County of Macon, — N.C. App. —, 339 S.E.2d 681 (1986).

ARTICLE 26.

Collection and Foreclosure of Taxes.

§ 105-357. Payment of taxes.

Local Modification. — Durham: 1985 (Reg. Sess., 1986), c. 910; city of Salisbury: 1985 (Reg. Sess., 1986), c. 910; city of Wilmington: 1985 (Reg. Sess., 1986), c. 910; town of Farmville: 1985 (Reg. Sess., 1986), c. 910.

§ 105-374. Foreclosure of tax lien by action in nature of action to foreclose a mortgage.

CASE NOTES

I. GENERAL CONSIDERATION.

Purported Adverse Possessor Not Entitled To Personal Notice. — Where a city, in a foreclosure action, gave personal notice to all the record owners of the property in question and notice by publication to all others having an interest in the disputed property who could not with due diligence be located, it was not required to give personal notice to a purported adverse possessor whose purported interest was not recorded. Overstreet v. City of Raleigh, 75 N.C. App. 351, 330 S.E.2d 643 (1985).

And Judgment Foreclosing Tax Lien Extinguish All Rights. — The effect of a judgment foreclosing a tax lien on real property was to extinguish all rights, title and interests in the property subject to foreclosure, including a claim based on adverse possession. The interest in the disputed property acquired by the purchaser at the tax foreclosure sale was fee simple and the purchaser's title defeated the claims of ownership based on adverse possession. Overstreet v. City of Raleigh, 75 N.C. App. 351, 330 S.E.2d 643 (1985).

§ 105-375. In rem method of foreclosure.

CASE NOTES

Judgment Foreclosing Tax Lien Extinguish All Rights. — The effect of a judgment foreclosing a tax lien on real property was to extinguish all rights, title and interests in the property subject to foreclosure, including a claim based on adverse possession. The inter-

est in the disputed property acquired by the purchaser at the tax foreclosure sale was fee simple and the purchaser's title defeated the claims of ownership based on adverse possession. Overstreet v. City of Raleigh, 75 N.C. App. 351, 330 S.E.2d 643 (1985).

§ 105-377. Time for contesting validity of tax foreclosure title.

CASE NOTES

Where city became record owner of property pursuant to tax foreclosure sale, and while purported adverse possessors brought their action to quiet title beyond the one year statute of limitation contained in this

section, there were no genuine issues of material fact and the city was entitled to summary judgment. *Overstreet v. City of Raleigh*, 75 N.C. App. 351, 330 S.E.2d 643 (1985).

SUBCHAPTER V. GASOLINE TAX.

ARTICLE 36.

Gasoline Tax.

§ 105-431. Purpose of Article.

The purpose of this Article is to provide for the payment and collection of a tax on the first sale of motor fuels when sold, or the use, when used, in this State. (1927, c. 93, s. 2; 1931, c. 145, s. 24; 1985 (Reg. Sess., 1986), c. 937, s. 1.)

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 8, 1986, deleted "double taxation not intended" at the end of the catchline, deleted "double taxation is not intended" following "in this State", and de-

leted a former second sentence, which read "Motor fuels manufactured, produced, or sold for exportation, and exported are not taxable and should not be included in the reports hereinafter required to be made by distributors."

§ 105-432. Sales from pipeline or seaport terminals not first sales.

The sale, consummated by delivery to a licensed distributor in that State, of motor fuel from a pipeline or seaport terminal in transport truck or railroad tank car shipments is not considered the first sale of the motor fuel. (1927, c. 93, s. 2¹/₂; 1931, c. 145, s. 24; 1985 (Reg. Sess., 1986), c. 937, s. 4.)

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 8, 1986,

rewrote this section, which formerly related to sales in tank car shipments.

§ 105-433. Application for license as distributor.

Any distributor engaged in business on April 1, 1931, shall, within 30 days thereafter, and any other distributor shall, prior to the commencement of doing business, file a duly acknowledged application for a license with the Secretary of Revenue on a form prescribed and furnished by him setting forth the name under which such distributor transacts or intends to transact business within this State, the address of each place of business and a designation of the principal place of business. If such distributor is a firm or association, the application shall set forth the name and address of each person constituting the firm or association, and if a corporation, the names and addresses of the principal officers and such other information as the Secretary of Revenue

may require. Each distributor shall at the same time file a bond in such amount, not exceeding forty thousand dollars (\$40,000) in such form and with such surety or sureties as may be required by the Secretary of Revenue, conditioned upon the rendition of the reports and the payment of the tax hereinafter provided for. A distributor who is also required to be bonded under G.S. 105-449.5 as a supplier of special fuels may file a single bond, under either this section or under G.S. 105-449.5, for the combined amount required under these sections but not exceeding eighty thousand dollars (\$80,000) and conditioned upon compliance with the requirements of Article 36 and Article 36A of this Subchapter. A distributor required to file a bond under this section shall, within 30 days after receiving a notice from the Secretary of Revenue, file an additional bond in the amount requested by the Secretary. The amount of the initial bond and any additional bonds filed by the distributor, however, may not exceed the limits set in this section. Upon approval of the application and bond, the Secretary of Revenue shall issue to the distributor a nonassignable license with a duplicate copy for each place of business of said distributor in this State, which shall be displayed in a conspicuous place at each such place of business and shall continue in force until surrendered or canceled. No distributor shall sell, offer for sale, or use any motor fuels within this State until such license has been issued. Any distributor failing to comply with or violating any of the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be fined not less than one hundred dollars (\$100.00), nor more than five thousand dollars (\$5,000), or imprisonment for not more than 24 months, or both. (1927, c. 93, s. 3; 1931, c. 145, s. 24; 1973, c. 476, s. 193; 1983, c. 220, s. 2; 1985 (Reg. Sess., 1986), c. 937, s. 5.)

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 8, 1986, inserted the present fifth and sixth sentences.

§ 105-434. Excise tax on motor fuel; payment of tax.

(a) Tax. — An excise tax is levied on motor fuel sold, distributed, or used by a distributor within this State at the rate of fourteen cents (14¢) per gallon plus three percent (3%) of the average wholesale price of motor fuel, as determined semiannually by the Secretary of Revenue from information on refiner and gas plant operator sales prices of finished motor gasoline and No. 2 diesel fuel for resale, published by the United States Department of Energy in the "Monthly Energy Review," or on equivalent data. The Secretary shall determine the average wholesale price of motor fuel by computing the average sales price of finished motor gasoline for the base period, computing the average sales price for No. 2 diesel fuel for the base period, and then computing a weighted average of the results of the first two computations based on the proportion of tax collected under this Article on motor fuel and Article 36A on fuel for the base period. The Secretary shall notify affected taxpayers of the tax rate to be in effect for each six-month period.

To facilitate collection of the motor fuel tax, the Secretary shall convert the percentage rate to a cents-per-gallon rate to be in effect during the six-month period beginning each January 1 and July 1. The rate to be in effect during the six-month period beginning January 1 shall be computed from data published for the six-month base period ending on the preceding September 30, and the rate to be in effect during the six-month period beginning July 1 shall be computed from data published for the six-month base period ending on the preceding March 31. The cents-per-gallon rate computed by the Secretary shall be rounded to the nearest one-tenth of a cent ($1/10\text{¢}$). If the cents-per-

gallon rate computed by the Secretary is exactly between two tenths of a cent, the rate shall be rounded up to the higher of the two.

(b) Payment. — The tax levied under this Article is due when a return is required to be filed. Each distributor shall, within 20 days after the end of each month, submit a return to the Secretary of Revenue, on a form prescribed by the Secretary, stating the quantity of motor fuel sold, distributed, or used by him within the State during the preceding calendar month. Each return shall be accompanied by a payment to the Secretary for the amount of tax shown to be due on the return and shall be signed by the distributor or his agent.

In reporting the amount of tax due, a distributor may elect to calculate the tax on adjusted monthly receipts less a tare of two percent (2%) on the first 150,000 gallons, one and one-half percent (1½%) on the next 100,000 gallons, and one percent (1%) on the excess over 250,000 gallons. "Adjusted monthly receipts" means the quantity of motor fuel purchased, produced, refined, or compounded during the month plus the quantity of untaxed motor fuel on hand at the beginning of the month and less the quantity of motor fuel transported out-of-state during the month or lost during the month due to damage to a conveyance transporting the motor fuel, fire, a natural disaster, an act of war, or an accident. The Secretary of Revenue may, in accordance with rules adopted by him, refund to a nonlicensed distributor the tax on motor fuel that is purchased and delivered to him taxpaid and that is lost due to fire, a natural disaster, an act of war, or an accident after it is delivered to him and before it is sold.

(c) Exception. — The tax levied by subsection (a) does not apply to nonanhydrous ethanol that is not sold or distributed.

(d) Local Tax Prohibited. — No county, city, town, or other political subdivision of the State may levy or collect any tax upon the sale, distribution, or use of motor fuel. (1927, c. 93, s. 4; 1929, c. 40, s. 1; 1931, c. 145, s. 24; 1941, cc. 16, 146; 1943, c. 113; 1949, c. 1250, s. 13; 1969, c. 600, s. 20; 1973, c. 476, s. 193; 1981, c. 690, s. 1; 1985, c. 261, s. 3; 1985 (Reg. Sess., 1986), c. 937, s. 2; c. 982, s. 3.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 982, s. 26 provides:

"Notwithstanding G.S. 105-434 and G.S. 105-449.16, the percentage wholesale component of the excise tax levied under those sections shall be one and one-half cents (1½¢) from July 15, 1986, to January 1, 1987. The 1987 Session of the General Assembly will examine the question of having a different computation of the wholesale tax for motor fuel and special fuel."

Session Laws 1985 (Reg. Sess., 1986), c. 982, s. 31 provides: "Notwithstanding G.S. 105-434 and G.S. 105-449.19, distributors of motor fuel and suppliers of special fuels shall file a report in accordance with those sections for the period July 1, 1986, through July 14, 1986, and a report for the period July 15, 1986, through July 31, 1986. Each report by a distributor of motor fuel shall be considered separately in applying the tare allowance under G.S. 105-434."

Effect of Amendments. — Session Laws 1985 (Reg. Sess., 1986), c. 937, s. 2, effective July 8, 1986, deleted a proviso at the end of

subsection (a) as it read prior to amendment by Session Laws 1985 (Reg. Sess., 1986), c. 982, s. 3, and substituted the following language therefor:

"A distributor may elect to calculate the tax on adjusted monthly receipts less a tare of two percent (2%) on the first 150,000 gallons, one and one-half percent (1½%) on the next 100,000 gallons, and one percent (1%) on the excess over 250,000 gallons. 'Adjusted monthly receipts' means the quantity of motor fuel purchased, produced, refined, or compounded during the month plus the quantity of untaxed motor fuel on hand at the beginning of the month and less the quantity of motor fuel transported out-of-state during the month or lost during the month due to damage to a conveyance transporting the motor fuel, fire, a natural disaster, an act of war, or an accident. The Secretary of Revenue may, in accordance with rules adopted by him, refund to a nonlicensed distributor the tax on motor fuel that is purchased and delivered to him taxpaid and that is lost due to fire, a natural disaster, an

act of war, or an accident after it is delivered to him and before it is sold.”

Session Laws 1985 (Reg. Sess., 1986), c. 982, s. 3, effective July 15, 1986, rewrote this section.

The section is set out above as rewritten by Session Laws 1985 (Reg. Sess., 1986), c. 982, s. 3, at the direction of the Revisor of Statutes.

§ 105-435. Tax on fuels not within definition; manner of collection; from whom collected.

(a) Every person who owns or operates over the highways of this State, any motor vehicle propelled by a motor which uses any product not included within the definition of “motor fuels” hereinbefore set out to generate power for the propulsion of said vehicle, shall pay to the Secretary of Revenue, for the use of the highways of this State, a tax at the rate established pursuant to G.S. 105-434(a) on the fuel used in such vehicle upon the highways of this State.

(1941, c. 376, s. 2; 1949, c. 1250, s. 13; 1951, c. 838; 1955, c. 822, s. 2; 1969, c. 600, s. 20; 1973, c. 476, s. 193; 1981, c. 690, s. 1; 1985 (Reg. Sess., 1986), c. 982, s. 4.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 (Reg.

Sess., 1986) amendment, effective July 15, 1986, substituted “at the rate established pursuant to G.S. 105-434(a)” for “of twelve cents (12¢) per gallon” in subsection (a).

§ 105-440. Applications for and administration of tax refunds; penalty.

(a) Annual Refunds. — An application for an annual refund of tax permitted by this Article shall be filed with the Secretary of Revenue on or before April 15th following the end of the calendar year for which the refund is claimed. The application shall state whether or not the applicant has filed a North Carolina income tax return for the preceding taxable year, and shall state that the applicant has paid for the fuel for which a refund is claimed or that payment for the fuel has been secured to the seller’s satisfaction.

(b) Quarterly Refunds. — An application for a quarterly refund of tax permitted by this Article shall be filed with the Secretary of Revenue on or before the last day of the month following the end of the calendar quarter for which the refund is claimed. The application shall state that the applicant has paid for the fuel for which a refund is claimed or that payment for the fuel has been secured to the seller’s satisfaction.

(c) Late Applications. — Applications filed with the Secretary within six months of the date the application is due shall be accepted, but the amount of the refund shall be reduced by twenty-five percent (25%) if the application is filed within 30 days after the date the application is due, and shall be reduced by fifty percent (50%) if the application is filed more than 30 days but within six months after the date the application is due. An application filed more than six months after the date the application is due shall not be accepted.

(d) Approval of Refund. — If the Secretary of Revenue determines that an application for refund is correct, he shall issue the applicant a warrant upon the State Treasurer for the amount of the refund. If the Secretary determines that an application for refund is incorrect, he shall send a written notice of his determination to the applicant, stating a time and place for a hearing. If, upon holding the hearing, the Secretary finds the applicant has collected or sought to collect a refund to which he is not entitled, he shall reject the application

and the applicant shall be required to pay back the tax, if any, refunded to him on the basis of the rejected application. The applicant may seek review of the Secretary's decision under G.S. 105-241.2, 105-241.3, and 105-241.4.

(e) Penalty. — A person who knowingly makes a false application for refund to obtain a refund to which he is not entitled is guilty of a misdemeanor and is punishable by a fine of up to five hundred dollars (\$500.00), imprisonment for up to two years, or both. (1927, c. 93, s. 10; 1931, c. 145, s. 24; 1985 (Reg. Sess., 1986), c. 982, s. 6.)

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 15, 1986, rewrote this section, which formerly related to a penalty for making a false claim for a rebate.

§ 105-441. Enumeration of acts constituting misdemeanor; cancellation of license and bond.

Any distributor who shall fail, neglect, or refuse to make the reports herein required or pay the taxes herein imposed, or who shall refuse to permit the Secretary of Revenue or any agent appointed by him, to examine the books and records of such distributor pertaining to the motor fuels made taxable by this Article or who shall make any false, or fraudulent report or statement hereunder, or who does, or attempts to do, anything whatsoever to avoid a full disclosure of the quantity of motor fuels sold, distributed or used within this State, or who fails to file an additional bond required under G.S. 105-433 shall be guilty of a misdemeanor, and, on conviction, shall be fined not less than one hundred dollars (\$100.00) and not more than five thousand dollars (\$5,000) or, in the case of an individual or the officer or employee charged with the duty of making such report for a corporation, to be imprisoned not exceeding 24 months, or both; and the Secretary of Revenue may forthwith cancel the license of such distributor and notify him in writing of such cancellation by registered mail to be sent to his last known address. In the event that the license of any distributor is cancelled as above provided, and in the event such distributor shall have paid to the State of North Carolina all the taxes due and payable by him under this Article, together with any and all penalties accruing under the provisions of this Article, then the Secretary of Revenue shall cancel and surrender the bond theretofore filed by said distributor. (1927, c. 93, s. 11; 1931, c. 145, s. 24; 1933, c. 544, s. 10; 1973, c. 476, s. 193; 1985 (Reg. Sess., 1986), c. 937, s. 6.)

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 8, 1986, inserted "or who fails to file an additional bond required under G.S. 105-433" near the middle of the first sentence.

§ 105-446. Refund for tax on motor fuel used other than to propel a motor vehicle.

A person who purchases and uses motor fuel for a purpose other than to operate a licensed motor vehicle may receive an annual refund, for the tax paid during the preceding calendar year, at a rate equal to fourteen cents (14¢) per gallon plus the average of the two wholesale cents-per-gallon rates of tax in effect during the year for which refund is claimed, less one cent (1¢) per gallon. An application for a refund allowed under this section shall be made in accordance with G.S. 105-440. (1931, c. 145, s. 24; c. 304; 1933, c. 211; 1937, c.

111; 1941, c. 15; 1943, c. 123; 1955, c. 1350, s. 24; 1957, c. 1236, s. 1; 1961, cc. 480, 668; 1967, c. 699; 1969, c. 600, s. 20; c. 1298, s. 3; 1973, c. 476, s. 193; c. 1287, s. 14; 1981, c. 690, s. 1; 1985 (Reg. Sess., 1986), c. 982, s. 5.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 982, s. 29 provides: "Notwithstanding G.S. 105-446, G.S. 105-446.5, and G.S. 105-449.24, the annual refund rate for tax paid on motor fuel or special fuels for calendar

year 1986 shall be twelve and six-tenths cents ($12\frac{6}{10}\%$) per gallon."

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 15, 1986, rewrote this section.

§ 105-446.1. Refunds of taxes paid by counties and municipalities.

The following entities shall be entitled to reimbursement for the tax levied by G.S. 105-434 upon filing a statement in writing with the Secretary of Revenue, which statement shall be made upon the oath or affirmation of the chief executive officer of said entity, showing the number of gallons of fuel purchased and used by said entity on which the tax levied by G.S. 105-434 has been paid: the Board of Transportation, counties, municipal corporations, volunteer fire departments, county fire departments, volunteer rescue squads, and "sheltered workshop" organizations recognized and approved by the Department of Human Resources. "Chief executive officer" shall mean the Director of Highways, the mayor, city manager or other municipal officer designated by the governing body of the municipality, the chairman of the board of county commissioners or other county officer designated by the board of county commissioners, or the president or other duly designated officer or agent of a volunteer fire department, county fire department, volunteer rescue squad or "sheltered workshop" organization. Reimbursement shall be at a rate equal to fourteen cents (14¢) per gallon plus the wholesale cents-per-gallon rate of tax in effect during the quarter for which the refund is claimed, less one cent (1¢) per gallon. An application for a refund under this section shall be made in accordance with G.S. 105-440. (1957, c. 1226; 1969, c. 600, s. 20; c. 1298, s. 4; 1971, c. 1160; 1973, c. 476, s. 193; c. 507, s. 5; c. 1287, s. 14; 1975, c. 845; 1981, c. 690, s. 1; 1981 (Reg. Sess., 1982), c. 1246, ss. 1, 2; 1985 (Reg. Sess., 1986), c. 982, s. 7.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 982, s. 30 provides: "Notwithstanding G.S. 105-446.1, G.S. 105-446.3, and G.S. 105-449.24, the quarterly refund rate for tax paid on motor fuel or special fuels for the quarter ending June 30, 1986, shall be eleven cents (11¢) per gallon, and the quarterly refund rate for tax paid on motor fuel or special fuels for the quarter ending September 30, 1986, shall be fourteen cents (14¢) per gallon."

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 15, 1986, substituted "reimbursement for" for "be reimbursed at the rate of eleven cents (11¢) per gallon of" following "The following entities shall be entitled to" at the beginning of the first sentence and rewrote the last two sentences.

§ 105-446.3. Refund of taxes paid on motor fuels used in operation of motor buses transporting fare-paying passengers in a city transit system, in operation of a taxicab transporting fare-paying passengers, and in operation of private non-profit transportation services.

(a) Any person, association, firm or corporation, who shall purchase any motor fuels, as defined in this Article, for the purpose of use, and the same is actually used, in the operation of motor buses transporting fare-paying passengers, in connection with a city transit system or in the operation of a taxicab transporting fare-paying passengers, both as hereinafter defined in subsection (b) of this section, or in the operation, by private nonprofit organizations, of motor vehicles transporting passengers under contract with or at the express designation of units of local government (such transportation above and hereinafter referred to as private nonprofit transportation services) shall be entitled to reimbursement for the tax levied by this Article upon filing with the Secretary of Revenue an application upon the oath or affirmation of the applicant or his agent showing the number of gallons of motor fuel so purchased and used. Reimbursement shall be at a rate equal to fourteen cents (14¢) per gallon plus the wholesale cents-per-gallon rate of tax in effect during the quarter for which the refund is claimed, less one cent (1¢) per gallon. An application for a refund allowed under this section shall be made in accordance with G.S. 105-440.

(b) For the purposes of this section the term "city transit system" means a system of mass public transportation authorized to operate within any municipality or within contiguous municipalities and within a zone adjacent to and commercially a part of such municipality or contiguous municipalities as defined by the North Carolina Utilities Commission under the provisions of G.S. 62-260. Any person, association, firm or corporation, who, in addition to the operation of a city transit system as herein defined, holds a certificate from the North Carolina Utilities Commission for operations outside of the municipal limits and adjacent commercial zones or who conducts exempt operations outside of the municipal limits or adjacent commercial zones shall be entitled to the refund provided by this section only on taxes levied upon motor fuels actually used in the operation of the city transit system. For the purposes of this section the term "taxicab" shall mean a taxicab as defined in G.S. 20-87(1); provided, however, that a city transit system as defined herein shall not include limousine operations.

(c) to (h) Repealed by Session Laws 1985 (Reg. Sess., 1986), c. 982, s. 8, effective July 15, 1986. (1971, c. 1221, s. 1; 1973, c. 476, s. 193; c. 1287, s. 14; 1977, 2nd Sess., c. 1215; 1981, c. 690, s. 1; 1985 (Reg. Sess., 1986), c. 826, s. 10; c. 982, s. 8.)

Editor's Note. —

Session Laws 1985 (Reg. Sess., 1986), c. 982, s. 30 provides: "Notwithstanding G.S. 105-446.1, G.S. 105-446.3, and G.S. 105-449.24, the quarterly refund rate for tax paid on motor fuel or special fuels for the quarter ending June 30, 1986, shall be eleven cents (11¢) per gallon, and the quarterly refund rate for tax paid on motor fuel or special fuels for the quarter end-

ing September 30, 1986, shall be fourteen cents (14¢) per gallon."

Effect of Amendments. — Session Laws 1985 (Reg. Sess., 1986), c. 826, s. 10, effective June 30, 1986, substituted "20-87(1)" for "20-87(2)" in the last sentence of subsection (b).

Session Laws 1985 (Reg. Sess., 1986), c. 982, s. 8, effective July 15, 1986, substituted "reimbursement for the" for "be reimbursed at the

rate of eleven cents (11¢) per gallon of" preceding "tax levied by this Article upon filing" in the first sentence of subsection (a), rewrote the

last two sentences of subsection (a), and deleted subsections (c), (d), (e), (f), (g), and (h).

§ 105-446.5. Refund of taxes paid on motor fuel used by concrete mixing vehicles, solid waste compacting vehicles, and certain agricultural delivery vehicles.

(a) Refund. — A person who purchases and uses motor fuel in one of the vehicles listed below may receive a refund for the amount of fuel consumed by the vehicle:

- (1) A concrete mixing vehicle;
- (2) A solid waste compacting vehicle;
- (3) A bulk feed vehicle that delivers feed to poultry or livestock and uses a power take-off to unload the feed; and
- (4) A vehicle that delivers lime or fertilizer in bulk to farms and uses a power take-off to unload the lime or fertilizer.

The refund rate shall be computed by subtracting one cent (1¢) from fourteen cents (14¢) per gallon plus the average of the two wholesale cents-per-gallon rates of tax in effect during the year for which the refund is claimed, and multiplying the difference by thirty-three and one-third percent (33⅓%). An application for a refund allowed under this section shall be made in accordance with G.S. 105-440. This refund is allowed for the amount of fuel consumed by the vehicle in its mixing, compacting, or unloading operations, as distinguished from propelling the vehicle, which amount is considered to be one third of the amount of fuel consumed by the vehicle.

(b), (c) Repealed by Session Laws 1985 (Reg. Sess., 1986), c. 982, s. 9, effective July 15, 1986. (1979, c. 801, s. 92; 1981, c. 690, s. 1; 1983 (Reg. Sess., 1984), c. 1025; 1985, c. 656, s. 54; 1985 (Reg. Sess., 1986), c. 982, s. 9.)

Editor's Note. —

Session Laws 1985 (Reg. Sess., 1986), c. 982, s. 29 provides: "Notwithstanding G.S. 105-446, G.S. 105-446.5, and G.S. 105-449.24, the annual refund rate for tax paid on motor fuel or special fuels for calendar year 1986 shall be twelve and six-tenths cents (12⅘¢) per gallon."

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, ef-

fective July 15, 1986, deleted "of thirty-three and one-third percent (33⅓%) of eleven cents (11¢) per gallon of the tax levied under this Article" at the end of the introductory language of subsection (a), added the two sentences at the end of subsection (a), following subdivision (4), and deleted subsection (b), relating to application for reimbursement, and subsection (c), relating to administration.

§ 105-446.6. Refund on taxpaid motor fuel transported to another state.

Upon application to the Secretary, any person, association or corporation who purchases motor fuel upon which the tax imposed by this Article has been paid, and who transports the fuel to another state for sale or use in that state may be reimbursed at a rate equal to fourteen cents (14¢) per gallon plus the wholesale cents-per-gallon rate of tax paid on the fuel, less one cent (1¢) per gallon. The refund application shall require the claimant to furnish evidence satisfactory to the Secretary that the motor fuel for which the refund is claimed has been reported for taxation in the state to which it was transported. As used in this section, to "transport" means to carry motor fuel in a

cargo tank, tank car, barge or barrel and does not include carrying fuel in a tank connected with or attached to the engine of a motor vehicle. (1981 (Reg. Sess., 1982), c. 1219, s. 1; 1985 (Reg. Sess., 1986), c. 937, s. 3; c. 982, s. 10.)

Effect of Amendments. — Session Laws 1985 (Reg. Sess., 1986, c. 937, s. 3, effective July 8, 1986, inserted the present second sentence.

Session Laws 1985 (Reg. Sess., 1986), c. 982, s. 10, effective July 15, 1986, substituted "a

rate equal to fourteen cents (14¢) per gallon plus the wholesale cents-per-gallon rate of tax paid on the fuel, less one cent (1¢) per gallon" for "the rate of eleven cents (11¢) per gallon for the amount of tax paid" at the end of the first sentence.

§ 105-449. Exemption of motor fuel used in public school transportation; false returns, etc.

(a) Motor fuel purchased by a local board of education for use in public school transportation in this State is exempt from the excise tax levied by this Article provided an invoice for the fuel stating the board of education to whom the fuel was delivered, the price per gallon of the fuel excluding the tax, and the kind and quantity of fuel sold is furnished to the Secretary of Revenue. To implement this exemption, a person who holds a State contract for the sale of motor fuel to be used in public school transportation shall invoice motor fuel sold to a local board of education for this purpose at the prevailing contract price, excluding the tax, and a person who does not hold a State contract for the sale of motor fuel to be used in public school transportation but who sells motor fuel for this purpose in quantities not sufficient to require a State contract shall invoice motor fuel sold to a local board of education at the lowest informal bid price, excluding the tax.

(b) A person authorized to sell motor fuel to a local board of education who paid the tax levied by this Article on fuel sold to the local board for public school transportation may obtain a refund of the tax paid on the fuel upon filing an application for refund with the Secretary of Revenue and attaching an invoice, containing the information required in subsection (a), to the refund application. Upon receipt of a proper application and invoice, the Secretary shall issue a warrant upon the State Treasurer for the amount of tax paid.

(c) It is the intent and purpose of this section to relieve motor fuel used in the public school system of North Carolina from the tax levied by this Article and thereby to that extent reduce the cost of public school transportation.

(d) The motor fuel tax exemption provided by this section shall include motor fuel sold for use in automobiles owned by the school boards and furnished to school superintendents to be used only on official business, in public school activities buses, driver training vehicles, bookmobiles belonging to or operated by county libraries and in public school trucks, vehicles and implements used in public school buildings and grounds maintenance and repair as well as motor fuel sold for use in school service trucks used to service school buses.

(1941, c. 119; 1949, c. 1250, s. 13; 1959, c. 155; 1969, c. 600, s. 20; 1973, c. 476, s. 193; 1981, c. 690, s. 1; 1985 (Reg. Sess., 1986), c. 937, s. 9; c. 982, s. 11.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — Session Laws 1985 (Reg. Sess., 1986), c. 937, s. 9, effective

July 8, 1986, substituted "motor fuel" for "gasoline" throughout subsections (c) and (d), and rewrote subsections (a) and (b) to read as follows:

"(a) Motor fuel purchased by a local board of

education and used in public school transportation in this State is exempt from the per gallon tax levied by this Article provided an invoice for the fuel stating the board of education to whom the fuel was delivered, the price per gallon of the fuel excluding the per gallon tax, and the kind and quantity of fuel sold is furnished to the Secretary of Revenue. To implement this exemption, a person who holds a State contract for the sale of motor fuel to be used in public school transportation shall invoice motor fuel sold to a local board of education for this purpose at the prevailing contract price, excluding the per gallon tax, and a person who does not hold a State contract for the sale of motor fuel to be used in public school transportation but who sells motor fuel for this purpose in quantities not sufficient to require a State contract shall invoice motor fuel sold to a local board of education at the lowest informal bid price, excluding the per gallon tax.

"(b) A person authorized to sell motor fuel to a local board of education who paid the per

gallon tax levied by this Article on fuel sold to the local board for public school transportation may obtain a refund of the tax paid on the fuel upon filing an application for refund with the Secretary of Revenue and attaching an invoice, containing the information required in subsection (a), to the refund application. Upon receipt of a proper application and invoice, the Secretary shall issue a warrant upon the State Treasurer for the amount of the per gallon tax paid."

Session Laws 1985 (Reg. Sess., 1986), c. 982, s. 11, effective July 15, 1986, also rewrote subsections (a) and (b), in subsection (c) substituted "tax levied by this Article" for "twelve cents (12¢) gasoline tax now imposed by the State", and in subsections (c) and (d) substituted "motor fuel" for "gasoline."

Subsections (a) and (b) are set out above as rewritten by Session Laws 1985 (Reg. Sess., 1986), c. 982, s. 11, at the direction of the Revisor of Statutes.

ARTICLE 36A.

Special Fuels Tax.

§ 105-449.2. Definitions.

The following words, terms and phrases as used in this Article are, for the purposes thereof, hereby defined as follows:

- (2) "Motor vehicle" means a self-propelled vehicle that is designed for use on a highway.
- (3) "Fuel" means combustible gases and liquids, other than those subject to tax under Article 36, that are or can be used to generate power to propel a motor vehicle.
- (7) "User" means a person who owns or operates a fuel-propelled motor vehicle licensed under Chapter 20 and who does not maintain storage facilities for fueling the vehicle.
- (9) "Supplier" means a person who:
 - a. Sells or delivers fuel to a user-seller; or
 - b. Maintains an inventory of fuel, part or all of which he uses or sells for use in a motor vehicle, and is not required to be licensed as a user-seller; or
 - c. Imports fuel, other than in the usual tank or receptacle connected with the engine of a motor vehicle, into the State for his own use.
- (10) Repealed by Session Laws 1985 (Reg. Sess., 1986), c. 937, s. 14, effective July 8, 1986.

(1955, c. 822, s. 1; 1965, c. 1120, s. 1; 1973, c. 476, s. 193; c. 1431; 1979, c. 13, s. 1; 1981, c. 105, s. 1; 1985, c. 413, s. 2; c. 528, s. 2; c. 602, s. 1; 1985 (Reg. Sess., 1986), c. 826, s. 12; c. 937, ss. 10, 13, 14, 16.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendments, it is not set out.

Effect of Amendments. —

Session Laws 1985 (Reg. Sess., 1986), c. 826,

s. 12, effective June 30, 1986, deleted "and licensed" following "designed" in subdivision (2).

Session Laws 1985 (Reg. Sess., 1986), c. 937, ss. 10, 13, 14 and 16, effective July 8, 1986, rewrote subdivisions (3), (7), and (9), and de-

leted subdivision (10), defining the term "Peddler."

§ 105-449.3. License required of supplier.

Every supplier shall obtain a license from the Secretary. (1955, c. 822, s. 1; 1973, c. 476, s. 193; 1985 (Reg. Sess., 1986), c. 937, s. 15.)

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 8, 1986, rewrote this section.

§ 105-449.5. Supplier to file bond.

A supplier's license shall not be issued until the applicant has filed with the Secretary a bond in the approximate sum of three times the average monthly tax due to be paid by such supplier, but the amount of the bond shall in no case be less than five hundred dollars (\$500.00) nor more than forty thousand dollars (\$40,000). Such bond shall be in such form and with such surety or sureties as may be required by the Secretary, conditioned upon making proper reports and paying the tax provided for in this Article, and otherwise complying with the provisions of this Article. A supplier who is also required to be bonded under G.S. 105-433 as a distributor of motor fuels may file a single bond, under either this section or under G.S. 105-433 for the combined amount required under these sections but not exceeding eighty thousand dollars (\$80,000), and conditioned upon compliance with the requirements of Article 36 and Article 36A of this Subchapter. A supplier required to file a bond under this section shall, within 30 days after receiving a notice from the Secretary, file an additional bond in the amount requested by the Secretary. The amount of the initial bond and any additional bonds filed by the supplier, however, may not exceed the limits set in this section. (1955, c. 822, s. 1; 1973, c. 476, s. 193; 1983, c. 220, s. 3; 1985 (Reg. Sess., 1986), c. 937, s. 7.)

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 8, 1986, added the last two sentences.

§ 105-449.9. License required of user and user-seller.

Every user, except a user whose use of fuel is limited to private passenger motor vehicles and other motor vehicles licensed under Chapter 20 at 6,000 pounds or less, and every user-seller shall obtain a license from the Secretary. When issued, a user's or a user-seller's license is effective until it is cancelled. (1955, c. 822, s. 1; 1973, c. 476, s. 193; 1985 (Reg. Sess., 1986), c. 937, s. 11.)

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 8, 1986, rewrote this section.

§ 105-449.10. Records and reports required of user-seller or user.

(b) A user shall pay the tax levied by this Article on any nontaxpaid fuel acquired by him. A licensed user shall pay the tax due on nontaxpaid fuel acquired during a reporting period when filing a report for that period. An unlicensed user who acquires nontaxpaid fuel shall report the fuel and pay the tax due on the fuel in the same manner as a licensed user. (1955, c. 822, s. 1; 1965, c. 1120, s. 2; 1973, c. 476, s. 193; 1979, c. 13, s. 2; 1979, 2nd Sess., c. 1086, s. 1; 1981, c. 105, s. 2; 1985 (Reg. Sess., 1986), c. 937, s. 12.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 8, 1986, rewrote subsection (b).

§ 105-449.11. Display of license.

Suppliers' and user-sellers' licenses so issued shall be displayed conspicuously by the licensee at his principal place of business. (1955, c. 822, s. 1; 1985 (Reg. Sess., 1986), c. 937, s. 21.)

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 8, 1986, deleted a former second sentence, which read

"Each peddler shall display his license or an official duplicate thereof on each motor vehicle used by him for the sale or delivery of fuel."

§ 105-449.14. Power of Secretary to cancel licenses.

If a licensee shall at any time file a false report of any data or information required by this Article, or shall fail, refuse or neglect to file any report as required by this Article, or to pay the full amount of any tax required by this Article, or if a supplier fails to file an additional bond required under G.S. 105-449.5 or fails to keep accurate records of quantities of fuel received, produced, refined, manufactured, compounded, sold or used in this State, or if a user-seller fails to maintain accurately any required records the Secretary may forthwith cancel his license and notify him in writing of such cancellation by registered mail sent to his last address appearing on the files of the Secretary.

The Secretary may cancel any license upon the written request of the licensee. (1955, c. 822, s. 1; 1973, c. 476, s. 193; 1985 (Reg. Sess., 1986), c. 937, s. 8.)

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 8, 1986, inserted "fails to file an additional bond re-

quired under G.S. 105-449.5 or" in the first sentence.

§ 105-449.16. Levy of tax; purposes; special provision for certain nonanhydrous ethanol.

(a) A tax at the rate established pursuant to G.S. 105-434 is hereby imposed upon all fuel sold or delivered by any supplier to any licensed user-seller, or used by any such supplier in any motor vehicle owned, leased or operated by him, or delivered by such supplier directly into the fuel supply tank of a motor vehicle, or imported by a user-seller into, or acquired tax free by a user-seller

or user in this State for resale or use for the propulsion of a motor vehicle. A supplier who consigns fuel to a reseller may elect to report and pay the tax due on the fuel when the reseller sells or dispenses the fuel instead of when the supplier delivers the fuel to the reseller. For the purpose of this section, "imported" shall not include fuels brought into this State in the usual tank or receptacle connected with the engine of a motor vehicle. The primary purposes of this levy and this Article are to provide a more efficient and effective method of collecting the tax now imposed and collected pursuant to G.S. 105-435, by providing for the collection of said tax from the supplier instead of the user. The tax herein provided for is levied for the same purposes as the tax provided for in G.S. 105-435. It is not intended that the tax collected pursuant to this Article shall be in addition to that provided in G.S. 105-435, but the payment of the tax as provided by this Article shall be deemed conclusively to constitute a compliance with the provisions of G.S. 105-435. The tax levied in this section shall be subject to the provisions of section 13 of Chapter 1250 of the Session Laws of 1949, relating to G.S. 105-435, in that one cent (1¢) of the amount of tax levied on each gallon shall be applied exclusively to the payment of the principal of and the interest on the two hundred million dollars (\$200,000,000) State of North Carolina Secondary Road Bonds therein provided for and as further provided in said Chapter 1250 of the Session Laws of 1949.

(1955, c. 822, s. 1; 1969, c. 600, s. 21; 1979, 2nd Sess., c. 1187, ss. 3, 6; 1981, c. 690, s. 2; 1983, c. 591, ss. 2, 4; 1983 (Reg. Sess., 1984), c. 1003, s. 2; 1985, c. 261, s. 1; c. 413, s. 1; 1985 (Reg. Sess., 1986), c. 982, s. 12.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. —

Session Laws 1985 (Reg. Sess., 1986), c. 982, s. 26 provides: "Notwithstanding G.S. 105-434 and G.S. 105-449.16, the percentage wholesale component of the excise tax levied under those sections shall be one and one-half cents (1½¢) from July 15, 1986, to January 1, 1987. The 1987 Session of the General Assembly will examine the question of having a different computation of the wholesale tax for motor fuel and special fuel."

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective July 15, 1986, substituted "established pursuant to G.S. 105-434" for "of twelve cents (12¢) per gallon" in the first sentence of subsection (a), substituted "tax levied in this section" for "twelve cents (12¢) per gallon tax, hereinabove provided for" in the last sentence of subsection (a), and substituted "of the amount of tax levied on each gallon" for "out of every said twelve cents (12¢) tax per gallon" in that sentence.

§ 105-449.19. Tax reports; computation and payment of tax.

On or before the twenty-fifth day of each calendar month, each supplier of liquid fuel shall render to the Secretary a statement on forms prepared and furnished by the Secretary, which shall show the quantity of fuel on hand on the first and last days of the preceding calendar month, the quantity received during the month and the quantity sold to user-sellers or delivered into motor vehicles; and each supplier of fuels which are not liquid shall keep such records and make such reports of inventory as the Secretary shall by regulation prescribe in order to show accurately the quantity of such fuel used by such supplier, sold to user-sellers, or delivered into motor vehicles owned by others and pay a tax thereon which as calculated by the Secretary, would be equivalent to the tax levied on liquid fuels. Each such supplier shall at the time of rendering such report pay to the Secretary the tax or taxes herein levied during the preceding calendar month. (1955, c. 822, s. 1; 1969, c. 600, s. 21; 1973, c. 476, s. 193; 1981, c. 690, s. 2; 1985 (Reg. Sess., 1986), c. 937, s. 17; c. 982, s. 13.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 982, s. 31 provides: "Notwithstanding G.S. 105-434 and G.S. 105-449.19, distributors of motor fuel and suppliers of special fuels shall file a report in accordance with those sections for the period July 1, 1986, through July 14, 1986, and a report for the period July 15, 1986, through July 31, 1986. Each report by a distributor of motor fuel shall be considered separately in applying the fare allowance under G.S. 105-434."

Effect of Amendments. — Session Laws

1985 (Reg. Sess., 1986), c. 937, s. 17, effective July 8, 1986, inserted "or delivered into motor vehicles" following "quantity sold to user-sellers" and substituted "sold to user-sellers, or delivered into motor vehicles owned by others" for "or sold to user-sellers" in the first sentence.

Session Laws 1985 (Reg. Sess., 1986), c. 982, s. 13, effective July 15, 1986, deleted "twelve cents (12¢) per gallon" preceding "tax levied on liquid fuel" at the end of the first sentence.

§ 105-449.22. Leased motor vehicles.

(b) A lessor of a motor vehicle who gives written notice, by filing a report or otherwise, to the Secretary that the lessor desires to be taxed as a user, user-seller or supplier may be treated by the Secretary as a user, user-seller, or supplier with respect to a motor vehicle leased to another by him as well as fuel consumed by the leased motor vehicle when the lessor supplies or pays for the fuel consumed by the motor vehicle or makes rental or other charges calculated to include the cost of the fuel. A lessee may exclude from reports made pursuant to this Article a motor vehicle of which he is the lessee if that motor vehicle is leased from a lessor who is a user, user-seller, or supplier pursuant to this section.

(1955, c. 822, s. 1; 1983, c. 29, s. 1; 1985 (Reg. Sess., 1986), c. 826, s. 11.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 (Reg.

Sess., 1986) amendment, effective June 30, 1986, substituted "Secretary" for "secretary" in two places in the first sentence of subsection (b).

§ 105-449.24. Exemptions and refunds.

The exemptions from and the refunds of the tax levied by Article 36 on motor fuel apply to the tax levied by this Article on fuel, except the exemption and refund for losses in G.S. 105-434(a). (1967, c. 1110, s. 15; 1971, c. 1221, s. 2; 1979, c. 801, s. 93; 1979, 2nd Sess., c. 1187, ss. 4-6; 1981, c. 690, s. 2; 1983, c. 591, ss. 3, 4; 1983 (Reg. Sess., 1984), c. 1003, ss. 1, 2; 1985, c. 261, s. 2; 1985 (Reg. Sess., 1986), c. 937, s. 18; c. 982, s. 14.)

Editor's Note. —

Session Laws 1985 (Reg. Sess., 1986), c. 982, s. 29 provides: "Notwithstanding G.S. 105-446, G.S. 105-446.5, and G.S. 105-449.24, the annual refund rate for tax paid on motor fuel or special fuels for calendar year 1986 shall be twelve and six-tenths cents (12⁶/₁₀¢) per gallon."

Session Laws 1985 (Reg. Sess., 1986), c. 982, s. 30 provides: "Notwithstanding G.S. 105-446.1, G.S. 105-446.3, and G.S. 105-449.24, the quarterly refund rate for tax paid on motor fuel or special fuels for the quarter ending June 30, 1986, shall be eleven cents (11¢) per gallon, and the quarterly refund rate for tax paid on motor fuel or special fuels for the quar-

ter ending September 30, 1986, shall be fourteen cents (14¢) per gallon."

Effect of Amendments. —

Session Laws 1985 (Reg. Sess., 1986), c. 937, s. 18, effective July 8, 1986, rewrote this section to read as follows:

"§ 105-449.24. Exemptions, rebates, and refunds.

"The exemptions from and the rebates and refunds of the tax levied by Article 36 on motor fuel apply to the tax levied by this Article on fuel, except the exemption and refund for losses in G.S. 105-434(a)."

Session Laws 1985 (Reg. Sess., 1986), c. 982, s. 14, effective July 15, 1986, also rewrote this section.

The section is set out above as rewritten by Session Laws 1985 (Reg. Sess., 1986), c. 982, s. 14, at the direction of the Revisor of Statutes.

§§ 105-449.30, 105-449.31: Repealed by Session Laws 1985 (Reg. Sess., 1986), c. 937, s. 19, effective July 8, 1986.

Editor's Note. — Sections 105-449.30 and 105-449.31 were also repealed by Session Laws 1985 (Reg. Sess., 1986), c. 982, s. 15, effective July 15, 1986.

ARTICLE 36B.

Tax on Carriers Using Fuel Purchased outside State.

§ 105-449.38. Tax levied.

A road tax for the privilege of using the streets and highways of this State is hereby imposed upon every motor carrier on the amount of gasoline or other motor fuel used by such motor carrier in its operations within this State. The tax shall be at the rate established by the Secretary pursuant to G.S. 105-434. Except as credit for certain taxes as hereinafter provided for in this Article, taxes imposed on motor carriers by this Article are in addition to any taxes imposed on such carriers by any other provisions of law. The tax herein levied is for the same purposes as the tax imposed under the provisions of G.S. 105-434. (1955, c. 823, s. 2; 1969, c. 600, s. 22; 1981, c. 690, s. 3; 1985 (Reg. Sess., 1986), c. 982, s. 16.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 982, s. 32 provides: "Notwithstanding G.S. 105-449.45, a motor carrier shall file a report in accordance with that section for the period July 1, 1986, through July 14, 1986, and a report for the period July 15, 1986, through September 30, 1986. Notwithstanding G.S. 105-449.38 and G.S. 105-449.39, a motor

carrier may elect to file a single report for the quarter ending September 30, 1986, reporting fuel use at the rate of fifteen cents (15¢) per gallon and claiming credit for fuel purchased at the rate of fifteen cents (15¢) per gallon."

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 15, 1986, rewrote the second sentence.

§ 105-449.39. Credit for payment of motor fuel tax.

Every motor carrier subject to the tax levied by this Article is entitled to a credit against this tax for the amount of tax paid by the carrier under Articles 36 and 36A of this Subchapter on motor fuel or special fuel purchased in this State and used by the carrier in its operations either inside or outside this State. Evidence of the payment of such tax in such form as may be required by, or is satisfactory to, the Secretary shall be furnished by each such carrier claiming the credit herein allowed. When the amount of the credit herein provided to which any motor carrier is entitled for any quarter exceeds the amount of the tax for which such carrier is liable for the same quarter, such excess may under regulations of the Secretary be allowed as a credit on the tax for which such carrier would be otherwise liable for another quarter or quarters; or upon application within 180 days from the end of any quarter, duly verified and presented, in accordance with regulations promulgated by the Secretary and supported by such evidence as may be satisfactory to the Secretary, such excess may be refunded to said motor carrier.

Unless the Secretary of Revenue exercises his discretion as hereinafter provided, or as provided in G.S. 105-449.40, he shall allow such refund only after an audit of the applicant's records. However, he may, in his sole discretion, make refunds without prior audit or without having been furnished a bond pursuant to G.S. 105-449.40 if the motor carrier has complied with the provisions of this Subchapter and rules and regulations promulgated thereunder for a period of one full prior registration year. (1955, c. 823, s. 3; 1969, c. 600, s. 22; c. 1098; 1973, c. 476, s. 193; 1979, 2nd Sess., c. 1098; 1981, c. 690, s. 3; 1985 (Reg. Sess., 1986), c. 982, s. 17.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 982, s. 32 provides: "Notwithstanding G.S. 105-449.45, a motor carrier shall file a report in accordance with that section for the period July 1, 1986, through July 14, 1986, and a report for the period July 15, 1986, through September 30, 1986. Notwithstanding G.S. 105-449.38 and G.S. 105-449.39, a motor carrier may elect to file a single report for the

quarter ending September 30, 1986, reporting fuel use at the rate of fifteen cents (15¢) per gallon and claiming credit for fuel purchased at the rate of fifteen cents (15¢) per gallon."

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 15, 1986, substituted the present first sentence for the former first and second sentences.

§ 105-449.42A. Leased motor vehicles.

(b) A lessor of a motor vehicle who gives written notice, by filing a report or otherwise, to the Secretary that the lessor desires to be taxed as a motor carrier may be treated by the Secretary as a motor carrier with respect to a motor vehicle leased to another by him as well as motor fuel consumed by the leased motor vehicle when the lessor supplies or pays for the motor fuel consumed by the motor vehicle or makes rental or other charges calculated to include the cost of the fuel. A lessee motor carrier may exclude from reports made pursuant to this Article a motor vehicle of which he is the lessee if that motor vehicle is leased from a lessor who is a motor carrier pursuant to this section.

(1983, c. 29, s. 3; 1985 (Reg. Sess., 1986), c. 826, s. 11.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 (Reg.

Sess., 1986) amendment, effective June 30, 1986, substituted "Secretary" for "secretary" in two places in subsection (b).

§ 105-449.45. Reports of carriers.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 982, s. 32 provides: "Notwithstanding G.S. 105-449.45, a motor carrier shall file a report in accordance with that section for the period July 1, 1986, through July 14, 1986, and a report for the period July 15, 1986, through September 30, 1986. Notwithstanding

G.S. 105-449.38 and G.S. 105-449.39, a motor carrier may elect to file a single report for the quarter ending September 30, 1986, reporting fuel use at the rate of fifteen cents (15¢) per gallon and claiming credit for fuel purchased at the rate of fifteen cents (15¢) per gallon."

§ 105-449.47. Registration of vehicles.

A motor carrier may not operate or cause to be operated in this State any vehicle listed in the definition of motor carrier unless the motor carrier has registered the vehicle for purposes of the tax imposed by this Article with the Commissioner of Motor Vehicles or the Secretary, as appropriate. All vehicles required to be registered under this section that are registered in this State under G.S. 20-87 or G.S. 20-88 shall be registered with the Commissioner of Motor Vehicles pursuant to G.S. 20-88.01 for the purposes of the tax imposed by this Article. All other vehicles required to be registered under this section shall be registered with the Secretary.

Upon application and payment of a fee of ten dollars (\$10.00), the Secretary shall issue a registration card and identification marker for a vehicle. The registration card shall be carried in the vehicle for which it was issued when the vehicle is in this State. The identification marker shall be clearly displayed at all times and shall be affixed to the vehicle for which it was issued in the place and manner designated by the Secretary. Every identification marker issued shall bear a number that corresponds to the number on the registration card issued for the same vehicle. Registration cards and identification markers required by this section shall be issued on a calendar year basis. The Secretary may renew registration cards and identification markers without issuing new cards and markers. All identification markers issued by the Secretary remain the property of the State. The Secretary may withhold or revoke a registration card and identification marker when a motor carrier fails to comply with this Article or Article 36A of this Subchapter. (1955, c. 823, s. 11; 1973, c. 746, s. 193; 1983, c. 713, s. 56; 1985 (Reg. Sess., 1986), c. 937, s. 20.)

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, ef-

fective July 8, 1986, added the last sentence of the second paragraph.

SUBCHAPTER VI. TAX RESEARCH.**ARTICLE 37.*****Tax Research.*****§ 105-455. Submission of proposed amendments and information to Advisory Budget Commission; continuing study of economic conditions.**

The Secretary of Revenue shall prepare and submit to the Advisory Budget Commission such amendments to the Revenue and Machinery Acts as the survey made by the Secretary indicates should be made, for their consideration in preparing amendatory Revenue and Machinery Acts for the General Assembly.

The Advisory Budget Commission is hereby authorized, empowered and directed to call upon the Secretary for such amendments and such recommendations as the Secretary shall make with respect to any needed changes in the Revenue and Machinery Acts. The Advisory Budget Commission is authorized, empowered and directed to consider such a report and shall make to the next session of the General Assembly a report on its findings with respect to

such recommendations as it shall see fit to make and shall also report to the General Assembly the content of the report filed with it by the Department of Revenue.

It shall be the duty of the Secretary of Revenue to make a continuing study of economic conditions, and to evaluate the effect of these conditions on the tax bases and prospective collections therefrom. The Secretary shall submit estimates of revenue to the Advisory Budget Commission for its information. (1941, c. 327, s. 7; 1953, c. 1125, s. 2; 1973, c. 476, s. 193; 1985 (Reg. Sess., 1986), c. 955, s. 8.)

Editor's Note. — Section 1 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "This act may be cited as the Separation of Powers Act of 1986."

Section 127 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "If any part of this act

shall be declared invalid by any court, this shall not affect any other part of this act."

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 1, 1986, substituted "preparing" for "repairing" in the first paragraph.

SUBCHAPTER VIII. LOCAL GOVERNMENT SALES AND USE TAX.

ARTICLE 39.

Local Government Sales and Use Tax.

§ 105-472. Disposition and distribution of taxes collected.

With respect to the counties in which he shall collect and administer the tax, the Secretary of Revenue shall, on a quarterly basis, distribute to each taxing county and to the municipalities therein the net proceeds of the tax collected in that county under this Article which amount shall be determined by deducting taxes refunded, the cost to the State of collecting and administering the tax in the taxing county and such other deductions as may be properly charged to the taxing county, from the gross amount of the tax remitted to the Secretary of Revenue from the taxing county. The Secretary shall determine the cost of collection and administration, and that amount shall be retained by the State before distribution of the net proceeds of the tax. For the purposes of this Article, "municipalities" shall mean cities as defined by G.S. 153A-1(1).

The board of county commissioners shall, in the resolution levying the tax, determine that the net proceeds of the tax shall be distributed in one of the following methods and thereafter said proceeds shall be distributed in accordance therewith:

- (1) The amount distributable to a taxing county and to the municipalities therein from the net proceeds of the tax collected therein shall be determined upon the following basis: The net proceeds of the tax collected in a taxing county shall be distributed to that taxing county and to the municipalities therein upon a per capita basis according to the total population of the taxing county, plus the total population of the municipalities therein; provided, however, that "total population" of a municipality lying within more than one county shall be only that part of its population which lives within the taxing county. For this purpose, the Secretary of Revenue shall determine a per capita figure by dividing the net proceeds of the tax collected under this Article for the preceding quarter within a taxing county by the total population of that taxing county plus the total population of all mu-

municipalities therein according to the most recent annual estimates of population as certified to the Secretary of Revenue by the State Budget Officer. The per capita figure thus derived shall be multiplied by the population of the taxing county and each respective municipality therein according to the most recent annual estimates of population as certified to the Secretary of Revenue by the State Budget Officer, and each respective product shall be the amount to be distributed to each taxing county and to each municipality therein. The State Budget Officer shall annually cause to be prepared and shall certify to the Secretary of Revenue such reasonably accurate population estimates of all counties and municipalities in the State as may be practicably developed; or

- (2) The net proceeds of the tax collected in a taxing county shall be divided between the county and the municipalities therein in proportion to the total amount of ad valorem taxes levied by each on property having a tax situs in the taxing county during the fiscal year next preceding such distribution. For purposes of this section, the amount of the ad valorem taxes levied by such county or municipality shall include any ad valorem taxes levied by such county or municipality in behalf of a taxing district or districts and collected by the county or municipality. In computing the amount of tax proceeds to be distributed to any county or municipality, the amount of any ad valorem taxes levied but not substantially collected shall be ignored. Each county and municipality receiving a distributable share of the sales and use tax levied under this Article shall in turn immediately share the proceeds with any district or districts in behalf of which the county or municipality levied ad valorem taxes in the proportion that the district levy bears to the total levy of the county or municipality. Any county or municipality which fails to provide the Department of Revenue with information concerning ad valorem taxes levied by that county or municipality adequate to permit a timely determination of the appropriate share of that county or municipality of tax proceeds collected under this Article may be excluded by the Secretary from each quarterly distribution with respect to which such information was not provided in a timely manner, and such tax proceeds shall then be distributed only to the governmental unit or units whose information was provided in a timely manner. For the purpose of computing the distribution of the tax under this subsection to any county and the municipalities located therein for any quarter with respect to which the property valuation of a public service company is the subject of an appeal pursuant to the provisions of the Machinery Act, or to applicable provisions of federal law, and the Department of Revenue is restrained by operation of law or by a court of competent jurisdiction from certifying such valuation to the county and the municipalities therein, the Department shall use the last property valuation of such public service company which has been so certified in order to determine the ad valorem tax levies applicable to such public service company in the county and the municipalities therein.

Where local use taxes, levied pursuant to this Article, or to any other local sales tax act, which cannot be identified as being attributable to any particular taxing county are collected and remitted to the Secretary, he shall apportion said taxes to the taxing counties in the same proportion that the local sales and use taxes collected each month in a taxing county bears to the total local sales and use taxes collected in all taxing counties each month during the quarter for which a distribution is to be made, and the total net proceeds shall then be distributed as above provided.

The board of county commissioners in each taxing county shall, by resolution adopted during the month of April of each year, determine which of the two foregoing methods of distribution shall be in effect in the county during the next succeeding fiscal year. In order for such resolution to be effective, a certified copy thereof must be delivered to the Secretary of Revenue at his office in Raleigh within 15 calendar days after its adoption. If the board fails to adopt any resolution or if it fails to adopt a method of distribution not then in effect in the county, or if a certified copy of the resolution is not timely delivered to the Secretary, the method of distribution then in effect in the county shall continue in effect for the following fiscal year. The method of distribution in effect on the first of July of each fiscal year shall apply to every distribution made during that fiscal year. (1971, c. 77, s. 2; 1973, c. 476, s. 193; c. 752; 1979, c. 12, s. 1; 1979, 2nd Sess., c. 1134, s. 49; 1981, c. 4, s. 2; 1985 (Reg. Sess., 1986), c. 934, s. 2.)

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective September 1, 1986, substituted "cities as defined by G.S. 153A-1(1)" for "incorporated cities and towns" at the end of the first paragraph.

ARTICLE 40.

Supplemental Local Government Sales and Use Taxes.

§ 105-486. Distribution of additional taxes.

(1983, c. 908, s. 1; 1985 (Reg. Sess., 1986), c. 906, s. 2.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, only the catchline is set out.

Effect of Amendments. — The 1985 (Reg.

Sess., 1986) amendment, effective July 7, 1986, deleted "and use" following "Distribution" in the catchline to this section.

ARTICLE 41.

Alternative Local Government Sales and Use Taxes.

§ 105-493. Distribution of taxes.

(1983, c. 908, s. 1; 1985 (Reg. Sess., 1986), c. 906, s. 2.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, only the catchline is set out.

Effect of Amendments. — The 1985 (Reg.

Sess., 1986) amendment, effective July 7, 1986, deleted "and use" following "Distribution" in the catchline to this section.

ARTICLE 42.

*Additional Supplemental Local Government
Sales and Use Taxes.***§ 105-495. Short title.**

This Article shall be known as the Additional Supplemental Local Government Sales and Use Tax Act. (1985 (Reg. Sess., 1986), c. 906, s. 1.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 906, s. 3 makes this Article effective upon ratification. The act was ratified July 7, 1986.

§ 105-496. Purpose and intent.

It is the purpose of this Article to afford the counties and cities of this State an opportunity to obtain an added source of revenue with which to meet their growing financial needs, and to reduce their reliance on other revenues, such as the property tax and federal revenue sharing, by providing all counties of the State that are subject to this Article with authority to levy one-half percent ($1/2\%$) sales and use taxes. (1985 (Reg. Sess., 1986), c. 906, s. 1.)

§ 105-497. Limitations.

This Article applies only to counties that levy one percent (1%) sales and use taxes under Article 39 of this Chapter or under Chapter 1096 of the 1967 Session Laws and also levy one-half percent ($1/2\%$) local sales and use taxes under Article 40 of this Chapter. (1985 (Reg. Sess., 1986), c. 906, s. 1.)

§ 105-498. Levy and collection of additional taxes.

Any county subject to this Article may levy one-half percent ($1/2\%$) local sales and use taxes in addition to any other State and local sales and use taxes levied pursuant to law. Except as provided in this Article, the adoption, levy, collection, distribution, administration, and repeal of these additional taxes shall be in accordance with Article 39 of this Chapter. In applying the provisions of Article 39 of this Chapter to this Article, references to "this Article" mean Article 42 of Chapter 105. All taxes levied pursuant to this Article shall be collected by the Secretary and may not be collected by a taxing county. The exemption for building materials in G.S. 105-468.1 does not apply to taxes levied under this Article. (1985 (Reg. Sess., 1986), c. 906, s. 1.)

§ 105-499. Form of ballot.

(a) The form of the question to be presented on a ballot for a special election concerning the additional taxes authorized by this Article shall be: "FOR one-half percent ($1/2\%$) local sales and use taxes in addition to the current one and one-half percent ($1\frac{1}{2}\%$) local sales and use taxes" or "AGAINST one-half percent ($1/2\%$) local sales and use taxes in addition to the current one and one-half percent ($1\frac{1}{2}\%$) local sales and use taxes."

(b) The form of the question to be presented on a ballot for a special election concerning the repeal of any additional taxes levied pursuant to this Article

shall be: "FOR repeal of the additional one-half percent ($1\frac{1}{2}\%$) local sales and use taxes, thus reducing local sales and use taxes to one and one-half percent ($1\frac{1}{2}\%$)" or "AGAINST repeal of the additional one-half percent ($1\frac{1}{2}\%$) local sales and use taxes, thus reducing local sales and use taxes to one and one-half percent ($1\frac{1}{2}\%$)." (1985 (Reg. Sess., 1986), c. 906, s. 1.)

§ 105-500. Retail collection bracket.

The following bracket applies to collections by retailers in a county that levies additional sales and use taxes under this Article:

- (1) No amount on sales of less than 9¢;
- (2) 1¢ on sales of 9¢ to 23¢;
- (3) 2¢ on sales of 24¢ to 48¢;
- (4) 3¢ on sales of 49¢ to 67¢;
- (5) 4¢ on sales of 68¢ to 85¢;
- (6) 5¢ on sales of 86¢ to \$1.09; and
- (7) Sales of over \$1.09 — straight five percent (5%) with major fractions governing. (1985 (Reg. Sess., 1986), c. 906, s. 1.)

§ 105-501. Distribution of additional taxes.

The Secretary shall, on a quarterly basis, distribute the net proceeds of the additional one-half percent ($1\frac{1}{2}\%$) sales and use taxes levied under this Article to the taxing counties on a per capita basis according to the most recent annual population estimates certified to the Secretary by the State Budget Officer. The amount distributed to a taxing county shall then be divided among the county and the municipalities located in the county in accordance with the method by which the one percent (1%) sales and use taxes levied in that county pursuant to Article 39 of this Chapter or Chapter 1096 of the 1967 Session Laws are distributed.

If any taxes levied under this Article by a county have not been collected in that county for a full quarter because of the levy or repeal of the taxes, the Secretary shall distribute a pro rata share to that county for that quarter based on the number of months the taxes were collected in that county during the quarter. (1985 (Reg. Sess., 1986), c. 906, s. 1.)

§ 105-502. Use of additional tax revenue by counties.

(a) Except as provided by subsection (b) of this section, revenue received by a county under this Article shall be subject to the following restrictions:

- (1) Sixty percent (60%) of the revenues received by the county during the first two fiscal years in which the tax is in effect;
- (2) Fifty percent (50%) of the revenues received by the county during the next two fiscal years;
- (3) Forty percent (40%) of the revenues received by the county during the next four fiscal years;
- (4) Thirty percent (30%) of the revenues received by the county during the next two fiscal years; and
- (5) Twenty percent (20%) of the revenues received by the county during the next fiscal year may be used by the county only for public school capital outlay purposes or to retire any indebtedness incurred by the county for these purposes during the period beginning five years prior to the date the taxes took effect.

(b) The Local Government Commission may, upon petition by a county, authorize a county to use part or all of its tax revenue, otherwise required by subsection (a) to be used for public school capital outlay purposes, for any lawful purpose. The petition shall be in the form prescribed by the Local Government Commission and shall demonstrate that the county can provide for its public school capital needs without restricting the use of part or all of the designated amount of the additional one-half percent ($\frac{1}{2}\%$) sales and use tax revenue for these purposes.

In making its decision, the Local Government Commission may consider information from sources other than the petition. The Commission shall issue a written decision on each petition stating the findings of the Commission concerning the public school capital needs of the petitioning county and the percentage of revenue otherwise restricted by subsection (a) that may be used by the petitioning county for any lawful purpose.

Decisions of the Commission allowing counties to use a percentage of their tax revenue that would otherwise be restricted under subsection (a) for any lawful purpose are final and shall continue in effect until the restrictions imposed by those subsections expire. A county whose petition is denied, in whole or in part, by the Commission may subsequently submit a new petition to the Commission.

(c) A county may expend part or all of the revenue restricted for public school capital needs pursuant to subsection (a) in the fiscal year in which the revenue is received, or the county may place part or all of this revenue in a capital reserve fund and shall specifically identify this revenue in accordance with Chapter 159 of the General Statutes.

(d) For purposes of this section in determining the number of fiscal years in which one-half percent ($\frac{1}{2}\%$) sales and use taxes levied under this Article have been in effect in a county, these taxes are considered to be in effect only from the effective date of the levy of these taxes and are considered to be in effect for a full fiscal year during the first year in which these taxes were in effect, regardless of the number of months in that year in which the taxes were actually in effect. (1985 (Reg. Sess., 1986), c. 906, s. 1.)

§ 105-503. Report on county spending on public school capital outlay.

(a) It is the purpose of this Article for counties to appropriate funds generated under this Article to increase the level of county spending for public elementary and secondary school capital outlay (including retirement of indebtedness incurred by the county for this purpose) above and beyond the level of spending prior to the levy of the additional tax authorized under this Article.

(b) On or before February 15 of each year the Local Government Commission shall furnish to the General Assembly a report of the level of each county's appropriations for public school capital outlay (including retirement of indebtedness incurred and monies reserved for this purpose). The report shall include the amount each county has provided for public school capital outlay for a period including at a minimum the most recent five fiscal years, estimates of public school facility needs, the proportion of revenue from taxes collected under Article 40 of this Chapter that has been provided for public school capital outlay purposes (including retirement of indebtedness incurred and monies reserved for these purposes), the proportion of revenue collected under this Article that has been expended for a public school capital outlay purposes (including retirement of indebtedness incurred and monies reserved

for these purposes), and any other factors it deems relevant to carrying out the intent stated in subsection (a) of this section.

(c) Any local board of education may petition the Local Government Commission to make a finding that the funds provided by a county for public school capital outlay purposes are, within the financial resources available and consistent with the fiscal policies of the Board of County Commissioners, inadequate to meet the public school capital outlay needs within that county and that the Board of County Commissioners has not complied with the requirements or intent of this Article. The petition shall be in the form prescribed by the Commission. In making its finding, the Commission shall consider the facts it is required to report under G.S. 105-503, as well as any other information it deems necessary. The Commission shall report its findings on such petition, together with any recommendations it deems appropriate, to the Joint Legislative Commission on Governmental Operations. (1985 (Reg. Sess., 1986), c. 906, s. 1.)

§ 105-504. Use of additional tax revenue by municipalities.

(a) Except as provided in subsection (b) or (e), forty percent (40%) of the revenue received by a municipality from additional one-half percent ($\frac{1}{2}\%$) sales and use taxes levied under this Article during the first five fiscal years in which the additional taxes are in effect in the municipality and thirty percent (30%) of the revenue received by a municipality from these taxes in the second five fiscal years in which the taxes are in effect in the municipality may be used by the municipality only for water and sewage capital outlay purposes or to retire any indebtedness incurred by the municipality for these purposes.

(b) The Local Government Commission may, upon petition by a municipality, authorize a municipality to use part or all its tax revenue, otherwise required by subsection (a) to be used for water and sewage capital needs, for any lawful purpose. The petition shall be in the form prescribed by the Local Government Commission and shall demonstrate that the municipality can provide for its water and sewage capital needs without restricting the use of part or all of the designated amount of the additional one-half percent ($\frac{1}{2}\%$) sales and use tax revenue for these purposes.

In making its decision, the Local Government Commission may consider information from sources other than the petition. The Commission shall issue a written decision on each petition stating the findings of the Commission concerning the water and sewage capital needs of the petitioning municipality and the percentage of revenue otherwise restricted by subsection (a) that may be used by the petitioning municipality for any lawful purpose.

Decisions of the Commission allowing municipalities to use a percentage of their tax revenue that would otherwise be restricted under subsection (a) for any lawful purpose are final and shall continue in effect until the restriction imposed by that subsection expires. A municipality whose petition is denied, in whole or in part, by the Commission may subsequently submit a new petition to the Commission.

(c) For purposes of determining the number of fiscal years in which one-half percent ($\frac{1}{2}\%$) sales and use taxes levied under this Article have been in effect in a municipality, these taxes are considered to be in effect only from the effective date of the levy of these taxes and are considered to be in effect for a full fiscal year during the first year in which these taxes were in effect, regardless of the number of months in that year in which the taxes were actually in effect.

(d) A municipality may expend part of all of the revenue restricted for water and sewage capital needs pursuant to subsection (a) in the fiscal year in which the revenue is received, or the municipality may place part or all of this revenue in a capital reserve fund and shall specifically identify this revenue in accordance with Chapter 159 of the General Statutes.

(e) An authorization received by a municipality under G.S. 105-487(c) to use all or part of its tax revenue for any lawful purpose, which is still in effect during any period during which revenues are received under this Article shall, to the extent and duration of its applicability, also apply to the use of revenues received under this Article. (1985 (Reg. Sess., 1986), c. 906, s. 1.)

Chapter 105A.

Setoff Debt Collection Act.

Article 1.

In General.

Sec.

105A-2. Definitions.

ARTICLE 1.

In General.

§ 105A-2. Definitions.

As used in this Article:

(1) "Claimant agency" means and includes:

- a. The State Education Assistance Authority as enabled by Article 23 of Chapter 116 of the General Statutes;
- b. The North Carolina Department of Human Resources when in the exercise of its authority to collect health profession student loans made pursuant to G.S. 131-121;
- c. The North Carolina Department of Human Resources when in the performance of its duties under the Medical Assistance Program enabled by Chapter 108, Article 2, Part 5, and any county operating the same Program at the local level, when and only to the extent such a county is in the performance of Medical Assistance Program collection functions;
- d. The North Carolina Department of Human Resources when in the performance of its duties, under the Child Support Enforcement Program as enabled by Chapter 110, Article 9 and Title IV, Part D of the Social Security Act to obtain indemnification for past paid public assistance or to collect child support arrearages owed to an individual receiving program services and any county operating the program at the local level, when and only to the extent that the county is engaged in the performance of those same duties.
- e. The University of North Carolina, including its constituent institutions as specified by G.S. 116-2(4);
- f. The North Carolina Memorial Hospital in the conduct of its financial affairs and operations pursuant to G.S. 116-37;
- g. The Board of Governors of the University of North Carolina and the State Board of Education through the College Scholarship Loan Committee when in the performance of its duties of administering the Scholarship Loan Fund for Prospective College Teachers enabled by Chapter 116, Article 5;
- h. The Office of the North Carolina Attorney General on behalf of any State agency when the claim has been reduced to a judgment;
- i. The State Board of Education through community colleges, technical institutes, and industrial education centers as enabled by Chapter 115D in the conduct of their financial affairs and operations;

- j. State facilities as listed in G.S. 122C-181(a), School for the Deaf at Morganton, North Carolina Sanatorium at McCain, Western Carolina Sanatorium at Black Mountain, Eastern North Carolina Sanatorium at Wilson, and Gravelly Sanatorium at Chapel Hill under Chapter 143, Article 7; Governor Morehead School under Chapter 115, Article 40; Central North Carolina School for the Deaf under Chapter 115, Article 41; Wright School for Treatment and Education of Emotionally Disturbed Children under Chapter 122, Article 12A; the Lenox Baker Children's Hospital under Chapter 131, Article 14; and these same institutions by any other names by which they may be known in the future;
 - k. The North Carolina Department of Revenue;
 - l. The Administrative Office of the Courts;
 - m. The Division of Forest Resources of the Department of Natural Resources and Community Development;
 - n. The Administrator of the Teachers' and State Employees' Comprehensive Major Medical Plan, established in Article 3 of General Statutes Chapter 135;
 - o. The State Board of Education through the Superintendent of Public Instruction when in the performance of his duties of administering the Scholarship Loan Fund for Prospective Teachers enabled by Chapter 115C, Article 32A and the scholarship loan and grant programs enabled by Chapter 115C, Article 24C, Part 1.
 - p. The Board of Trustees of the Teachers' and State Employees' Retirement System and the Board of Trustees of the Local Governmental Employees' Retirement System in the performance of their duties pursuant to Chapters 120, 128, 135 and 143 of the General Statutes.
 - q. The North Carolina Teaching Fellows Commission in the performance of its duties pursuant to Chapter 115C, Article 24C, Part 2.
- (2) "Debtor" means any individual owing money to or having a delinquent account with any claimant agency which obligation has not been adjudicated satisfied by court order, set aside by court order, or discharged in bankruptcy.
 - (3) "Debt" means any liquidated sum due and owing any claimant agency which has accrued through contract, subrogation, tort, operation of law, or any other legal theory regardless of whether there is an outstanding judgment for that sum.
 - (4) "Department" means the North Carolina Department of Revenue.
 - (5) "Refund" means any individual's North Carolina income tax refund.
 - (6) "Net proceeds collected" means gross proceeds collected through final setoff against a debtor's refund minus any collection assistance fee charged by the Department. (1979, c. 801, s. 94; 1981, c. 724; 1983, c. 922, s. 21.11; 1983 (Reg. Sess., 1984), c. 1034, s. 10.2; 1985, c. 589, s. 33; c. 649, s. 6; c. 747; 1985 (Reg. Sess., 1986), c. 1014, s. 63(e), (f).)

Editor's Note. —

Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 243, contains a severability clause.

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, ef-

fective July 15, 1986, inserted "and the scholarship loan and grant programs enabled by Chapter 115C, Article 24C, Part 1" at the end of subdivision (1)o and added subdivision (1)q.

Chapter 106.
Agriculture.

Article 1B.

State Farm Operations Commission.

Sec.

106-26.20. Use of products.

Article 49C.

**Federal and State Cooperation as to
Meat Inspection; Implementation
of Inspection.**

106-549.29. North Carolina Department of
Agriculture responsible for coop-
eration.

Article 49D.

Poultry Products Inspection Act.

106-549.52. State and federal cooperation.

Article 58.

North Carolina Biologics Law of 1981.

106-715 to 106-718. [Reserved.]

Article 59.

**Northeastern North Carolina Farmers
Market Commission.**

106-719. Purpose.

106-720. Northeastern Farmers Market Com-
mission established; membership.

106-721. Powers and duties of the Commis-
sion; powers and duties of the
Commissioner of Agriculture and
the Board of Agriculture.

106-722 to 106-725. [Reserved.]

Article 60.

**Southeastern North Carolina Farmers
Market Commission.**

106-726. Purpose.

Sec.

106-727. Southeastern Farmers Market Com-
mission established; membership.

106-728. Powers and duties of the Commis-
sion; powers and duties of the
Commissioner of Agriculture and
the Board of Agriculture.

106-729 to 106-734. [Reserved.]

Article 61.

Preservation of Farmland.

106-735. Short title and purpose.

106-736. Farmland preservation programs au-
thorized.

106-737. Qualifying farmland.

106-737.1. Revocation of conservation agree-
ment.

106-738. Voluntary agricultural districts.

106-739. Agricultural advisory board.

106-740. Public hearings on condemnation of
farmland.

106-741. Record notice of proximity to
farmlands.

106-742. Waiver of water and sewer assess-
ments.

106-743. County ordinances.

106-744 to 106-749. [Reserved.]

Article 62.

Grape Growers Council.

106-750. North Carolina Grape Growers
Council—Creation; powers and
duties.

106-751. North Carolina Grape Growers
Council—Composition; terms; re-
imbursement.

ARTICLE 1B.

State Farm Operations Commission.

§ 106-26.20. Use of products.

The Department of Human Resources shall have priority on those food products and services produced by the State farm operations program which

are deemed essential to their institutional needs. The value of such food products and services provided by the State farm operations program shall be based on mutually negotiated agreements between the Commission and the respective agencies. To the extent food products are available from the State farm operations program, the Department of Human Resources and other State agencies shall use such products, unless provided by other state-owned farm operations. In event of a dispute between departments, the Governor shall determine the forms of such agreement and method of payment, either by cash or book transfer. Prior to taking any action under this section, the Governor may consult with the Advisory Budget Commission. (1977, c. 1122, s. 8; 1983, c. 717, s. 21; 1985 (Reg. Sess., 1986), c. 955, ss. 9, 10.)

Editor's Note. — Section 1 of the Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "This act may be cited as the Separation of Powers Act of 1986."

Section 127 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "If any part of this act shall be declared invalid by any court, this shall not affect any other part of this act."

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 1, 1986, deleted "after consultation with the Advisory Budget Commission" following "Governor" in the next-to-last sentence and added the last sentence.

ARTICLE 19B.

Plant Protection and Conservation Act.

§ 106-202.16. Criteria and procedures for placing plants on protected plant lists.

Editor's Note. — Session Laws 1985, c. 461, which, as noted in the 1985 Cumulative Supplement, added the Venus Fly Trap to the

North Carolina Protected Plants Lists, was repealed by Session Laws 1985 (Reg. Sess., 1986), c. 864.

ARTICLE 28B.

Regulation of Production, Distribution, etc., of Milk and Cream.

§ 106-266.14. Penalties.

CASE NOTES

Stated in *State v. Felts*, — N.C. App. —, 339 S.E.2d 99 (1986).

ARTICLE 49C.

*Federal and State Cooperation as to Meat Inspection;
Implementation of Inspection.***§ 106-549.29. North Carolina Department of Agriculture responsible for cooperation.**

(b) In such cooperative efforts, the North Carolina Department of Agriculture is authorized to accept from said Secretary advisory assistance in planning and otherwise developing the State program, technical and laboratory assistance and training (including necessary curricular and instructional materials and equipment), and financial and other aid for administration of such a program.

(1969, c. 893, s. 15; 1985 (Reg. Sess., 1986), c. 1014, s. 155(a).)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 243, contains a severability clause.

Effect of Amendments. — The 1985 (Reg.

Sess., 1986) amendment, effective July 15, 1986, and also applicable to the state budget for fiscal year 1985-86, deleted the last sentence of subsection (b), which authorized payment of part of the estimated total cost of the cooperative program.

ARTICLE 49D.

*Poultry Products Inspection Act.***§ 106-549.52. State and federal cooperation.**

(b) In such cooperative efforts, the Department of Agriculture is authorized to accept from said Secretary advisory assistance in planning and otherwise developing the State program, technical and laboratory assistance and training (including necessary curricular and instructional materials and equipment), and financial and other aid for administration of such a program.

(1971, c. 677, s. 5; 1985 (Reg. Sess., 1986), c. 1014, s. 155(b).)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 243, contains a severability clause.

Effect of Amendments. — The 1985 (Reg.

Sess., 1986) amendment, effective July 15, 1986, and also applicable to the state budget for fiscal year 1985-86, deleted the last sentence of subsection (b), relating to payment of part of the estimated total cost of the cooperative program.

ARTICLE 56.

*North Carolina Commercial Fertilizer Law.***§ 106-662. Sampling, inspection and testing.**

CASE NOTES

Applied in *L. Harvey & Son Co. v. Jarman*,
76 N.C. App. 191, 333 S.E.2d 47 (1985).

ARTICLE 57.

*Nuisance Liability of Agricultural Operations.***§ 106-700. Legislative determination and declaration of policy.**

CASE NOTES

Cited in *Mayes v. Tabor*, 77 N.C. App. 197,
334 S.E.2d 489 (1985).

§ 106-701. When agricultural operation, etc., not constituted nuisance by changed conditions in locality.

CASE NOTES

Applied in *Mayes v. Tabor*, 77 N.C. App.
197, 334 S.E.2d 489 (1985).

ARTICLE 58.

North Carolina Biologics Law of 1981.

§§ 106-715 to 106-718: Reserved for future codification purposes.

ARTICLE 59.

*Northeastern North Carolina Farmers
Market Commission.***§ 106-719. Purpose.**

The purpose of this Article is to establish a farmers market in northeastern North Carolina that will facilitate the sale and marketing of agricultural

commodities produced in northeastern North Carolina, encourage increased production and sale of these agricultural commodities, and encourage the cultivation and diversification of agricultural commodities in northeastern North Carolina. (1985 (Reg. Sess., 1986), c. 1014, s. 158(a).)

Editor's Note. — Section 244 of Session Laws 1985 (Reg. Sess., 1986), c. 1014, makes this Article effective July 1, 1986. Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 243, contains a severability clause.

§ 106-720. Northeastern Farmers Market Commission established; membership.

(a) There is established the Northeastern North Carolina Farmers Market Commission. The Commission shall be located administratively in the Department of Agriculture but shall exercise its exclusive powers and functions, herein granted, independently of the Commissioner of Agriculture and the Board of Agriculture.

(b) The Commission shall consist of nine members, as follows:

(1) The Commissioner of Agriculture;

(2) Four members appointed by the General Assembly upon the recommendation of the President of the Senate in accordance with G.S. 120-121; and

(3) Four members appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives in accordance with G.S. 120-121, one of whom shall be designated to serve as chairman as provided in subsection (d) of this section.

(c) Members of the Commission appointed by the General Assembly shall serve for staggered four-year terms. To achieve staggered terms, the initial terms of two members appointed by the General Assembly upon the recommendation of the President of the Senate and two members appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives shall be for two years.

(d) The person designated by the General Assembly as chairman pursuant to subsection (b)(3) of this section shall call the organizational meeting of the Commission and shall serve as chairman until the Commission elects its own chairman. Thereafter, the Commission shall elect its own chairman who shall serve at the pleasure of the Commission.

(e) The Commission shall meet on a quarterly basis and otherwise upon the call of the chairman.

(f) Members of the Commission who are not State officers or employees shall receive per diem and necessary travel and subsistence expenses in accordance with G.S. 138-5. Members who are State officers or employees shall be reimbursed for travel and subsistence in accordance with G.S. 138-6. (1985 (Reg. Sess., 1986), c. 1014, s. 158(a).)

§ 106-721. Powers and duties of the Commission; powers and duties of the Commissioner of Agriculture and the Board of Agriculture.

(a) The Commission shall:

- (1) Select the site for the Northeastern North Carolina Farmers Market;
- (2) Make all programming decisions on the construction of the Farmers Market; and
- (3) Advise the Commissioner of Agriculture on the operation of the Farmers Market.

(b) The Commissioner shall:

- (1) Appoint an advisory board consisting of one member from each of the counties the Commissioner determines will be served by the Northeastern North Carolina Farmers Market. This advisory board shall advise the Northeastern North Carolina Farmers Market Commission.
- (2) Operate the Northeastern North Carolina Farmers Market. (1985 (Reg. Sess., 1986), c. 1014, s. 158(a).)

§§ 106-722 to 106-725: Reserved for future codification purposes.

ARTICLE 60.

*Southeastern North Carolina Farmers
Market Commission.*

§ 106-726. Purpose.

The purpose of this Article is to establish a farmers market in southeastern North Carolina that will facilitate the sale and marketing of agricultural commodities produced in southeastern North Carolina, encourage increased production and sale of these agricultural commodities, and encourage the cultivation and diversification of agricultural commodities in southeastern North Carolina. (1985 (Reg. Sess., 1986), c. 1014, s. 159(a).)

Editor's Note. — Section 244 of Session Laws 1985 (Reg. Sess., 1986), c. 1014, makes this Article effective July 1, 1986. Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 243, contains a severability clause.

§ 106-727. Southeastern Farmers Market Commission established; membership.

(a) There is established the Southeastern North Carolina Farmers Market Commission. The Commission shall be located administratively in the Department of Agriculture but shall exercise its exclusive powers and functions, herein granted, independently of the Commissioner of Agriculture and the Board of Agriculture.

(b) The Commission shall consist of nine members, as follows:

- (1) The Commissioner of Agriculture;
- (2) Four members appointed by the General Assembly upon the recommendation of the President of the Senate in accordance with G.S.

120-121, one of whom shall be designated to serve as chairman as provided in subsection (d) of this section; and

- (3) Four members appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives in accordance with G.S. 120-121.

(c) Members of the Commission appointed by the General Assembly shall serve for staggered four-year terms. To achieve staggered terms, the initial terms of two members appointed by the General Assembly upon the recommendation of the President of the Senate and two members appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives shall be for two years.

(d) The person designated by the General Assembly as chairman pursuant to subsection (b)(2) of this section shall call the organizational meeting of the Commission and shall serve as chairman until the Commission elects its own chairman. Thereafter, the Commission shall elect its own chairman who shall serve at the pleasure of the Commission.

(e) The Commission shall meet on a quarterly basis and otherwise upon the call of the chairman.

(f) Members of the Commission who are not State officers or employees shall receive per diem and necessary travel and subsistence expenses in accordance with G.S. 138-5. Members who are State officers or employees shall be reimbursed for travel and subsistence in accordance with G.S. 138-6. (1985 (Reg. Sess., 1986), c. 1014, s. 159(a).)

§ 106-728. Powers and duties of the Commission; powers and duties of the Commissioner of Agriculture and the Board of Agriculture.

(a) The Commission shall:

- (1) Select the site for the Southeastern North Carolina Farmers Market;
- (2) Make all programming decisions on the construction of the Farmers Market; and
- (3) Advise the Commissioner of Agriculture on the operation of the Farmers Market.

(b) The Commissioner shall:

- (1) Appoint an advisory board consisting of one member from each of the counties the Commissioner determines will be served by the Southeastern North Carolina Farmers Market. This advisory board shall advise the Southeastern North Carolina Farmers Market Commission.
- (2) Operate the Southeastern North Carolina Farmers Market. (1985 (Reg. Sess., 1986), c. 1014, s. 159(a).)

§§ 106-729 to 106-734: Reserved for future codification purposes.

ARTICLE 61.

*Preservation of Farmland.***§ 106-735. Short title and purpose.**

(a) This article shall be known as "The Farmland Preservation Enabling Act."

(b) The purpose of this Article is to authorize counties to undertake a series of programs to encourage the preservation of farmland as defined herein. (1985 (Reg. Sess., 1986), c. 1025, s. 1.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1025, s. 2, makes this Article effective July 16, 1986.

§ 106-736. Farmland preservation programs authorized.

A county may by ordinance establish a farmland preservation program under this Article. The ordinance may authorize qualifying farms, as defined in G.S. 106-737, to take advantage of one or more of the benefits authorized by the remaining sections of this Article. (1985 (Reg. Sess., 1986), c. 1025, s. 1.)

§ 106-737. Qualifying farmland.

In order for farmland to qualify under this Article, it must be real property that:

- (1) Is participating in the farm present-use-value taxation program established by G.S. 105-277.2 through 105-277.7 or is otherwise determined by the county to meet all the qualifications of this program set forth in G.S. 105-277.3;
- (2) Is certified by the Soil Conservation Service of the United States Department of Agriculture as being a farm on which at least two-thirds of the land is composed of soils that (i) are best suited for providing food, seed, fiber, forage, timber, and oil seed crops, (ii) have good soil qualities, (iii) are favorable for all major crops common to the county where the land is located, (iv) have a favorable growing season, and (v) receive the available moisture needed to produce high yields an average of eight out of 10 years; or on which at least two-thirds of the land has been actively used in agricultural, horticultural or forestry operations as defined in G.S. 105-277.2(1), (2), and (3) during each of the five previous years, measured from the date on which the determination must be made as to whether the land in question qualifies;
- (3) Is managed in accordance with the Soil Conservation Service defined erosion control practices that are addressed to highly erodable land; and
- (4) Is the subject of a conservation agreement, as defined in G.S. 121-35, between the county and the owner of such land that prohibits nonfarm use or development of such land for a period of at least 10 years, except for the creation of not more than three lots that meet applicable county zoning and subdivision regulations. (1985 (Reg. Sess., 1986), c. 1025, s. 1.)

§ 106-737.1. Revocation of conservation agreement.

By written notice to the county, the landowner may revoke this conservation agreement. Such revocation shall result in loss of qualifying farm status. (1985 (Reg. Sess., 1986), c. 1025, s. 1.)

§ 106-738. Voluntary agricultural districts.

(a) An ordinance adopted under this Article shall provide:

- (1) For the establishment of voluntary agricultural districts consisting initially of at least the number of contiguous acres of qualifying farmland or the number of qualifying farms deemed appropriate by the board of county commissioners;
- (2) For the formation of such districts upon the execution by the owners of the requisite acreage of an agreement to sustain agriculture in the district;
- (3) That the form of this agreement must be reviewed and approved by an agricultural advisory board established under G.S. 106-739 or some other county board or official;
- (4) That each such district have a representative on the agricultural advisory board established under G.S. 106-739.

(b) The purpose of such agricultural districts shall be to increase identity and pride in the agricultural community and its way of life and to increase protection from nuisance suits and other negative impacts on properly managed farms. The county may take such action as it deems appropriate to encourage the formation of such districts and to further their purposes and objectives. (1985 (Reg. Sess., 1986), c. 1025, s. 1.)

§ 106-739. Agricultural advisory board.

An ordinance adopted under this Article shall provide for the establishment of an agricultural advisory board, organized and appointed as the county shall deem appropriate. The county may confer upon this advisory board authority to:

- (1) Review and make recommendations concerning the establishment and modification of agricultural districts;
- (2) Review and make recommendations concerning any ordinance or amendment adopted or proposed for adoption under this Article;
- (3) Hold public hearings on public projects likely to have an impact on agricultural operations, particularly if such projects involve condemnation of all or part of any qualifying farm;
- (4) Advise the board of county commissioners on projects, programs, or issues affecting the agricultural economy or way of life within the county;
- (5) Perform other related tasks or duties assigned by the board of county commissioners. (1985 (Reg. Sess., 1986), c. 1025, s. 1.)

§ 106-740. Public hearings on condemnation of farmland.

An ordinance adopted under this Article may provide that no State or local public agency or governmental unit may formally initiate any action to condemn any interest in qualifying farmland within a voluntary agricultural district until such agency has requested the local agricultural advisory board established under G.S. 106-739 to hold a public hearing on the proposed condemnation.

- (1) Following a public hearing held pursuant to this section, the board shall prepare and submit written findings and a recommendation to the decision-making body of the agency proposing acquisition.
- (2) The board designated to hold the hearing shall have 30 days after receiving a request under this section to hold the public hearing and submit its findings and recommendations to the agency.
- (3) The agency may not formally initiate a condemnation action while the proposed condemnation is properly before the advisory board within these time limitations. (1985 (Reg. Sess., 1986), c. 1025, s. 1.)

§ 106-741. Record notice of proximity to farmlands.

(a) Any county that has a computerized land records system may require that such records include some form of notice reasonably calculated to alert a person researching the title of a particular tract that such tract is located within one-half mile of a poultry, swine, or dairy qualifying farm or within 600 feet of any other qualifying farm or within one-half mile of a voluntary agricultural district.

(b) In no event shall the county or any of its officers, employees, or agents be held liable in damages for any misfeasance, malfeasance, or nonfeasance occurring in good faith in connection with the duties or obligations imposed by any ordinance adopted under subsection (a).

(c) In no event shall any cause of action arise out of the failure of a person researching the title of a particular tract to report to any person the proximity of the tract to a qualifying farm or voluntary agricultural district as defined in this Article. (1985 (Reg. Sess., 1986), c. 1025, s. 1.)

§ 106-742. Waiver of water and sewer assessments.

(a) A county may provide by ordinance that its water and sewer assessments be held in abeyance, with or without interest, for farms, whether inside or outside of a voluntary agricultural district, until improvements on such property are connected to the water or sewer system for which the assessment was made.

(b) The ordinance may provide that, when the period of abeyance ends, the assessment is payable in accordance with the terms set out in the assessment resolution.

(c) Statutes of limitations are suspended during the time that any assessment is held in abeyance without interest.

(d) If an ordinance is adopted under this section, then the assessment procedures followed under Article 9 of Chapter 153A shall conform to the terms of this ordinance with respect to qualifying farms that entered into conservation agreements while such ordinance was in effect.

(e) Nothing in this section is intended to diminish the authority of counties to hold assessments in abeyance under G.S. 153A-201. (1985 (Reg. Sess., 1986), c. 1025, s. 1.)

§ 106-743. County ordinances.

A county adopting an ordinance under this Article may consult with the North Carolina Commissioner of Agriculture or his staff before adoption, and shall record the ordinance with the Commissioner's office after adoption. Thereafter, the county shall submit to the Commissioner at least once a year, a written report including the status, progress and activities of the county's farmland preservation program under this Article. (1985 (Reg. Sess., 1986), c. 1025, s. 1.)

§§ 106-744 to 106-749: Reserved for future codification purposes.

ARTICLE 62.*Grape Growers Council.***§ 106-750. North Carolina Grape Growers Council — Creation; powers and duties.**

There is created the North Carolina Grape Growers Council of the Department of Agriculture. The North Carolina Grape Growers Council shall have the following powers and duties:

- (1) To identify and implement methods for improving North Carolina's rank as a wine-producing State;
- (2) To assure orderly growth and development of North Carolina's grape and wine industry;
- (3) To achieve public awareness of the quality of North Carolina grapes and wine;
- (4) To coordinate the interaction of North Carolina's grape and wine industry with other segments of the State's economy such as tourism, retail trade, and horticulture;
- (5) To conduct methods of quality assurance of North Carolina's grape and wine industry to create a sound foundation for further growth;
- (6) To assist in the coordination of the activities of the various State agencies and other organizations contributing to the development of the grape and wine industry;
- (7) To receive and disburse funds;
- (8) To enter into contracts for the purpose of developing new or improved markets or marketing methods for wine and grape products;
- (9) To contract for research services to improve viticultural and enological practices in North Carolina;
- (10) To enter into agreements with any local, state, or national organizations or agency engaged in education for the purpose of disseminating information on wine or other viticultural projects;
- (11) To enter into contracts with commercial entities for the purpose of developing marketing, advertising, and other promotional programs designed to promote the orderly growth of the North Carolina grape and wine industry;
- (12) To acquire any licenses or permits necessary for performance of the duties of the Council; and
- (13) To develop a State Viticulture Plan that identifies problems and constraints of the viticultural industry, proposes solutions to those problems and delineates planning mechanisms for the orderly growth of the industry. (1985 (Reg. Sess., 1986), c. 974, s. 1.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 974, s. 2 makes this Article effective upon ratification, except subsection (b)

of § 106-751 is made effective only upon adequate funds being appropriated or otherwise made available for that purpose.

§ 106-751. North Carolina Grape Growers Council — Composition; terms; reimbursement.

(a) The North Carolina Grape Growers Council shall consist of 11 members appointed by the Commissioner of Agriculture in the following manner: seven commercial grape growers; three winery operators; and one retailer of North Carolina grape products. For purposes of this Article, a commercial grape grower is one who has at least three acres of grapes or sells ten thousand dollars (\$10,000) worth of grapes annually. The Commissioner shall appoint, within 30 days of the effective date of this act, four members for three-year terms, four members for two-year terms, and three members for one-year terms. Thereafter, members shall be appointed for four-year terms and shall serve until their successors are appointed and qualified. Any member of the Council may be reappointed for additional terms. Any appointment to fill a vacancy on the Council shall be for the balance of the unexpired term. Any member of the Council may be removed by the Commissioner for misfeasance, malfeasance, or nonfeasance.

(b) (For effective date see note) Members of the Council shall receive per diem and necessary travel and subsistence expenses in accordance with G.S. 138-5 from funds appropriated for the operation of the Council.

(c) All clerical and other services required by the Council may be provided by the Department of Agriculture.

(d) The Commissioner of Agriculture shall appoint a chairman who shall serve at the pleasure of the Commissioner.

(e) The Council may select a secretary who need not be a member of the Council.

(f) The Council shall meet when necessary as determined by the chairman or upon written request of a majority of the members.

(g) A majority of the Council shall constitute a quorum for the transaction of business. (1985 (Reg. Sess., 1986), c. 974, s. 1.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 974, s. 2 makes this Article effective upon ratification, except subsection (b)

of this section is made effective only upon adequate funds being appropriated or otherwise made available for that purpose.

Chapter 108A.
Social Services.

Article 2.

Programs of Public Assistance.

Part 2. Aid to Families with Dependent Children.

Sec.

108A-28. (Effective July 1, 1987 contingent on appropriation) Eligibility requirements; certain contributions to be disregarded.

108A-33. Granting or denial of assistance.

108A-39. Fraudulent misrepresentation.

108A-39.1. AFDC Emergency Assistance Program.

108A-39.2. Community Work Experience Program.

Part 5. Food Stamp Program.

Sec.

108A-53. Fraudulent misrepresentation.

Part 6. Medical Assistance Program.

108A-62. Therapeutic leave for medical assistance patients.

Article 6.

Protection of the Abused, Neglected or Exploited Disabled Adult Act.

108A-103. Duty of director upon receiving report.

ARTICLE 1.

County Administration.

Part 1. County Boards of Social Services.

§ 108A-9. Duties and responsibilities.

CASE NOTES

The county department of social services is merely an extension of the county. *Meares v. Brunswick County*, 615 F. Supp. 14 (E.D.N.C. 1985).

And Has No Sovereign Immunity. — Because the Brunswick County Department of

Social Services and the Brunswick County Board of Social Services are extensions of Brunswick County which does not enjoy sovereign immunity, neither do they have sovereign immunity. *Meares v. Brunswick County*, 615 F. Supp. 14 (E.D.N.C. 1985).

ARTICLE 2.

Programs of Public Assistance.

Part 1. Aid to the Aged and Disabled.

§ 108-25. Eligibility requirements.

Cross References. — As to the AFDC Emergency Assistance Program, see § 108A-39.1. As to the Community Work Experience Program, see § 108A-39.2.

Part 2. Aid to Families with Dependent Children.

§ 108A-28. (Effective July 1, 1987 contingent on appropriation) Eligibility requirements; certain contributions to be disregarded.

(a) Assistance shall be granted to any dependent child, as defined in G.S. 108A-24(3), who:

- (1) Is a resident of the State or whose mother was a resident when the child was born;
- (2) Has been deprived of parental support or care by reason of a parent's death, physical or mental incapacity, continued absence from the home, or unemployment under the eligibility requirements set forth in G.S. 108A-28(b);
- (3) Has no adequate means of support.

(b) Assistance shall be granted to a parent or relative, as specified in G.S. 108A-24(3), with whom a dependent child lives who:

- (1) Is assuming responsibility for the child's ongoing care;
- (2) Is a resident of the State;
- (3) Has no adequate means of support.

Assistance shall also be granted to two parents, whether natural, adoptive, or stepparents, with whom a dependent child lives, who meet the eligibility criteria set out in subdivisions (1), (2), and (3) of this subsection, and in applicable federal rules and regulations, and who are married to each other. (1937, c. 288, s. 35; 1939, c. 395, s. 1; 1941, c. 232; 1945, c. 615, s. 1; 1961, c. 533; 1965, c. 939, s. 1; 1967, c. 660; 1969, c. 546, s. 1; 1973, c. 714, ss. 1-3; c. 826; 1979, c. 162, s. 1; 1981, c. 275, s. 1; 1985 (Reg. Sess., 1986), c. 1014, s. 229 (a).)

For this section as in effect until July 1, 1987, and until State and federal funds are appropriated, see the 1985 Cumulative Supplement.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 243, contains a severability clause.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 1, 1987, provided State and federal funds are appropriated to implement it, rewrote subdivision (a)(2) and added the last paragraph of subsection (b).

§ 108A-33. Granting or denial of assistance.

(d) All rules and regulations of the Social Services Commission or the Department which govern eligibility for public assistance from State appropriations or the amount of public assistance shall be subject to the approval of the Director of the Budget. Prior to taking any action under this subsection, the Director of the Budget may consult with the Advisory Budget Commission. (1937, c. 288, ss. 15, 16, 45, 46; 1939, c. 395, s. 1; 1941, c. 232; 1945, c. 615, s. 1; 1947, c. 91, s. 3; 1953, c. 675, s. 12; 1959, c. 179, ss. 1, 2; 1969, c. 546, s. 1; 1971, c. 523, s. 1; 1973, c. 476, s. 138; 1977, 2nd Sess., c. 1219, s. 12; 1979, c. 702, s. 5; 1981, c. 275, s. 1; 1985, c. 122, s. 7; 1985 (Reg. Sess., 1986), c. 955, ss. 11, 12.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Section 1 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "This

act may be cited as the Separation of Powers Act of 1986."

Section 127 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "If any part of this act shall be declared invalid by any court, this shall not affect any other part of this act."

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 1, 1986, deleted "and consultation with the Advisory

Budget Commission" at the end of the first sentence of subsection (d) and added the second sentence of subsection (d).

§ 108A-39. Fraudulent misrepresentation.

(a) Any person whether provider or recipient, or person representing himself as such, who willfully and knowingly and with intent to deceive makes a false statement or representation or who fails to disclose a material fact and as a result of making a false statement or representation or failing to disclose a material fact obtains, for himself or another person, attempts to obtain for himself or another person, or continues to receive or enables another person to continue to receive public assistance in th amount of not more than four hundred dollars (\$400.00) is guilty of a misdemeanor, and upon conviction or plea of guilty shall be fined or imprisoned or both at the discretion of the court.

(b) Any person, whether provider or recipient, or person representing himself as such who willfully and knowingly with the intent to deceive makes a false statement or representation or fails to disclose a material fact and as a result of making a false statement or representation or failing to disclose a material fact, obtains for himself or another person, attempts to obtain for himself or another person, or continues to receive or enables another person to continue to receive public assistance in an amount of more than four hundred dollars (\$400.00) is guilty of a Class I felony.

(1937, c. 288, ss. 27, 57; 1963, cc. 1013, 1024, 1062; 1969, c. 546, s. 1; 1977, c. 604, s. 1; 1979, c. 510, s. 2; c. 907; 1981, c. 275, s. 1.)

Only Part of Section Set Out. — As the rest of the section was not affected, it is not set out.

Editor's Note. — Subsections (a) and (b) of

§ 108A-39 are set out above to correct a typographical error in the 1985 Cumulative Supplement.

§ 108A-39.1. AFDC Emergency Assistance Program.

The Social Services Commission shall adopt rules to implement the Aid to Families with Dependent Children-Emergency Assistance (AFDC-EA) Program. Effective November 1, 1986, the Department of Human Resources, Division of Social Services, shall provide emergency assistance to families whose family income does not exceed one hundred ten percent (110%) of the current federal poverty level as established by the U. S. Secretary of Health and Human Services and published annually in the Federal Register. Annual program benefits may not exceed five hundred dollars (\$500.00). Funding for the non-federal share of Emergency Assistance benefits shall be shared at a rate of fifty percent (50%) State participation and fifty percent (50%) county participation. (1985 (Reg. Sess., 1986), c. 1014, s. 119.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 244 makes this section effective July 1, 1986.

The second paragraph of Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 119 provides: "Of the funds appropriated in Section 2 of this act to the Department of Human Resources, Divi-

sion of Social Services, nine hundred twenty-two thousand seven hundred ninety dollars (\$922,790) shall be used to fund the State's participation in the Emergency Assistance Program."

Sessions Laws 1985 (Reg. Sess., 1986), c. 1014, s. 243 contains a severability clause.

§ 108A-39.2. Community Work Experience Program.

(a) The purpose of the Community Work Experience Program is to provide work and training for families receiving assistance under the Aid to Families with Dependent Children (AFDC) Program.

(b) Uniform program components shall be developed in the Community Work Experience Program for all program participants. The program components shall include the following:

- (1) Assessment of participant vocational and academic skills;
- (2) Development of an employability and training plan;
- (3) Job Preparation;
- (4) Job Development and Placement Services;
- (5) Job Training;
- (6) Work Experience;
- (7) Supportive Services; and
- (8) Post-termination services and follow-up.

(c) The County Departments of Social Services shall ensure that each participant is being provided necessary transportation and child care prior to requiring the participant to participate in a program component. The participant shall be reimbursed for any necessary expenses that are incurred in order to participate in a program component.

(d) Participants placed on work experience sites shall be placed for a period not to exceed nine months. After six months, if a participant is still on the worksite, a reevaluation of that participant's employability and placement plan shall occur. Health related problems that may keep a participant from participating in the program shall be taken into consideration prior to placing participants on work experience sites.

(e) Program participants shall be offered institutional skills training, on-the-job training, or other skills training that is consistent with their employability and training plan. This program shall be coordinated with skills training efforts through local Private Industry Councils and Service Delivery Areas under the Job Training Partnership Act, P.L. 97-300, and other federal, State, or local training programs.

(f) AFDC recipients who are enrolled in a General Equivalency Diploma program shall be excused from participation in the Community Work Experience Program.

(g) Program participants shall be provided a handbook outlining their rights as program participants. This handbook shall include a participant's right to appeal, and the obligation of the program to inform and protect a recipient's rights.

(h) The amount of time that a participant can be required to work at a work experience site shall be calculated by dividing the participant's net AFDC grant by minimum wage. For purposes of this section, the net AFDC grant is equal to the amount of a participant's AFDC grant minus the child support assigned to the State. In no event will a participant be placed at a work experience site for more than 50 hours a month.

(i) The General Assembly, through the Legislative Services Commission, may conduct an evaluation of the Community Work Experience Program. The evaluation should include an analysis of:

- (1) The program's impact in helping participants obtain unsubsidized employment;
- (2) The types of unsubsidized jobs that participants obtain as a result of the program and the average salary and the benefit package;
- (3) Job retention information, including retention rates after six, nine, and 12 months;
- (4) The issue of whether participants displace regular, paid employees;

- (5) The number of participants sanctioned from the program and the reason for the sanctions;
 - (6) The adequacy of the supportive services provided during a participant's participation in the program and upon obtaining unsubsidized employment;
 - (7) The adequacy of the job training opportunities in helping participants obtain the skills that would enable them to move permanently out of welfare;
 - (8) The costs of the program per participant, including the costs to the worksite sponsors, as compared to the savings to the State that are directly attributable to the program; and
 - (9) The participants' evaluation of the program in improving their assessment of the adequacy skills training and support services. The evaluation shall include a comparison of the Community Work Experience Program to other job training models that work with AFDC recipients, including Work Incentive Program (WIN), Job Training Partnership Act (JTPA), the Greensboro Compass program, Human Resource Development (HRD), the Raleigh Self-Sufficiency Demonstration project, and grant diversion.
- (j) The Department of Human Resources shall submit a plan to the United States Department of Health and Human Services to operate an AFDC grant diversion program for participants in a program. The Department shall solicit community involvement from the private and nonprofit sectors in developing the grant diversion plan and job placements. (1985 (Reg. Sess., 1986), c. 1014, s. 128(a)-(j).)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 244 makes this section effective July 1, 1986.

The first sentence of Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 128(a) provides: "Of the funds appropriated in Section 2 of this act to the Department of Human Resources for the Community Work Experience Program, the sum of six hundred thousand dollars (\$600,000) shall be used to expand the program into 18 new counties in 1986-87."

Sessions Laws 1985 (Reg. Sess., 1986), c. 1014, s. 128(k) provides: "(k) The Department of Human Resources shall report to the Joint Legislative Commission on Governmental Operations and the Fiscal Research Division by January 1987 on its progress in implementing the new program, the grant diversion, and the already existing programs."

Sessions Laws 1985 (Reg. Sess., 1986), c. 1014, s. 243 contains a severability clause.

Part 5. Food Stamp Program.

§ 108A-53. Fraudulent misrepresentation.

(a) Any person, whether provider or recipient or person representing himself as such, who knowingly obtains or attempts to obtain, or aids or abets any person to obtain by means of making a willfully false statement or representation or by impersonation or by failing to disclose material facts or in any manner not authorized by this Part or the regulations issued pursuant thereto, transfers with intent to defraud any food stamps or authorization cards to which he is not entitled in the amount of four hundred dollar (\$400.00) or less shall be guilty of a misdemeanor. Whoever knowingly obtains or attempts to obtain, or aids or abets any person to obtain by means of making a willfully false statement or representation or by impersonation or by failing to disclose material facts or in any manner not authorized by this Part or the regulations issued pursuant thereto, transfers with intent to defraud any food stamps or authorization cards to which he is not entitled in an

amount more than four hundred dollars (\$400.00) shall be guilty of a felony and shall be punished as in cases of larceny.

(1981, c. 275, s. 1.)

Only Part of Section Set Out. — As the rest of the section was not affected, it is not set out.

Editor's Note. — Subsection (a) of § 108A-53 is set out above to correct a typographical error in the 1985 Cumulative Supplement.

CASE NOTES

Cited in *State v. Wells*, 78 N.C. App. 769, 338 S.E.2d 573 (1986).

Part 6. Medical Assistance Program.

§ 108A-54. Authorization of Medical Assistance Program.

CASE NOTES

Calculation of Medicaid Reserve. — The Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), 42 U.S.C. § 1396a(a)-(10)(C)(i)(III), mandates that North Carolina use the "\$6,000/6% rule" for calculating what property should be excluded from a persons' Medicaid reserve, under which rule property may be excluded from an applicant's or recipient's reserve of property if it has equity value

of less than \$6,000 and earns an annual income equal to or greater than 6% of its value, but will be included if it has equity value greater than \$6,000 or earns an annual income of less than 6% of its value, because it is a part of a methodology for determining Supplemental Security Income Eligibility. *Morris ex rel. Simpson v. Morrow*, 783 F.2d 454 (4th Cir. 1986).

§ 108A-58. Transfer of property for purposes of qualifying for medical assistance; periods of ineligibility.

CASE NOTES

Calculation of Medicaid Reserve. — The Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), 42 U.S.C. § 1396a(a)-(10)(C)(i)(III), mandates that North Carolina use the "\$6,000/6% rule" for calculating what property should be excluded from a persons' Medicaid reserve, under which rule property may be excluded from an applicant's or recipient's reserve of property if it has equity value

of less than \$6,000 and earns an annual income equal to or greater than 6% of its value, but will be included if it has equity value greater than \$6,000 or earns an annual income of less than 6% of its value, because it is a part of a methodology for determining Supplemental Security Income Eligibility. *Morris ex rel. Simpson v. Morrow*, 783 F.2d 454 (4th Cir. 1986).

§ 108A-62. Therapeutic leave for medical assistance patients.

Patients at an intermediate care facility or skilled nursing facility may take up to 60 days of therapeutic leave in any 12-month period without the facility losing reimbursement under the medical assistance program, provided, however, no more than 14 consecutive days may be taken without approval of the Department of Human Resources, Division of Medical Assistance. (1979, c. 925; 1981, c. 275, s. 1; 1985 (Reg. Sess., 1986), c. 1014, s. 120.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 243, contains a severability clause.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 1, 1986, substituted "60 days" for "18 days" and added the language beginning "provided, however."

ARTICLE 4.

*Public Assistance and Social Services
Appeals and Access to Records.*

§ 108A-79. Appeals.

CASE NOTES

Cited in *Alexander v. Hill*, 625 F. Supp. 564 (W.D.N.C. 1985).

ARTICLE 5.

Financing of Programs of Public Assistance and Social Services.

§ 108A-90. Counties to levy taxes.

CASE NOTES

Cited in *Meares v. Brunswick County*, 615 F. Supp. 14 (E.D.N.C. 1985).

ARTICLE 6.

Protection of the Abused, Neglected or Exploited Disabled Adult Act.

§ 108A-103. Duty of director upon receiving report.

(a) Any director receiving a report that a disabled adult is in need of protective services shall make a prompt and thorough evaluation to determine whether the disabled adult is in need of protective services and what services are needed. The evaluation shall include a visit to the person and consultation with others having knowledge of the facts of the particular case. When necessary for a complete evaluation of the report, the director shall have the authority to review and copy any and all records, or any part of such records, related to the care and treatment of the disabled adult that have been maintained by any individual, facility or agency acting as a caretaker for the disabled adult. This shall include but not be limited to records maintained by facilities licensed by the North Carolina Department of Human Resources. Use of information so obtained shall be subject to and governed by the provisions of G.S. 108A-80 and Article 3 of Chapter 122C of the General Statutes. The director shall have the authority to conduct an interview with the disabled adult with no other persons present. After completing the evaluation

the director shall make a written report of the case indicating whether he believes protective services are needed and shall notify the individual making the report of his determination as to whether the disabled adult needs protective services.

(1973, c. 1378, s. 1; 1975, c. 797; 1981, c. 275, s. 1; 1985, c. 589, s. 35; c. 658, s. 1; 1985 (Reg. Sess., 1986), c. 863, s. 6.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Sess., 1986) amendment, effective August 1, 1986, substituted "Article 3 of Chapter 122C of the General Statutes" for "G.S. 122-8.1" at the end of the fifth sentence of subsection (a).

Effect of Amendments. — The 1985 (Reg.

Chapter 110.
Child Welfare.

Article 9.
Child Support.

Sec.
110-129. Definitions.
110-130.1. Non-AFDC services.
110-136.3. Income withholding procedures; applicability.
110-136.4. Implementation of withholding in IV-D cases.
110-136.5. Implementation of withholding in non-IV-D cases.

Sec.
110-136.6. Amount to be withheld.
110-136.7. Multiple withholding.
110-136.8. Notice to payor; payor's responsibilities.
110-136.9. Payment of withheld funds.
110-136.10. Termination of withholding.
110-141. Effectuation of intent of Article.

ARTICLE 7.
Day-Care Facilities.

§ 110-85. Legislative intent and purpose.

Editor's Note. — Section 97 of Session Laws 1985, c. 479, as amended by s. 130(a) of Session Laws 1985 (Reg. Sess., 1986), c. 1014, effective July 1, 1986, provides:

"(a) Rules for the monthly schedule of payments for the purchase of day care services for low income children shall be established by the Social Services Commission pursuant to G.S. 143B-153(8)a., in accordance with the following requirements:

"(1) Effective July 1, 1986, for facilities in which fewer than fifty percent (50%) of the enrollees are subsidized by State or federal funds, the State shall continue to pay the same fee paid by private paying parents for a child in the same age group in the same facility.

"(2) Effective July 1, 1986, facilities in which fifty percent (50%) or more of the enrollees are subsidized by State or federal funds shall be reimbursed at the facilities' fiscal year 1985-86 payment rate.

"(3) Effective January 1, 1987, facilities in which fifty percent (50%) or more of the enrollees are subsidized by State or federal funds may choose annually one of the following payment options:

"a. The facility's payment rate for fiscal year 1985-86; or

"b. The county market rate, as calculated annually by the Department of Human Resources' Office of Child Day Care Services. A market rate shall be calculated for each county and for each age group of enrollees, and shall be the county average of all fees charged to unsubsidized private pay-

ing parents for each age group of enrollees. In fiscal year 1986-87, the county market rates shall be calculated from data collected by the Department of Human Resources' Office of Child Day Care Services in its 1986 Survey of Market Rates. Effective July 1, 1987, the county market rates shall be calculated from facility fee schedules collected by the Office of Child Day Care Services during its annual inspection visits.

"(b) Facilities licensed pursuant to Article 7 of Chapter 110 of the General Statutes may participate in the program that provides for the purchase of slots in day care facilities, for minor children of needy families. No separate licensing requirements may be used to select facilities to participate.

"Effective July 1, 1986, day care plans from which the State purchases day care services shall meet the standards established by the Child Day Care Commission pursuant to G.S. 110-101 and G.S. 110-105.1. Until it can demonstrate that it meets the standards adopted by the Child Day Care Commission, a day care plan from which the State purchases day care services for minor children of needy families shall meet all certification standards adopted by the Department of Human Resources' Office of Child Day Care Services. The fee for the purchase of care from a day care plan is one hundred fifty dollars (\$150.00) per month. The fee for the purchase of care from individual Child Caring Providers is one hundred dollars (\$100.00) per month.

"(c) Effective January 1, 1986, providers whose programs exceed licensing standards may modify their programs to standards consistent with licensing standards.

"(d) Any savings that result by reason of this schedule shall be used by the Department to provide for payment of the costs of necessary day care for more minor children of needy families.

"(e) County departments of social services shall continue to negotiate with day care providers for day care services below those rates prescribed by subsection (a) of this section. County departments are directed to purchase day care services so as to serve the greatest number of children possible with existing resources."

§ 110-101. (For schedule of applicability see note) Registration; minimum standards for plans.

Editor's Note. — Section 97 of Session Laws 1985, c. 479, as amended by s. 130(a) of Session Laws 1985 (Reg. Sess., 1986), c. 1014, effective July 1, 1986, provides:

"(a) Rules for the monthly schedule of payments for the purchase of day care services for low income children shall be established by the Social Services Commission pursuant to G.S. 143B-153(8)a., in accordance with the following requirements:

"(1) Effective July 1, 1986, for facilities in which fewer than fifty percent (50%) of the enrollees are subsidized by State or federal funds, the State shall continue to pay the same fee paid by private paying parents for a child in the same age group in the same facility.

"(2) Effective July 1, 1986, facilities in which fifty percent (50%) or more of the enrollees are subsidized by State or federal funds shall be reimbursed at the facilities' fiscal year 1985-86 payment rate.

"(3) Effective January 1, 1987, facilities in which fifty percent (50%) or more of the enrollees are subsidized by State or federal funds may choose annually one of the following payment options:

"a. The facility's payment rate for fiscal year 1985-86; or

"b. The county market rate, as calculated annually by the Department of Human Resources' Office of Child Day Care Services. A market rate shall be calculated for each county and for each age group of enrollees, and shall be the county average of all fees charged to unsubsidized private paying parents for each age group of enrollees. In fiscal year 1986-87, the county market rates shall be calculated from data collected by the Department of Human Resources' Office of Child Day Care Services in its 1986 Survey of Market Rates. Effective July 1, 1987, the county market rates shall be calculated from facility fee

schedules collected by the Office of Child Day Care Services during its annual inspection visits.

"(b) Facilities licensed pursuant to Article 7 of Chapter 110 of the General Statutes may participate in the program that provides for the purchase of slots in day care facilities, for minor children of needy families. No separate licensing requirements may be used to select facilities to participate.

"Effective July 1, 1986, day care plans from which the State purchases day care services shall meet the standards established by the Child Day Care Commission pursuant to G.S. 110-101 and G.S. 110-105.1. Until it can demonstrate that it meets the standards adopted by the Child Day Care Commission, a day care plan from which the State purchases day care services for minor children of needy families shall meet all certification standards adopted by the Department of Human Resources' Office of Child Day Care Services. The fee for the purchase of care from a day care plan is one hundred fifty dollars (\$150.00) per month. The fee for the purchase of care from individual Child Caring Providers is one hundred dollars (\$100.00) per month.

"(c) Effective January 1, 1986, providers whose programs exceed licensing standards may modify their programs to standards consistent with licensing standards.

"(d) Any savings that result by reason of this schedule shall be used by the Department to provide for payment of the costs of necessary day care for more minor children of needy families.

"(e) County departments of social services shall continue to negotiate with day care providers for day care services below those rates prescribed by subsection (a) of this section. County departments are directed to purchase day care services so as to serve the greatest number of children possible with existing resources."

ARTICLE 9.

Child Support.

§ 110-129. Definitions.

As used in this Article:

- (6) "Disposable income" means any form of periodic payment to an individual, regardless of sources, including but not limited to wages, salary, commission, self-employment income, bonus pay, severance pay, sick pay, incentive pay, vacation pay, compensation as an independent contractor, worker's compensation, disability, annuity, survivor's benefits, pension and retirement benefits, interest, dividends, rents, royalties, trust income and other similar payments, which remain after the deduction of amounts for federal, State, and local taxes, Social Security, and involuntary retirement contributions. However, Supplemental Security Income, Aid for Dependent Children, and other public assistance payments shall be excluded from disposable income. For employers, disposable income means "wage" as it is defined by G.S. 95-25.2 (16).
- (7) "IV-D case" means a case in which services have been applied for or are being provided by a child support enforcement agency established pursuant to Title IV-D of the Social Security Act as amended and this Article.
- (8) "Non-IV-D case" means any case, other than a IV-D case, in which child support is legally obligated to be paid.
- (9) "Initiating party" means the party, the attorney for a party, a child support enforcement agency, or the clerk of superior court who initiates an action, proceeding, or procedure as allowed or required by law for the establishment or enforcement of a child support obligation.
- (10) "Mistake of fact" means that the obligor:
 - (a) is not in arrears in an amount equal to the support payable for one month; or
 - (b) did not request that withholding begin, if withholding is pursuant to a purported request by the obligor for withholding; or
 - (c) is not the person subject to the court order of support for the child named in the advance notice of withholding.
- (11) "Obligee", in a IV-D case, means the child support enforcement agency, and in a non-IV-D case means the individual to whom a duty of support is owed or the individual's legal representative.
- (12) "Obligor" means the individual who owes a duty to make child support payments under a court order.
- (13) "Payor" means any payor, including any federal, State, or local governmental unit, of disposable income to an obligor. When the payor is an employer, payor means employer as is defined at 29 USC § 203(d) in the Fair Labor Standards Act. (1975, c. 827, s. 1; 1977, 2nd Sess., c. 1186, ss. 2, 3; 1985, c. 592; 1985 (Reg. Sess., 1986), c. 949, s. 1.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Section 9 of Session Laws 1985 (Reg. Sess., 1986), c. 949, provides: "Noth-

ing in this act shall be construed as affecting any garnishment proceeding heretofore or hereafter instituted." The act becomes effective October 1, 1986, pursuant to s. 10 of c. 949.

Effect of Amendments. — The 1985 (Reg.

Sess., 1986) amendment, effective October 1, 1986, added subdivisions (6) through (13).

§ 110-130. Action by the designated representatives of the county commissioners.

CASE NOTES

Enforcement Action Against Member of Cherokee Indians. — A State court lacked the necessary subject matter jurisdiction in a civil action brought by a county child support enforcement agency against a member of the Eastern Band of Cherokee Indians who resided within the exterior boundaries of the reserva-

tion, in light of the well established rule of federal preemption, in conjunction with the specific federal regulations involved. The county had to litigate the matter in the court of Indian offenses. *Jackson County ex rel. Child Support Enforcement Agency v. Swayney*, 75 N.C. App. 629, 331 S.E.2d 145 (1985).

§ 110-130.1. Non-AFDC services.

(a) All child support collection and paternity determination services provided under this Article to recipients of public assistance shall be made available to any individual not receiving public assistance in accordance with federal law and as contractually authorized by the nonrecipient, upon proper application and payment of an appropriate nonrefundable application fee. For applicants whose gross household income is equal to or less than two hundred percent (200%) of the then currently established poverty level applicable to the applicant's household size, the application fee shall be five dollars (\$5.00). For applicants whose gross household income exceeds such poverty level, the application fee shall be twenty-five dollars (\$25.00).

For purposes of this section, "household income" means the sum of the gross amount of periodically recurring income which accrues to the members of a collective group of individuals living in one residence consisting of a natural or adoptive parent who has custody of a dependent child or children whose other natural or adoptive parent is absent from the residence, the custodial parent's current spouse, and all other dependent children. "Household size" means the sum of the persons specified as living in the residence as described above.

(b) Except for the application fee, the State shall not recover the costs or fees of providing services to a non-AFDC client whose household income is equal to or less than two hundred percent (200%) of the federal poverty guidelines.

(b1) The State shall recover the actual costs of providing services to a non-AFDC client whose gross household income exceeds two hundred percent (200%) of the then currently established federal poverty level applicable to the client's household size until all costs incurred on the client's behalf have been recovered. The rate of accrual of such costs shall be computed annually by the Department of Human Resources and disclosed at the time of application to the client as an hourly dollar amount for administrative services and an hourly dollar amount for attorney's services. Incurred costs may be recovered by any or all of the following means:

- (1) a ten percent (10%) deduction from any support received;
- (2) voluntary payments from either the responsible parent or client;
- (3) payments by the responsible parent which the court may order, only if such payments do not reduce the responsible parent's ability to pay current support and arrears.

The appropriate judicial official shall be informed of the available cost recovery methods at the time a support order is sought.

A client from whom costs can be recovered pursuant to this subsection shall be liable for prepayment of any necessary court filing fees and paternity blood testing fees.

In all cases where ongoing enforcement services are being provided to a client from whom costs can be recovered pursuant to this subsection, or in cases in which ongoing enforcement services are no longer being provided but for whom costs were incurred and can be recovered pursuant to this subsection, or in cases in which a public assistance debt which accrued pursuant to G.S. 110-135 remains unrecovered, support payments shall be transmitted to the Department of Human Resources for appropriate distribution. When services are terminated and all costs and any public assistance debts have been satisfied, the support payment shall be redirected to the client.

Any costs incurred pursuant to this section shall constitute a debt owed to the State by the client. Any costs ordered by the court under subdivision (3) above shall constitute a debt owed to the State by the responsible parent. Payment may be demanded from either or both of them.

(1983, c. 527, s. 1; 1985, c. 781, ss. 1-5; 1985 (Reg. Sess., 1986), c. 931, ss. 1, 2.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 931, s. 3 deleted the language of Session Laws 1985, c. 781, s. 6 providing that c. 781 would expire June 30, 1987, as noted in the Editor's Note in the 1985 Cumulative Supplement.

Effect of Amendments. — The 1985 (Reg.

Sess., 1986) amendment, effective September 1, 1986, substituted "an appropriate nonrefundable application fee" for "a ten dollar (\$10.00) application fee" at the end of the first sentence of the first paragraph of subsection (a), added the second and third sentences of the first paragraph of subsection (a), added the second paragraph of subsection (a), rewrote subsection (b), and inserted subsection (b1).

§ 110-133. Agreements of support.

CASE NOTES

Cited in Lee v. Lee, 78 N.C. App. 632, 337 S.E.2d 690 (1985).

§ 110-136.3. Income withholding procedures; applicability.

(a) Required contents of support orders. All child support orders, civil or criminal, entered or modified in the State beginning October 1, 1986, shall:

- (1) Require the obligor to keep the clerk of court or IV-D agency informed of his current residence and mailing address and of the name and address of any payor of his disposable income and of the amount and effective date of any substantial change in his disposable income, and
- (2) Provide for implementation of income withholding procedures as provided in this Article.

(b) When obligor subject to withholding. An obligor shall become subject to income withholding on the earliest of:

- (1) The date on which the obligor fails to make legally obligated child support payments in an amount equal to the support payable for one month; or
- (2) The date on which the obligor requests withholding.

(c) Applicability. Notwithstanding any other provision of law, the income withholding provisions of this Article shall apply to any civil or criminal child support order, entered or modified before, on, or after October 1, 1986.

(d) Interstate cases. An interstate case is one in which a child support order of one state is to be enforced in another state.

(1) In interstate cases withholding provisions shall apply to a child support order of this or any other state. A petition addressed to this State to enforce a child support order of another state or a petition from an initiating party in this State addressed to another state to enforce a child support order entered in this State shall include:

- a. A certified copy of the support order with all modifications, including any income withholding notice or order still in effect;
- b. A copy of the income withholding law of the jurisdiction which issued the support order, provided that such jurisdiction has a withholding law;
- c. A sworn statement of arrearages;
- d. The name, address, and social security number of the obligor, if known;
- e. The name and address of the obligor's employer or of any other source of income of the obligor derived in the state in which withholding is sought; and
- f. The name and address of the agency or person to whom support payments collected by income withholding shall be transmitted.

For purposes of enforcing a petition under this subsection, jurisdiction is limited to the purposes of income withholding.

(2) The law of the state in which the support order was entered shall apply in determining when withholding shall be implemented and interpreting the child support order. The law and procedures of the state where the obligor is employed shall apply in all other respects.

(3) Except as otherwise provided by subdivision (2), income withholding initiated under this subsection is subject to all of the notice, hearing and other provisions of Chapter 110.

(4) In all interstate cases notices and orders to withhold shall be served upon the payor by a North Carolina agency or judicial officer. In all interstate non-IV-D cases, the advance notice to the obligor shall be served pursuant to G.S. 1A-1, Rule 4, Rules of Civil Procedure.

(e) Procedures and regulations. Procedures, rules, regulations, forms, and instructions necessary to effect the income withholding provisions of this Article shall be established by the Secretary of the Department of Human Resources or his designee and the Administrative Office of the Courts. Forms and instructions shall be sent with each order or notice of withholding. (1985 (Reg. Sess, 1986), c. 949, s. 2.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 949, s. 10, makes this section effective October 1, 1986.

Section 9 of Session Laws 1985 (Reg. Sess.,

1986), c. 949, provides: "Nothing in this act shall be construed as affecting any garnishment proceeding heretofore or hereafter instituted."

§ 110-136.4. Implementation of withholding in IV-D cases.

(a) Advance notice of withholding. When an obligor in a IV-D case becomes subject to income withholding, the obligee shall, after verifying the obligor's current employer or other payor, wages or other disposable income, and mailing address, serve the obligor with advance notice of withholding in accordance with G.S. 1A-1, Rule 4, Rules of Civil Procedure.

(b) Contents of advance notice. The advance notice to the obligor shall contain, at a minimum, the following information:

- (1) Whether the proposed withholding is based on the obligor's failure to make legally obligated payments in an amount equal to the support payable for one month or on the obligor's request for withholding;
- (2) The amount of overdue support, the total amount to be withheld, and when the withholding will occur;
- (3) The name of each child for whose benefit the child support is due, and information sufficient to identify the court order under which the obligor has a duty to support the child;
- (4) The amount and sources of disposable income;
- (5) That the withholding will apply to the obligor's wages or other sources of disposable income from current payors and all subsequent payors once the procedures under this section are invoked;
- (6) An explanation of the obligor's rights and responsibilities pursuant to this section;
- (7) That withholding will be continued until terminated pursuant to G.S. 110-136.10.

(c) Contested withholding. The obligor may contest the withholding only on the basis of a mistake of fact. To contest the withholding, the obligor must, within 10 days of receipt of the advance notice of withholding, request a hearing in the county where the support order was entered before the district court and give notice to the obligee specifying the mistake of fact upon which the hearing request is based. If the asserted mistake of fact can be resolved by agreement between the obligee and the obligor, no hearing shall occur. Otherwise, a hearing shall be held and a determination made, within 30 days of the obligor's receipt of the advance notice of withholding, as to whether the asserted mistake of fact is valid. No withholding shall occur pending the hearing decision. The failure to hold a hearing within 30 days shall not invalidate an otherwise properly entered order. If it is determined that a mistake of fact exists, no withholding shall occur. Otherwise, within 45 days of the obligor's receipt of the advance notice of withholding, the obligee shall serve the payor, pursuant to G.S. 1A-1, Rule 4, Rules of Civil Procedure, with notice of his obligation to withhold, and shall mail a copy of such notice to the obligor and file a copy with the clerk. In the event of appeal, withholding shall not be stayed. If the appeal is concluded in favor of the obligor, the obligee shall promptly repay sums wrongfully withheld and notify the payor to cease withholding.

(d) Uncontested withholding. If the obligor does not contest the withholding within the 10-day response period, the obligee shall serve the payor, pursuant to G.S. 1A-1, Rule 4, Rules of Civil Procedure, with notice of his obligation to withhold, and shall mail a copy of such notice to the obligor and file a copy with the clerk.

(e) Payment not a defense to withholding. The payment of overdue support shall not be a basis for terminating or not implementing withholding.

(f) Multiple withholdings. The obligor must notify the obligee if the obligor is currently subject to another withholding for child support. In the case of two or more withholdings against one obligor, the obligee or obligees shall attempt to resolve any conflict between the orders in a manner that is fair and

equitable to all parties and within the limits specified by G.S. 110-136.6. If the conflict cannot be so resolved, an injured party, upon request, shall be granted a hearing in accordance with the procedure specified in G.S. 110-136.4(c). The conflict between the withholding orders shall be resolved in accordance with G.S. 110-136.7.

(g) Inability to implement withholding. When an obligor is subject to withholding, but withholding under this section cannot be implemented because the obligor's location is unknown, because the extent and source of his disposable income cannot be determined, or for any other reason, the obligee shall either request the clerk of superior court to initiate enforcement proceedings under G.S. 15A-1344.1(d) or G.S. 50-13.9(d) or take other appropriate available measures to enforce the support obligation.

(h) Modification of withholding. When an order for withholding has been entered under this section, the obligee may modify the withholding based on changed circumstances. The obligee shall proceed as is provided in this section.

(i) Applicability of section. The provisions of this section apply to IV-D cases only. (1985 (Reg. Sess., 1986), c. 949, s. 2.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 949, s. 10, makes this section effective October 1, 1986.

Section 9 of Session Laws 1985 (Reg. Sess.,

1986), c. 949, provides: "Nothing in this act shall be construed as affecting any garnishment proceeding heretofore or hereafter instituted."

§ 110-136.5. Implementation of withholding in non-IV-D cases.

(a) Motion or complaint or consent order for withholding. Notwithstanding any other provision of law, any obligee may apply to the court for an order of income withholding, or at any time the parties may agree to income withholding by consent order. The obligee may apply to the court by motion or in an independent action. The motion or complaint shall be verified and state, to the extent known:

- (1) That the obligor is under a court order to provide child support, and information sufficient to identify the order;
- (2) That the obligor is delinquent in an amount equal to the support payable for one month or that the obligor has requested that income withholding begin;
- (3) The amount of overdue support and the total amount sought to be withheld;
- (4) The name of each child for whose benefit support is due;
- (5) The name, location, and mailing address of the payor or payors from whom withholding is sought and the amount of the obligor's monthly disposable earnings from each payor.

(b) Notice to obligor. The motion or complaint shall include or be accompanied by a notice to the obligor, stating:

- (1) That withholding, if implemented, will apply to the obligor's current payors and all subsequent payors;
- (2) That withholding, if implemented, will be continued until terminated pursuant to G.S. 110-136.10.

(c) Order for withholding. If the district court judge finds after hearing evidence that the obligor, at the time of the filing of the motion or complaint was, or at the time of the hearing is, delinquent in child support payments in an amount equal to the support payable for one month or that the obligor has requested that income withholding begin, the court shall enter an order for income withholding, unless:

- (1) The obligor proves a mistake of fact; or
- (2) The court finds that the child support obligation can be enforced and the child's right to receive support can be ensured without entry of an order for income withholding; or
- (3) The court finds that the obligor has no disposable income subject to withholding or that withholding is not feasible for any other reason.

If the obligor fails to respond or appear, the court shall hear evidence and enter an order as provided herein.

(d) Notice to payor and obligor. If an order for income withholding is entered, a notice of obligation to withhold shall be served by certified mail, return receipt requested, on the payor or payors and the obligor.

(e) Modification of withholding. When an order for withholding has been entered under this section, any party may file a motion seeking modification of the withholding based on changed circumstances. The clerk or the court on its own motion may initiate a hearing for modification when it appears that modification of the withholding is required or appropriate. (1985 (Reg. Sess., 1986), c. 949, s. 2.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 949, s. 10, makes this section effective October 1, 1986.

1986), c. 949, provides: "Nothing in this act shall be construed as affecting any garnishment proceeding heretofore or hereafter instituted."

Section 9 of Session Laws 1985 (Reg. Sess.,

§ 110-136.6. Amount to be withheld.

(a) Computation of amount. When income withholding is implemented pursuant to this Article, the amount to be withheld shall include:

- (1) An amount sufficient to pay current child support; and
- (2) An additional amount toward liquidation of arrearages; and
- (3) A processing fee of two dollars (\$2.00) to cover the cost of withholding, to be retained by the payor for each withholding unless waived by the payor.

The amount withheld may also include court costs and attorneys fees as may be awarded by the court in non-IV-D cases and as may be awarded by the court in IV-D cases pursuant to G.S. 110-130.1.

(b) Limits on amount withheld. Withholding for current support, arrearages, processing fees, court costs, and attorneys fees shall not exceed forty percent (40%) of the obligor's disposable income for one pay period from the payor when there is one order of withholding. The sum of multiple withholdings, for current support, arrearages, processing fees, court costs, and attorneys fees shall not exceed:

- (1) Forty-five percent (45%) of disposable income for one pay period from the payor in the case of an obligor who is supporting his spouse or other dependent children; or
- (2) Fifty percent (50%) of disposable income for one pay period from the payor in the case of an obligor who is not supporting a spouse or other dependent children.

(c) Contents of order and notice. An order or advance notice for withholding and any notice to a payor of his obligation to withhold shall state a specific monetary amount to be withheld and the amount of disposable income from the applicable payor on which the amount to be withheld was determined. The notice shall clearly indicate that in no event shall the amount withheld exceed the appropriate percentage of disposable income paid by a payor as provided in subsection (b). (1985 (Reg. Sess., 1986), c. 949, s. 2.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 949, s. 10, makes this section effective October 1, 1986.

Section 9 of Session Laws 1985 (Reg. Sess.,

1986), c. 949, provides: "Nothing in this act shall be construed as affecting any garnishment proceeding heretofore or hereafter instituted."

§ 110-136.7. Multiple withholding.

When an obligor is subject to more than one withholding for child support, withholding for current child support shall have priority over past-due support. Where two or more orders for current support exist, each family shall receive a pro rata share of the total amount withheld based on the respective child support orders being enforced. (1985 (Reg. Sess., 1986), c. 949, s. 2.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 949, s. 10, makes this section effective October 1, 1986.

Section 9 of Session Laws 1985 (Reg. Sess.,

1986), c. 949, provides: "Nothing in this act shall be construed as affecting any garnishment proceeding heretofore or hereafter instituted."

§ 110-136.8. Notice to payor; payor's responsibilities.

(a) Contents of notice. Notice to a payor of his obligation to withhold shall include information regarding the payor's rights and responsibilities, the amount of disposable income attributable to that payor on which that withholding is based, the penalties under this section, and the maximum percentages of disposable income that may be withheld as provided in G.S. 110-136.6.

(b) Payor's responsibilities. A payor who has been properly served with a notice to withhold is required to:

- (1) Withhold from the obligor's disposable income and, within 10 days of the date the obligor is paid, send to the clerk of superior court specified in the notice, the amount specified in the notice, but in no event more than the amount allowed by G.S. 110-136.6; however, if a lesser amount of disposable income is available for any pay period, the payor shall either: (a) compute and send the appropriate amount to the clerk of court, using the percentages as provided in G.S. 110-136.6, or (b) request the initiating party to inform the payor of the proper amount to be withheld for that period;
- (2) Continue withholding until further notice from the IV-D agency or the clerk of superior court;
- (3) Withhold for child support before withholding pursuant to any other legal process under State law against the same disposable income;
- (4) Begin withholding from the first payment due the obligor in the first pay period that occurs 14 days following the date the notice of the obligation to withhold was served on the payor;
- (5) Promptly notify the obligee in a IV-D case, or the clerk of superior court in a non-IV-D case, in writing:
 - a. If there is more than one child support withholding for the obligor;
 - b. When the obligor terminates employment or otherwise ceases to be entitled to disposable income from the payor, and provide the obligor's last known address, and the name and address of his new employer, if known;
 - c. Of the payor's inability to comply with the withholding for any reason.

(c) Change in obligor's employment. If the obligor changes employment within the State when withholding is in effect, the requirement for withholding shall continue, and

- (1) In a IV-D case, the IV-D obligee shall make any necessary adjustments to the withholding, notify the obligor and his new employer in accordance with this section, and file a copy of the adjusted withholding with the clerk of superior court;
- (2) In a non-IV-D case, the clerk shall serve a notice of obligation to withhold according to the terms of the withholding order on the new employer and on the obligor; if the obligor or payor gives notice that an adjustment to the withholding order, other than the change in payor, is needed, the matter shall be scheduled for hearing before a child support hearing officer or district court judge who shall make any necessary adjustments to the withholding.

(d) The payor may combine amounts withheld from obligors' disposable incomes in a single payment to each clerk of superior court if the payor separately identifies by name and case number the portion of the single payment attributable to each individual obligor.

(e) Prohibited conduct by payor; civil penalty. Notwithstanding any other provision of law, when a court finds, pursuant to a motion in the cause filed by the initiating party joining the payor as a third party defendant, with 30 days notice to answer the motion, that a payor has willfully refused to comply with the provisions of this section, such payor shall be ordered to commence withholding and shall be held liable to the initiating party for any amount which such payor should have withheld, except that such payor shall not be required to vary the normal pay or disbursement cycles in order to comply with these provisions.

A payor shall not discharge from employment, refuse to employ, or otherwise take disciplinary action against any obligor solely because of the withholding. When a court finds that a payor has taken any of these actions, the payor shall be liable for a civil penalty to be paid to the county school fund. For a first offense, the civil penalty shall be one hundred dollars (\$100.00). For second and third offenses, the civil penalty shall be five hundred dollars (\$500.00) and one thousand dollars (\$1,000), respectively. Any payor who violates any provision of this paragraph shall be liable in a civil action for reasonable damages suffered by an obligor as a result of the violation, and an obligor discharged or demoted in violation of this paragraph shall be entitled to be reinstated to his former position. The statute of limitations for actions under this subsection shall be one year pursuant to G.S. 1-54.

(f) Any payor who withholds the sum provided in any notice or order to the payor shall not be liable for any penalties under this section. (1985 (Reg. Sess., 1986), c. 949, s. 2.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 949, s. 10 makes this section effective October 1, 1986.

Section 9 of Session Laws 1985 (Reg. Sess.,

1986), c. 949, provides: "Nothing in this act shall be construed as affecting any garnishment proceeding heretofore or hereafter instituted."

§ 110-136.9. Payment of withheld funds.

In IV-D cases, when required by federal or State law or regulations or by court order, the clerk of superior court shall transmit payments received from payors to the Department of Human Resources for appropriate distribution. In all other cases, unless a court order requires otherwise, the clerk of superior court shall transmit the payments to the custodial parent. (1985 (Reg. Sess., 1986), c. 949, s. 2.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 949, s. 10, makes this section effective October 1, 1986.

Section 9 of Session Laws 1985 (Reg. Sess.,

1986), c. 949, provides: "Nothing in this act shall be construed as affecting any garnishment proceeding heretofore or hereafter instituted."

§ 110-136.10. Termination of withholding.

A requirement that income be withheld for child support shall promptly terminate as to prospective payments when the payor receives notice from the court or IV-D agency that:

- (1) The child support order has expired or become invalid; or
- (2) The initiating party, the obligor, and the district court judge agree to termination because there is another adequate means to collect child support or arrearages; or
- (3) The whereabouts of the child and obligee are unknown, except that withholding shall not be terminated until all valid arrearages to the State are paid in full. (1985 (Reg. Sess., 1986), c. 949, s. 2.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 949, s. 10, makes this section effective October 1, 1986.

Section 9 of Session Laws 1985 (Reg. Sess.,

1986), c. 949, provides: "Nothing in this act shall be construed as affecting any garnishment proceeding heretofore or hereafter instituted."

§ 110-141. Effectuation of intent of Article.

The North Carolina Department of Human Resources shall supervise the administration of this program in accordance with federal law and shall cause the provisions of this Article to be effectuated and to secure child support from absent, deserting, abandoning and nonsupporting parents.

Effective July 1, 1986, the entity, whether the board of county commissioners or the Department of Human Resources, that is administering, or providing for the administration of, this program in each county on June 30, 1986, shall continue to administer, or provide for the administration of, this program in that county, with one exception. If a county program is being administered by the Department of Human Resources on June 30, 1986, and if the board of county commissioners of this county desires on or after that date to assume responsibility for the administration of the program, the board of county commissioners shall notify the Department of Human Resources between July 1 and September 1 of the current fiscal year. The obligations of the board of county commissioners to assume responsibility for the administration of the program shall not commence prior to July 1 of the subsequent fiscal year. Until that time, it is the responsibility of the Department of Human Resources to administer or provide for the administration of the program in the county.

A county may negotiate alternative arrangements to the procedure outlined in G.S. 110-130 for designating a local person or agency to administer the provisions of this Article in that county. (1975, c. 827, s. 1; 1977, 2nd Sess., c. 1186, s. 16; 1979, c. 488; 1983 (Reg. Sess., 1984), c. 1034, s. 76; 1985, c. 244; c. 479, s. 103; 1985 (Reg. Sess., 1986), c. 1014, s. 129.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 243, contains a severability clause.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 1, 1986,

deleted a former second paragraph, pertaining to responsibility for administration of this program in a county, and added the present second and third paragraphs.

Chapter 113.
Conservation and Development.

SUBCHAPTER IV. CONSERVATION OF MARINE AND ESTUARINE AND WILDLIFE RESOURCES.	
Article 13.	
Jurisdiction of Conservation Agencies.	
Sec.	agency; public hunting grounds; scheduling of managed big game hunts.
113-133.1. Limitations upon local regulation of wildlife resources; certain local acts retained.	113-265. Obstructing or polluting flow of water into hatchery; throwing fish offal into waters; robbing or injuring nets, seines, buoys, etc.
Article 14.	113-266. Interference with artificial reef marking devices.
Commercial and Sports Fisheries Licenses and Taxes.	Article 23C.
113-152. Licensing of vessels; fees.	North Carolina Seafood Industrial Park Authority.
Article 20.	
Miscellaneous Regulatory Provisions.	113-315.31. Issuance of bonds.
113-264. Regulatory power over property of	

SUBCHAPTER I. GENERAL PROVISIONS.

ARTICLE 1.

Powers and Duties of Department of Natural Resources and Community Development Generally.

§ 113-8. Powers and duties of the Department of Natural Resources and Community Development.

CASE NOTES

Applied in *Woodlief v. Johnson*, 75 N.C. App. 49, 330 S.E.2d 265 (1985).

SUBCHAPTER II. STATE FORESTS AND PARKS.

ARTICLE 2.

Acquisition and Control of State Forests and Parks.

§ 113-34. Power to acquire lands as State forests, parks, etc.; donations or leases by United States; leases for recreational purposes; rules governing public use.

CASE NOTES

Cited in *Woodlief v. Johnson*, 75 N.C. App. 49, 330 S.E.2d 265 (1985).

§ 113-35. State timber may be sold by Department of Natural Resources and Community Development; forest nurseries; control over parks, etc.; operation of public service facilities; concessions to private concerns.

CASE NOTES

Applied in *Woodlief v. Johnson*, 75 N.C. App. 49, 330 S.E.2d 265 (1985).

SUBCHAPTER IV. CONSERVATION OF MARINE AND ESTUARINE AND WILDLIFE RESOURCES.

ARTICLE 13.

Jurisdiction of Conservation Agencies.

§ 113-133.1. Limitations upon local regulation of wildlife resources; certain local acts retained.

(e) Because of strong community interest expressed in their retention, the local acts or portions of local acts listed in this section are not repealed. The following local acts are retained to the extent they apply to the county for which listed:

Alleghany: Session Laws 1951, Chapter 665; Session Laws 1977, Chapter 526; Session Laws 1979, Chapter 556.

Anson: Former G.S. 113-111, as amended by Session Laws 1955, Chapter 286.

Ashe: Former G.S. 113-111; Session Laws 1951, Chapter 665.

Avery: Former G.S. 113-122.

Beaufort: Session Laws 1947, Chapter 466, as amended by Session Laws 1979, Chapter 219; Session Laws 1957, Chapter 1364; Session Laws 1971, Chapter 173; Session Laws 1977, Chapter 90.

Bertie: Session Laws 1955, Chapter 1376; Session Laws 1975, Chapter 287.

Bladen: Public-Local Laws 1933, Chapter 550, Section 2 (as it pertains to fox season); Session Laws 1961, Chapter 348 (as it applies to Bladen residents fishing in Robeson County); Session Laws 1961, Chapter 1023; Session Laws 1971, Chapter 384.

Brunswick: Session Laws 1975, Chapter 218.

Buncombe: Public-Local Laws 1933, Chapter 308.

Burke: Public-Local Laws 1921, Chapter 454; Public-Local Laws 1921 (Extra Session), Chapter 213, Section 3 (with respect to fox seasons); Public-Local Laws 1933, Chapter 422, Section 3; Session Laws 1965, Chapter 608, as amended by Session Laws 1977, Chapter 68; Session Laws 1977, Chapter 636.

Caldwell: Former G.S. 113-122; Session Laws 1965, Chapter 608, as amended by Session Laws 1977, Chapter 68; Session Laws 1977, Chapter 636; Session Laws 1979, Chapter 507.

Camden: Session Laws 1955, Chapter 362 (to the extent it applies to inland fishing waters); Session Laws 1967, Chapter 441.

Carteret: Session Laws 1955, Chapter 1036; Session Laws 1977, Chapter 695.

Caswell: Public-Local Laws 1933, Chapter 311; Public-Local Laws 1937, Chapter 411.

Catawba: Former G.S. 113-111, as amended by Session Laws 1955, Chapter 1037.

Chatham: Public-Local Laws 1937 Chapter 236; Session Laws 1963, Chapter 271.

Chowan: Session Laws 1979, Chapter 184; Session Laws 1979, Chapter 582.

Cleveland: Public Laws 1907, Chapter 388; Session Laws 1951, Chapter 1101; Session Laws 1979, Chapter 587.

Columbus: Session Laws 1951, Chapter 492, as amended by Session Laws 1955, Chapter 506.

Craven: Session Laws 1971, Chapter 273, as amended by Session Laws 1971, Chapter 629.

Cumberland: Session Laws 1975, Chapter 748; Session Laws 1977, Chapter 471.

Currituck: Session Laws 1959, Chapter 545; Session Laws 1977, Chapter 494; Session Laws 1979, Chapter 582.

Dare: Session Laws 1973, Chapter 258; Session Laws 1973, Chapter 259; Session Laws 1979, Chapter 582.

Davie: Former G.S. 113-111, as amended by Session Laws 1947, Chapter 333.

Duplin: Session Laws 1965, Chapter 774; Session Laws 1973 (Second Session 1974), Chapter 1266; Session Laws 1979, Chapter 466.

Edgecombe: Session Laws 1961, Chapter 408.

Gates: Session Laws 1959, Chapter 298; Session Laws 1973, Chapter 124, amending Session Laws 1969, Chapter 121; Session Laws 1975, Chapter 269; Session Laws 1975, Chapter 748.

Grandville: Session Laws 1963, Chapter 670.

Greene: Session Laws 1975, Chapter 219; Session Laws 1979, Chapter 360.

Halifax: Public-Local Laws 1925, Chapter 571, Section 3 (with respect to fox-hunting seasons); Session Laws 1947, Chapter 954; Session Laws 1955, Chapter 1376; Session Laws 1959, Chapter 1304.

Harnett: Former G.S. 113-111, as modified by Session Laws 1977, Chapter 636.

Haywood: Former G.S. 113-111, as modified by Session Laws 1963, Chapter 322.

Henderson: Former G.S. 113-111.

Hertford: Session Laws 1959, Chapter 298; Session Laws 1975, Chapter 269; Session Laws 1975, Chapter 748; Session Laws 1977, Chapter 67.

Hoke: Session Laws 1963, Chapter 267.

Hyde: Public-Local Laws 1929, Chapter 354, Section 1 (as it relates to foxes); Session Laws 1951, Chapter 932.

Iredell: Session Laws 1979, Chapter 577.

Jackson: Session Laws 1965, Chapter 765; Session Laws 1971, Chapter 424.

Johnston: Session Laws 1975, Chapter 342.

Jones: Session Laws 1979, Chapter 441.

Lee: Session Laws 1963, Chapter 271; Session Laws 1977, Chapter 636.

Lenoir: Session Laws 1979, Chapter 441.

Lincoln: Public-Local Laws 1925, Chapter 449, Sections 1 and 2; Session Laws 1955, Chapter 878.

Madison: Public-Local Laws 1925, Chapter 418, Section 4; Session Laws 1951, Chapter 1040.

Martin: Session Laws 1955, Chapter 1376; Session Laws 1977, Chapter 636; Session Laws 1979, Chapter 568.

Mitchell: Session Laws 1965, Chapter 608, as amended by Session Laws 1977, Chapter 68.

Montgomery: Session Laws 1955, Chapter 692; Session Laws 1977 (Second Session 1978), Chapter 1142.

Nash: Session Laws 1961, Chapter 408.

New Hanover: Session Laws 1971, Chapter 559; Session Laws 1975, Chapter 95.

Northampton: Session Laws 1955, Chapter 1376; Session Laws 1959, Chapter 1304; Session Laws 1975, Chapter 269; Session Laws 1975, Chapter 748; Session Laws 1977, Chapter 67; Session Laws 1979, Chapter 548.

Orange: Public-Local Laws 1913, Chapter 547.

Pamlico: Session Laws 1977, Chapter 636.

Pasquotank: Session Laws 1979, Chapter 582.

Pender: Session Laws 1961, Chapter 333; Session Laws 1967, Chapter 229; Session Laws 1969, Chapter 258, as amended by Session Laws 1973, Chapter 420; Session Laws 1977, Chapter 585; Session Laws 1977, Chapter 805; Session Laws 1979, Chapter 546.

Perquimans: Former G.S. 113-111; Session Laws 1973, Chapter 160; Session Laws 1973, Chapter 264; Session Laws 1979, Chapter 582.

Polk: Session Laws 1975, Chapter 397; Session Laws 1975, Chapter 269, as amended by Session Laws 1977, Chapter 167.

Randolph: Public-Local Laws 1941, Chapter 246; Session Laws 1947, Chapter 920.

Robeson: Public-Local Laws 1924 (Extra Session), Chapter 92; Session Laws 1961, Chapter 348.

Rockingham: Former G.S. 113-111; Public-Local Laws 1933, Chapter 310.

Rowan: Session Laws 1975, Chapter 269, as amended by Session Laws 1977, Chapter 106, and Session Laws 1977, Chapter 500; Session Laws 1979, Chapter 556.

Rutherford: Session Laws 1973, Chapter 114; Session Laws 1975, Chapter 397.

Sampson: Session Laws 1979, Chapter 373.

Scotland: Session Laws 1959, Chapter 1143; Session Laws 1977, Chapter 436.

Stokes: Former G.S. 113-111; Public-Local Laws 1933, Chapter 310; Session Laws 1979, Chapter 556.

Surry: Public-Local Laws 1925, Chapter 474, Section 6 (as it pertains to fox seasons); Session Laws 1975, Chapter 269, as amended by Session Laws 1977, Chapter 167.

Swain: Public-Local Laws 1935, Chapter 52; Session Laws 1953, Chapter 270; Session Laws 1965, Chapter 765.

Transylvania: Public Laws 1935, Chapter 107, Section 2, as amended by Public Laws 1935, Chapter 238.

Tyrrell: Former G.S. 113-111; Session Laws 1953, Chapter 685; Session Laws 1979, Chapter 582.

Wake: Session Laws 1973 (Second Session 1974), Chapter 1382.

Washington: Session Laws 1947, Chapter 620; Session Laws 1979, Chapter 582.

Wayne: Session Laws 1975, Chapter 269; Session Laws 1975, Chapter 342, as amended by Session Laws 1977, Chapter 43; Session Laws 1975, Chapter 343, as amended by Session Laws 1977, Chapter 45; Session Laws 1977, Chapter 695.

Wilkes: Former G.S. 113-111, as amended by Session Laws 1971, Chapter 385; Session Laws 1951, Chapter 665; Session Laws 1973, Chapter 106; Session Laws 1979, Chapter 507.

Yadkin: Former G.S. 113-111, as amended by Session Laws 1953, Chapter 199; Session Laws 1979, Chapter 507.

Yancey: Session Laws 1965, Chapter 522.

(1979, c. 830, ss. 1, 14; 1979, 2nd Sess., c. 1285, ss. 2, 11; c. 1324, s. 2; 1981, c. 249, s. 2; c. 250, s. 2; 1983, c. 109, s. 2; c. 487, s. 2; 1985, c. 112, s. 1; c. 302, s. 1; c. 689, s. 27; 1986, c. 893, s. 4.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Sess., 1986) amendment, effective July 3, 1986, deleted "Session Laws 1977, Chapter 412" at the end of the entry for Hyde County in the table in subsection (e).

Effect of Amendments. — The 1985 (Reg.

ARTICLE 14.

Commercial and Sports Fisheries Licenses and Taxes.

§ 113-152. Licensing of vessels; fees.

(c) Licenses are issued annually upon a calendar-year basis for vessels of various lengths (length measured straight through the cabin and along the deck, from end to end, excluding the sheer) and types as follows for the fees indicated:

- (1) Vessels, without motors, regardless of length when used in connection with or other licensed vessels, no license required.
- (2) Vessels with or without motors not over 18 feet in length, one dollar (\$1.00) per foot.
- (3) Vessels with or without motors over 18 feet but not over 38 feet in length, one dollar and fifty cents (\$1.50) per foot.
- (4) Vessels with or without motors over 38 feet in length, three dollars (\$3.00) per foot.
- (4a) Vessels owned by persons who are not residents of North Carolina, two hundred dollars (\$200.00) or an amount equal to the nonresident fee charged by the nonresident's state, whichever is greater, in addition to the fee requirement otherwise applicable under this subsection or subsection (d).

Licenses for vessels owned by persons who are not residents of North Carolina or by corporations not incorporated under the laws of the State of North Carolina may be sold only during the month of January of each year for that calendar year.

- (5) Vessels engaged in menhaden fishing shall be taxed, based on tonnage, as prescribed in subsection (d).

Length is measured from end to end over the deck excluding sheer.

(1953, c. 1134; 1955, c. 888, ss. 1, 3; 1961, c. 1004; 1965, c. 957, s. 2; 1967, c. 444, ss. 1, 2; 1969, c. 1243; 1973, c. 1262, s. 28; 1977, c. 754; c. 999, ss. 1, 2; 1983, c. 570, ss. 2-7, 16, 22; 1985, c. 365, s. 1; 1985 (Reg. Sess., 1986), c. 1014, s. 227.1.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 243, contains a severability clause.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective January 1, 1987, added the second paragraph of subdivision (c)(4a).

§ 113-156.1. Licensing of ocean fishing piers; fees.

CASE NOTES

Constitutionality. — This section, requiring managers of ocean fishing piers to obtain a license, satisfies the requirements of uniformity, equal protection and due process under both the State and federal Constitutions, as the opportunity to establish an exclusive zone around ocean piers, pursuant to § 113-185(a), and the cost to the State of enforcing this zone, distinguishes ocean piers from other piers and provides reasonable grounds for their separate license tax classification. *State v. Rippey*, — N.C. App. —, 341 S.E.2d 98 (1986).

This section does not violate Art. V, § 5 of the North Carolina Constitution, which provides that every act of the General Assembly levying a tax shall state the special object to which it is to be applied and that it shall be applied to no other purpose, as this section is part of Subchapter IV of Chapter 113, the special purpose of which is the conservation of marine and estuarine and wildlife resources, and it is evident that the license tax is levied and applied for this purpose. *State v. Rippey*, — N.C. App. —, 341 S.E.2d 98 (1986).

ARTICLE 15.

Regulation of Coastal Fisheries.

§ 113-185. Fishing near ocean piers; trash or scrap fishing.

CASE NOTES

Classification of Ocean Piers. — Section 113-156.1, requiring managers of ocean fishing piers to obtain a license, satisfies the requirements of uniformity, equal protection and due process under both the State and federal Constitutions, as the opportunity to establish an exclusive zone around ocean piers, pursuant to

subsection (a) of this section, and the cost to the State of enforcing this zone, distinguishes ocean piers from other piers and provides reasonable grounds for their separate license tax classification. *State v. Rippey*, — N.C. App. —, 341 S.E.2d 98 (1986).

ARTICLE 16.

Cultivation of Shellfish.

§ 113-201.1. Definitions.

CASE NOTES

Quoted in In re Mason ex rel. Huber, 78 N.C. App. 16, 337 S.E.2d 99 (1985).

§ 113-202. New and renewal leases for shellfish cultivation; termination of leases issued prior to January 1, 1966.

CASE NOTES

Riparian rights are vested property rights that cannot be taken for private or public purposes without compensating the owner, and they arise out of ownership of land bounded or traversed by navigable water. In re Mason ex rel. Huber, 78 N.C. App. 16, 337 S.E.2d 99 (1985).

Lease May Not Impinge Upon Riparian Rights. — The Legislature vested the authority to promote the shellfish industry in the Marine Fisheries Commission, but it also mandated that the Commission may not lease a bottom area if the lease would impinge upon riparian rights. In re Mason ex rel. Huber, 78 N.C. App. 16, 337 S.E.2d 99 (1985).

Lease for shellfish cultivation issued under this section did not infringe upon the riparian rights of the landowner. In re Mason ex rel. Huber, 78 N.C. App. 16, 337 S.E.2d 99 (1985).

Findings Prerequisite to Lease. — As the Commission's regulations define the term "natural shellfish bed" as an area of public bottom where 10 bushels or more of shellfish per acre are found to be growing, and this section specifically requires that the Commission's regulations, as well as the statutory requirements, be followed in conducting an investigation and in making the determination of acceptability of a proposed site under subsection (a) of this section, before a lease may be approved there must be a finding under the Commission's regulatory standards that the site contains less than 10 bushels of shellfish per acre. In re Mason ex rel. Huber, 78 N.C. App. 16, 337 S.E.2d 99 (1985).

This section requires an investigation to determine whether a natural shellfish bed exists within the bounds of the area proposed to be leased. In re Mason ex rel. Huber, 78 N.C. App. 16, 337 S.E.2d 99 (1985).

Survey Required. — Without the results of a proper and timely survey, the Commission's regulations and the minimum requirements of this section cannot be satisfied. In re Mason ex rel. Huber, 78 N.C. App. 16, 337 S.E.2d 99 (1985).

Commission May Not Adopt One Standard But Apply Another. — The Commission may not adopt in its regulations one standard (an objective "10 bushels per acre" standard) and then apply another (a subjective standard that considers an area's substrate, vegetation and wind exposure). In re Mason ex rel. Huber, 78 N.C. App. 16, 337 S.E.2d 99 (1985).

Planting Must Await Determination. — To allow the unauthorized planting of artificial beds before investigations, and then conclude that there must be no natural beds at the mat-obstructed sites, would defeat the purpose of this section. Clearly, the planting must await the determination of the absence of a natural bed; otherwise, the determination is a foregone conclusion. In re Mason ex rel. Huber, 78 N.C. App. 16, 337 S.E.2d 99 (1985).

Where lease applicant's protective mats prevented a proper investigation, the Commission had insufficient evidence in the record, taken as a whole, to conclude that the area did not contain a natural shellfish bed. In re Mason ex rel. Huber, 78 N.C. App. 16, 337 S.E.2d 99 (1985).

Access as Condition of Lease. — The Commission was well within its authority to condition lease for shellfish cultivation on the provision of a zone of access for the owner of the riparian rights. In re Mason ex rel. Huber, 78 N.C. App. 16, 337 S.E.2d 99 (1985).

§ 113-205. Registration of grants in navigable waters; exercise of private fishery rights.

Legal Periodicals. — For article, "The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislation, Private Claims

to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

§ 113-206. Chart of grants, leases and fishery rights; overlapping leases and rights; contest or condemnation of claims; damages for taking of property.

Legal Periodicals. — For article, "The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislation, Private Claims

to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

ARTICLE 17.

Administrative Provisions; Regulatory Authority of Marine Fisheries Commission and Department.

§ 113-229. Permits to dredge or fill in or about estuarine waters or state-owned lakes.

Legal Periodicals. — For article, "The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislation, Private Claims

to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

§ 113-230. Orders to control activities in coastal wetlands.

Legal Periodicals. — For article, "The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislation, Private Claims

to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

ARTICLE 20.

Miscellaneous Regulatory Provisions.

§ 113-264. Regulatory power over property of agency; public hunting grounds; scheduling of managed big game hunts.

(b) Unless a different level of punishment is elsewhere set out, willful removal of, damage to, or destruction of any property of the Department or the Wildlife Resources Commission is a misdemeanor punishable in the discretion of the court.

(1965, c. 957, s. 2; 1973, c. 1262, ss. 18, 28; 1977, c. 771, s. 4; 1979, c. 830, s. 1; 1983, c. 403; 1985 (Reg. Sess., 1986), c. 996, s. 2.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 (Reg.

Sess., 1986) amendment, effective October 1, 1986, inserted "Unless a different level of punishment is elsewhere set out" at the beginning of subsection (b).

§ 113-265. Obstructing or polluting flow of water into hatchery; throwing fish offal into waters; robbing or injuring nets, seines, buoys, etc.

(e) Any person who willfully destroys or injures any buoys, markers, stakes, nets, or other devices or property lawfully set out in the open waters of the State in connection with any fishing or fishery, except as provided in G.S. 113-266, is guilty of a misdemeanor punishable in the discretion of the court. (1883, c. 137, s. 5; Code, ss. 3385, 3386, 3389, 3407, 3418; Rev., ss. 2444, 2465, 2478; C.S., ss. 1969, 1971, 1972; 1959, c. 405; 1965, c. 957, s. 2; 1971, c. 690, s. 4; 1973, c. 1262, ss. 18, 28; 1985 (Reg. Sess., 1986), c. 996, s. 3.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 (Reg.

Sess., 1986) amendment, effective October 1, 1986, inserted "except as provided in G.S. 113-266" in subsection (e).

§ 113-266. Interference with artificial reef marking devices.

It shall be a general misdemeanor, punishable in the discretion of the court pursuant to G.S. 14-3, for any person to destroy, injure, relocate, or remove any navigational aids, buoys, markers, or other devices lawfully set out by the Division of Marine Fisheries in connection with the marking of any artificial reef in the coastal waters of the State and in the Atlantic Ocean to the seaward extent of the State's jurisdiction as now or hereafter defined. (1985 (Reg. Sess., 1986), c. 996, s. 1.)

Editor's Note. — Section 4 of Acts 1985 (Reg. Sess., 1986), c. 996, makes this section effective October 1, 1986.

ARTICLE 23C.

North Carolina Seafood Industrial Park Authority.

§ 113-315.28. Purposes of Authority.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1028, s. 8 abolishes the Wanchese Harbor Citizens Advisory Council

and repeals Session Laws 1977, c. 612. The Seafood Industrial Park Authority is authorized to perform the functions of the council.

§ 113-315.31. Issuance of bonds.

(a) As a means of raising the funds needed from time to time in the acquisition, construction, equipment, maintenance and operation of any facility, building, structure, or any other matter or thing which the Authority is herein authorized to acquire, construct, equip, maintain, or operate, all or any of them, the said Authority is hereby authorized at one time or from time to time to issue with the approval of the Governor negotiable revenue bonds of the Authority. The principal and interest of revenue bonds shall be payable solely from the revenue to be derived from the operation of all or any part of its properties and facilities. Prior to taking any action under this subsection, the Governor may consult with the Advisory Budget Commission.

(1979, c. 459, s. 7; 1983, c. 577, s. 2; 1985 (Reg. Sess., 1986), c. 955, ss. 13, 14.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Section 1 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "This act may be cited as the Separation of Powers Act of 1986."

Section 127 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "If any part of this act

shall be declared invalid by any court, this shall not affect any other part of this act."

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 1, 1986, deleted "after receiving the advice of the Advisory Budget Commission" following "Governor" in the first sentence of subsection (a) and added the last sentence of subsection (a).

Chapter 113A.

Pollution Control and Environment.

ARTICLE 1.

Environmental Policy Act.

§ 113A-1. Title.

CASE NOTES

Cited in *In re Environmental Mgt. Comm'n*,
— N.C. App. —, 341 S.E.2d 588 (1986).

ARTICLE 7.

Coastal Area Management.

Part 1. Organization and Goals.

§ 113A-100. Short title.

Legal Periodicals. —

For comment, "Sunbathers Versus Property Owners: Public Access to North Carolina Beaches," see 64 N.C.L. Rev. 159 (1985).

For article, "The Battle to Preserve North

Carolina's Estuarine Marshes: The 1985 Legislation, Private Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

CASE NOTES

Cited in *Pamlico Marine Co. v. North Carolina Dep't of Natural Resources & Community Dev.*, — N.C. App. —, 341 S.E.2d 108 (1986).

§ 113A-102. Legislative findings and goals.

CASE NOTES

Quoted in *Pamlico Marine Co. v. North Carolina Dep't of Natural Resources & Commu-*

nity Dev., — N.C. App. —, 341 S.E.2d 108 (1986).

§ 113A-103. Definitions.

CASE NOTES

The purpose of the exception of subparagraph (5) b 7 was to exempt projects that were already underway and were so far along in their development that to require a Coastal Area Management Act permit would be unfair

and possibly a denial of constitutionally protected vested private property rights. *Pamlico Marine Co. v. North Carolina Dep't of Natural Resources & Community Dev.*, — N.C. App. —, 341 S.E.2d 108 (1986).

Applicability of Subparagraph (5) b 7. — The exception in subparagraph (5) b 7 did not apply to replacement of decking merely because original marina and pilings were built before the ratification of Coastal Area Management Act, as petitioner had to obtain a new

building permit from the Town of Bath prior to building this decking, which permit was issued after the ratification of CAMA. Pamlico Marine Co. v. North Carolina Dep't of Natural Resources & Community Dev., — N.C. App. —, 341 S.E.2d 108 (1986).

§ 113A-104. Coastal Resources Commission.

CASE NOTES

Cited in Pamlico Marine Co. v. North Carolina Dep't of Natural Resources & Community Dev., — N.C. App. —, 341 S.E.2d 108 (1986).

Part 2. Planning Processes.

§ 113A-107. State guidelines for the coastal area.

Legal Periodicals. —

For comment, "Sunbathers Versus Property

Owners: Public Access to North Carolina Beaches," see 64 N.C.L. Rev. 159 (1985).

Part 3. Areas of Environmental Concern.

§ 113A-113. Areas of environmental concern; in general.

Legal Periodicals. — For article, "The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislation, Private Claims

to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

Part 4. Permit Letting and Enforcement.

§ 113A-118. Permit required.

Legal Periodicals. — For article, "The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislation, Private Claims

to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

CASE NOTES

Quoted in Pamlico Marine Co. v. North Carolina Dep't of Natural Resources & Commu-

nity Dev., — N.C. App. —, 341 S.E.2d 108 (1986).

§ 113A-120. Grant or denial of permits.

Legal Periodicals. — For article, "The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislation, Private Claims

to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

ARTICLE 7A.

Coastal and Estuarine Water Beach Access Program.

§ 113A-134.1. Legislative findings.

Legal Periodicals. — For comment, "Sunbathers Versus Property Owners: Public Access to North Carolina Beaches," see 64 N.C.L. Rev. 159 (1985).

§ 113A-134.3. Standards for beach access program.

Legal Periodicals. — For comment, "Sunbathers Versus Property Owners: Public Access to North Carolina Beaches," see N.C.L. Rev. 159 (1985).

Chapter 114.

Department of Justice.

ARTICLE 1.

Attorney General.

§ 114-2. Duties.

Legal Periodicals. —

For survey of 1984 administrative law, "A

Declining Role for the Attorney General," see 63 N.C.L. Rev. 1051 (1985).

CASE NOTES

Subdivision (1) of this section does not contemplate the Attorney General's initiating an action under Article 2 of Chapter 128, where language therein has specifically set out who may file a petition for removal of a sheriff or police officer from office. *State v. Felts*, — N.C. App. —, 339 S.E.2d 99 (1986).

The duty to "consult with and advise the prosecutors, when requested by them, in all matters pertaining to the duties of their office" gives the Attorney General the authority to advise the prosecutors, not to completely replace them, or act instead of them, unless there is an express statutory provision authorizing the Attorney General to initiate a particular action. *State v. Felts*, — N.C. App. —, 339 S.E.2d 99 (1986).

Defense of Challenged Statutes. — The Attorney General of North Carolina is a constitutional officer, and he is required to take an oath which, among other things, binds him to "support, maintain and defend the Constitution of North Carolina not inconsistent with the Constitution of the United States . . ." It is but a small step from the language of this oath to the proposition asserted by the Attorney General that his duty includes the defense of statutes of this State against charges of unconstitutionality. *Hendon v. North Carolina State Bd. of Elections*, 633 F. Supp. 454 (W.D.N.C. 1986).

§ 114-2.1. Consent judgments.

Editor's Note. — Subsection (e) of Session Laws 1985, c. 757, s. 166, as quoted in the Editor's note in the 1985 Cumulative Supplement, is amended by Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 218(c) to read as follows: "The Office of State Budget and Management and the Department of Correction shall submit an annual report on expenditures and progress in achieving necessary improvements in the

South Piedmont Area and at the Montgomery County Unit to the Governor, the Joint Legislative Commission on Governmental Operations, and the Fiscal Research Division by May 1 of each year of the biennium."

Legal Periodicals. — For survey of 1984 administrative law, "A Declining Role for the Attorney General," see 63 N.C.L. Rev. 1051 (1985).

§ 114-2.2. Attorney General to approve consent judgments.

Editor's Note. — Subsection (e) of Session Laws 1985, c. 757, s. 166, as quoted in the Editor's note in the 1985 Cumulative Supplement, is amended by Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 218(c) to read as follows: "The Office of State Budget and Management and the Department of Correction shall submit an

annual report on expenditures and progress in achieving necessary improvements in the South Piedmont Area and at the Montgomery County Unit to the Governor, the Joint Legislative Commission on Governmental Operations, and the Fiscal Research Division by May 1 of each year of the biennium."

§ 114-4.2. Assistant attorneys general and other attorneys to assist Department of Transportation.

Legal Periodicals. — For survey of 1984 Attorney General,” see 63 N.C.L. Rev. 1051 administrative law, “A Declining Role for the (1985).

ARTICLE 3A.

Special Prosecution Division.

§ 114-11.6. Division established; duties.

CASE NOTES

Provision authorizing attorneys in the **Special Prosecution Division** to “perform any other duties assigned to them by the Attorney General” merely authorizes the Attorney General to delegate those duties which he is elsewhere authorized to perform. It creates no independent authority in its own right. *State v. Felts*, — N.C. App. —, 339 S.E.2d 99 (1986).

This section allows special prosecutors to prosecute or assist district attorneys in the prosecution of criminal cases only. It does not authorize the Attorney General or his designate to bring a proceeding under § 128-16 et seq., for removal of a sheriff or police officer. *State v. Felts*, — N.C. App. —, 339 S.E.2d 99 (1986).

Chapter 115C.

Elementary and Secondary Education.

SUBCHAPTER I. GENERAL PROVISIONS.

Article 1.

Definitions and Preliminary Provisions.

Sec.

115C-5. Definitions.

SUBCHAPTER II. ADMINISTRATIVE ORGANIZATION OF STATE AND LOCAL EDUCATION AGENCIES.

Article 2.

State Board of Education.

115C-11. Organization and internal procedures of Board.

115C-12. Powers and duties of the Board generally.

Article 4.

Office of the Controller.

115C-29. Controller's powers and duties generally.

Article 5.

Local Boards of Education.

115C-37. Election of board members.

115C-40. Board a body corporate.

115C-47. (For effective date see notes) Powers and duties generally.

115C-47. (For effective date see notes) Powers and duties generally.

Article 6.

Advisory Councils.

115C-54. [Repealed.]

115C-55. Advisory councils.

115C-56 to 115C-59. [Repealed.]

SUBCHAPTER III. SCHOOL DISTRICTS AND UNITS.

Article 7.

Organization of Schools.

115C-69. Types of districts defined.

115C-70. [Repealed.]

115C-73. Enlarging tax districts and city units by permanently attaching contiguous property.

SUBCHAPTER IV. EDUCATION PROGRAM.

Article 8.

General Education.

Part 2. Calendar.

Sec.

115C-84. Length of school day, month, and term; Veterans Day.

Article 9.

Special Education.

Part 2. Nondiscrimination in Education.

115C-115. (Effective July 1, 1987) Placements in private schools, out-of-state schools and schools in other local educational agencies.

Part 13. Budget Analysis and Departmental Funding.

115C-144. Departmental requests.

Article 10A.

Testing.

Part 1. Commission on Testing.

115C-174.1. Commission established; purpose.

115C-174.2. Membership of Commission.

115C-174.3. Term of office.

115C-174.4. Chairman.

115C-174.5. Compensation of members.

115C-174.6. Duties of Commission.

115C-174.7 to 115C-174.9. [Reserved.]

Part 2. Statewide Testing Program.

115C-174.10. Purposes of the Statewide Testing Program.

115C-174.11. Components of the testing program.

115C-174.12. Responsibilities of agencies.

115C-174.13. Public records exemption.

115C-174.14. Provisions for nonpublic schools.

Article 11.

High School Competency Testing.

115C-175 to 115C-188. [Repealed.]

Article 12.

Statewide Testing Program.

115C-189 to 115C-202. [Repealed.]

Article 17.

Supporting Services.

Part 1. Transportation.

Sec.

115C-243. Use of school buses by senior citizen groups.

115C-246. School bus routes.

SUBCHAPTER V. PERSONNEL.

Article 18.

Superintendents.

115C-272. Residence, oath of office, and salary of superintendent.

115C-276. Duties of superintendent.

Article 19.

Principals and Supervisors.

115C-284. Method of selection and requirements.

115C-285. Salary.

115C-288. Powers and duties of principal.

Article 20.

Teachers.

115C-295. Minimum age and certificate prerequisites.

115C-299. Hiring of teachers.

115C-302. Salary and vacation.

115C-303. Withholding of salary.

Article 21.

Other Employees.

115C-315. Hiring of school personnel.

115C-316. Salary and vacation.

Article 22.

General Regulations.

Part 1. Health Certificate.

115C-323. Employee health certificate.

Part 3. Principal and Teacher Employment Contracts.

115C-325. System of employment for public school teachers.

Article 24A.

Certified Personnel Evaluation Pilot Program.

115C-362. Certified School Personnel Evaluation Pilot Program.

Article 24B.

Career Development Pilot Program.

115C-363.2. Elements of the Plan.

115C-363.3. Levels of differentiation, salary, and evaluation requirements.

Sec.

115C-363.10. Report to the General Assembly.

115C-363.11. Salary under the Plan.

115C-363.12 to 115C-363.14. [Reserved.]

Article 24C.

Teacher Enhancement Program.

Part 1. Office of Teacher Recruitment.

115C-363.15. Office of Teacher Recruitment established; purpose.

115C-363.16. Development and analysis of data on teacher supply and demand.

115C-363.17. Recruitment of prospective teachers in the high schools.

115C-363.18. Coordination of efforts with the business community and major education organizations.

115C-363.19. Tuition grants for certain areas of need.

115C-363.20. Teacher Aide and Substitute Teacher Retraining Program.

115C-363.21. Teacher Incentive Program.

Part 2. North Carolina Teaching Fellows Commission.

115C-363.22. North Carolina Teaching Fellows Commission established.

115C-363.23. Membership.

115C-363.23A. Teaching Fellows Program established; administration.

115C-363.24. Teaching Grant Program for College Juniors.

SUBCHAPTER VI. STUDENTS.

Article 27.

Discipline.

115C-390. School personnel may use reasonable force.

SUBCHAPTER VII. FISCAL AFFAIRS.

Article 31.

The School Budget and Fiscal Control Act.

Part 2. Budget.

115C-430. Apportionment of county appropriations among local school administrative units.

Article 32.

Loans from State Literary Fund.

115C-461. Loans by county board to school districts.

Article 32A.

Scholarship Loan Fund for Prospective Teachers.

Sec.

115C-468 to 115C-472. [Repealed effective July 1, 1987.]

SUBCHAPTER VIII. LOCAL TAX ELECTIONS.

Article 36.

Voted Tax Supplements for School Purposes.

115C-503. Who may petition for election.

Sec.

115C-505. Boards of education must consider petitions.

115C-510. Elections in districts created from portions of contiguous counties.

SUBCHAPTER IX. PROPERTY.

Article 37.

School Sites and Property.

115C-518. Disposition of school property; easements and rights-of-way.

115C-524. Repair of school property; use of buildings for other than school purposes.

SUBCHAPTER I. GENERAL PROVISIONS.

ARTICLE 1.

Definitions and Preliminary Provisions.

§ 115C-5. Definitions.

As used in this Chapter unless the context requires otherwise:

(d) The term "school district" means any district defined by G.S. 115C-69. (1955, c. 664; c. 1372, art. 1, ss. 8, 9; 1965, c. 584, s. 2; 1967, c. 223, s. 1; 1971, c. 883; c. 1188, s. 2; 1973, c. 315, s. 1; c. 782, ss. 1-30; 1975, c. 437, s. 10; 1979, c. 864, s. 2; 1981, c. 423, s. 1; 1985 (Reg. Sess., 1986), c. 975, s. 2.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 975, s. 25 provides that the provisions of the act shall not be construed to abol-

ish or in any manner affect any supplemental tax or any local taxing district.

Effect of Amendment. — The 1985 (Reg. Sess., 1986) amendment, effective July 11, 1986, rewrote subdivision (d).

SUBCHAPTER II. ADMINISTRATIVE ORGANIZATION OF STATE AND LOCAL EDUCATION AGENCIES.

ARTICLE 2.

State Board of Education.

§ 115C-11. Organization and internal procedures of Board.

(a1) Student advisors — The Governor is hereby authorized to appoint two high school students who are enrolled in the public schools of North Carolina

as advisors to the State Board of Education. The student advisors shall participate in State Board deliberations in an advisory capacity only. The State Board may, in its discretion, exclude the student advisors from executive sessions.

The Governor shall make initial appointments of student advisors to the State Board as follows:

- (1) One high school junior shall be appointed for a two-year term beginning September 1, 1986, and expiring June 14, 1988; and
- (2) One high school senior shall be appointed for a one-year term beginning September 1, 1986, and expiring June 14, 1987. When an initial or subsequent term expires, the Governor shall appoint a high school junior for a two-year term beginning June 15 of that year. If a student advisor is no longer enrolled in the public schools of North Carolina or if a vacancy otherwise occurs, the Governor shall appoint a student advisor for the remainder of the unexpired term.

Student advisors shall receive per diem and necessary travel and subsistence expenses in accordance with the provisions of G.S. 138-5.

(1955, c. 1372, art. 2, s. 1; 1959, c. 573, s. 19; 1971, c. 704, s. 3; 1975, c. 699, s. 1; 1981, c. 423, s. 1; 1985 (Reg. Sess., 1986), c. 991, s. 1.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Section 1.1 of Acts 1985 (Reg. Sess., 1986), c. 991, provides: "Expenses of the student advisors authorized under G.S.

115C-11(a1) shall be paid out of funds already appropriated to the Department of Public Education."

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 12, 1986, added subsection (a1).

§ 115C-12. Powers and duties of the Board generally.

The general supervision and administration of the free public school system shall be vested in the State Board of Education. The powers and duties of the State Board of Education are defined as follows:

- (2) Repealed by Session Laws 1985 (Reg. Sess., 1986), c. 975, s. 24, effective July 11, 1986.

(1955, c. 1372, art. 2, s. 2; art. 17, s. 6; art. 18, s. 2; 1957, c. 541, s. 11; 1959, c. 1294; 1961, c. 969; 1963, c. 448; ss. 24, 27; c. 688, ss. 1, 2; c. 1223, s. 1; 1965, c. 584, s. 20.1; c. 1185, s. 2; 1967, c. 643, s. 1; 1969, c. 517, s. 1; 1971, c. 704, s. 4; c. 745; 1973, c. 236; c. 476, s. 138; c. 675; 1975, c. 686, s. 1; c. 699, s. 2; c. 975; 1979, c. 300, s. 1; c. 935; c. 986; 1981, c. 423, s. 1; 1983, c. 630, s. 1; 1983 (Reg. Sess., 1984), c. 1034, s. 16; 1985, c. 479, s. 55(c)(3); c. 757, s. 145(a); 1985 (Reg. Sess., 1986), c. 975, s. 24.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 975, s. 25 provides that the provisions of the act shall not be construed to abolish or in any manner affect any supplemental tax or any local taxing district.

Session Laws 1985 (Reg. Sess., 1986), c.

1014, s. 37(e) provides: "Notwithstanding the provisions of Section 19.1 of Chapter 1137 of the 1979 Session Laws as amended by Chapter 1053 of the 1981 Session Laws, G.S. 115C-12(9)a., G.S. 115C-12(16), G.S. 126-7, or any other provision of law other than G.S. 20-187.3(a) or G.S. 7A-102(c), no employee or officer of the public school system shall receive an automatic increment and no State employee

or officer shall receive a merit increment during the 1986-87 fiscal year, except as otherwise permitted by this act."

Effect of Amendments. — The 1985 (Reg.

Sess., 1986) amendment, effective July 11, 1986, deleted subdivision (2), relating to the power to divide administrative units into districts.

ARTICLE 4.

Officer of the Controller.

§ 115C-29. Controller's powers and duties generally.

(b) The controller, under the direction of the Board, shall perform the following duties:

- (1) He shall maintain a record or system of bookkeeping which shall reflect at all times the status of all educational funds committed to the administration of the Board and particularly the following:
 - a. State appropriation for maintenance of the public school term, which shall include all the objects of expenditure enumerated in G.S. 115C-426.
 - b. State appropriation and any other funds provided for the purchase and rental of public school textbooks.
 - c. State literary and building funds and such other building funds as may be hereafter provided by the General Assembly for loans, or grants, to local boards of education for school building purposes.
 - d. State and federal funds for vocational education and other funds as may be provided by act of Congress for assistance to the educational program.
 - e. State appropriation for the maintenance of the Board and its office personnel and including all employees serving under the Board.
 - f. Any miscellaneous funds within the jurisdiction of the Board not included in the above.
- (2) He shall prepare all forms and questionnaires necessary to furnish information and data for the consideration of the Board in preparing the State budget estimates required to be determined by the Board as to each local school administrative unit.
- (3) He shall certify to each local school administrative unit the teacher allotment as determined by the Board under G.S. 115C-301. The superintendent of the administrative units shall then certify to the Superintendent the names of the persons employed as teachers and principals. The Superintendent shall then determine the certificate ratings of the teachers and principals, shall certify such ratings to the controller, who shall then determine in accordance with the State standard salary schedule for teachers and principals, the salary rating of each person so certified. The controller shall then determine, in accordance with the schedule of salaries established, the total cost of salaries in each local school administrative unit for teachers and principals to be included in the State budget for the current fiscal year.
- (4) He shall satisfy himself before issuing any requisition upon the Department of Administration for payment out of the State treasury of any funds placed to the credit of any local school administrative unit, under the provisions of G.S. 115C-438:
 - a. That funds are lawfully available for the payment of such requisition; and

- b. Where the order covers salary payment to any employee that the amount thereof is within the salary schedule or salary rating of the particular employee.
- (5) He shall procure, through the Department of Administration, contracts for the purchase of the estimated needs and requirements of the several local school administrative units, covering the items of janitor supplies, instructional supplies, supplies used by the State Board of Education, and all other supplies, the payment for which is made from funds committed to the administration of the Board.
- (6) He shall purchase from the various publishers the textbooks needed and required in the public schools in accordance with contracts made by the State Board of Education.
- (7) Repealed by Session Laws 1983, c. 913, s. 16, effective July 22, 1983.
- (8) He shall attend all meetings of the Board and shall furnish all such information and data concerning the fiscal affairs of the Board as the Board may require.
- (9) He shall employ all necessary administrative and supervisory employees who work under his direction in the administration of the fiscal affairs of the Board, subject to the approval of the State Board of Education, which shall have authority to terminate such appointments for cause in conformity with Chapter 126 of the General Statutes, the State Personnel System.
- (10) He shall report directly to the Board upon all matters coming within his supervision and management.
- (11) He shall furnish to the Superintendent such information relating to fiscal affairs as may be necessary in the administration of his official duties.
- (11a) He shall have responsibility for the successful implementation of the central payroll system. This responsibility shall include recommending to the Board a systematic evaluation and selection process for qualifying vendors to specify payroll software requirements, systems software requirements, systems software and hardware, and any other expertise necessary to the central payroll requirements definition, system design, or implementation. It shall further include the responsibility to recommend to the Board termination of any contractual relationship where the contractor's performance is not meeting previously agreed upon performance standards, product standards, or deadlines. He shall report his progress monthly to the Joint Legislative Commission on Governmental Operations and to the Fiscal Research Division of the Legislative Services Commission.
- (12) He shall perform such other duties as may be assigned to him by the Board from time to time. (1955, c. 1372, art. 4, s. 1; 1957, c. 269, s. 1; 1975, c. 437, s. 15.1; c. 699, s. 4; c. 879, s. 46; 1981, c. 423, s. 1; 1983, c. 913, s. 16; 1985, c. 757, s. 145(m); 1985 (Reg. Sess., 1986), c. 975, s. 9.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 975, s. 25 provides that the provisions of the act shall not be construed to abol-

ish or in any manner affect any supplemental tax or any local taxing district.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 11, 1986, deleted "by districts" at the end of the second sentence of subdivision (b)(3).

ARTICLE 5.

*Local Boards of Education.***§ 115C-37. Election of board members.**

(g) Eligibility for Board Membership; Holding Other Offices. — Any person possessing the qualifications for election to public office set forth in Article VI, Sec. 6 of the Constitution of North Carolina shall be eligible to serve as a member of a local board of education: Provided, however, that any person elected or appointed to a local board of education, and also employed by that board of education, shall resign his employment before taking office as a member of that board of education.

Membership on a board of education is hereby declared to be an office that, with the exceptions provided above, may be held concurrently with any appointive office, pursuant to Article VI, Sec. 9 of the Constitution, but any person holding an elective office shall not be eligible to serve as a member of a local board of education.

(1955, c. 1372, art. 5, ss. 2-8; 1967, c. 972, ss. 2-6; 1969, c. 1301, s. 2; 1971, c. 704, s. 6; 1973, c. 1446, s. 1; 1977, c. 662; 1981, c. 423, s. 1; 1985, c. 404; c. 405, ss. 1, 2; 1985 (Reg. Sess., 1986), c. 975, s. 10.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 975, s. 25 provides that the provisions of the act shall not be construed to abolish or in any manner affect any supplemental tax or any local taxing district.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 11, 1986, deleted "or appointed to a district committee by that board of education" following "and also employed by that board of education" in the proviso in the first paragraph of subsection (g).

§ 115C-40. Board a body corporate.

The board of education of each county in the State shall be a body corporate by the name and style of "TheCounty Board of Education," and the board of education of each city administrative school unit in the State shall be a body corporate by the name and style of "TheCity Board of Education." The several boards of education, both county and city, shall hold all school property and be capable of purchasing and holding real and personal property, of building and repairing schoolhouses, of selling and transferring the same for school purposes, and of prosecuting and defending suits for or against the corporation.

Local boards of education, subject to any paramount powers vested by law in the State Board of Education or any other authorized agency shall have general control and supervision of all matters pertaining to the public schools in their respective local school administrative units; they shall execute the school laws in their units; and shall have authority to make agreements with other boards of education to transfer pupils from one local school administrative unit to another unit when the administration of the schools can be thereby more efficiently and more economically accomplished. (1955, c. 1372, art. 5, s. 10; 1981, c. 423, s. 1; 1985 (Reg. Sess., 1986), c. 975, s. 24.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 975, s. 25 provides that the provisions of the act shall not be construed to abolish or in any manner affect any supplemental tax or any local taxing district.

Effect of Amendments. — The 1985 (Reg.

Sess., 1986) amendment, effective July 11, 1986, deleted a former second paragraph of this section, relating to the conveyance of certain property in the possession of school committees to the board of education of the local school administrative unit.

§ 115C-45. Judicial functions of board.

CASE NOTES

Cited in Warren v. Buncombe County Bd. of Educ., — N.C. App. —, 343 S.E.2d 225 (1986).

§ 115C-47. (For effective date see notes) Powers and duties generally.

In addition to the powers and duties designated in G.S. 115C-36, local boards of education shall have the power or duty:

- (1) To Provide an Adequate School System. — It shall be the duty of local boards of education to provide adequate school systems within their respective local school administrative units, as directed by law.
- (2) To Exercise Certain Judicial Functions and to Participate in Certain Suits and Actions. — Local boards of education shall have the power and authority to exercise certain judicial functions pursuant to the provisions of G.S. 115C-45 and to participate in certain suits and actions pursuant to the provisions of G.S. 115C-44.
- (3) To Divide Local School Administrative Units into Attendance Areas. — Local boards of education shall have authority to divide their various units into attendance areas without regard to district lines.
- (4) To Regulate Extracurricular Activities. — Local boards of education shall make all rules and regulations necessary for the conducting of extracurricular activities in the schools under their supervision, including a program of athletics, where desired, without assuming liability therefor; provided, that all interscholastic athletic activities shall be conducted in accordance with rules and regulations prescribed by the State Board of Education.
- (5) To Fix Time of Opening and Closing Schools. — The time of opening and closing the public schools shall be fixed pursuant to the provisions of G.S. 115C-84(e).
- (6) To Regulate Fees, Charges and Solicitations. — Local boards of education shall adopt rules and regulations governing solicitations of, sales to, and fund-raising activities conducted by, the students and faculty members in schools under their jurisdiction, and no fees, charges, or costs shall be collected from students and school personnel without approval of the board of education as recorded in the minutes of said board; provided, this subdivision shall not apply to such textbooks fees as are determined and established by the State Board of Education. All schedules of fees, charges and solicitations approved by local boards of education shall be reported to the Superintendent of Public Instruction.
- (7) To Accept and Administer Federal or Private Funds. — Local boards of education shall have power and authority to accept, receive and administer any funds or financial assistance given, granted or provided under the provisions of the Elementary and Secondary Educa-

tion Act of 1965 (Public Law 89-10, 89th Congress, HR 2362) and under the provisions of the Economic Opportunity Act of 1964 (Public Law 88-452, 88th Congress, S. 2642), or other federal acts or funds from foundations or private sources, and to comply with all conditions and requirements necessary for the receipt, acceptance and use of said funds. In the administration of such funds, local boards of education shall have authority to enter into contracts with and to cooperate with and to carry out projects with nonpublic elementary and secondary schools, community groups and nonprofit corporations, and to enter into joint agreements for these purposes with other local boards of education. Local boards of education shall furnish such information as shall be requested by the State Board of Education, from time to time, relating to any programs related or conducted pursuant to this subdivision.

- (8) To Sponsor or Conduct Educational Research. — Local boards of education are authorized to sponsor or conduct educational research and special projects approved by the Department of Public Instruction and the State Board of Education that may improve the school system under their jurisdictions. Such research or projects may be conducted during the summer months and the board may use any available funds for such purposes.
- (9) To Assure Accurate Attendance Records. — When the governing board of any local school administrative unit shall have information that inaccurate school attendance records are being kept, the board concerned shall immediately investigate such inaccuracies and take necessary action to establish and maintain correct records and report its findings and action to the State Board of Education.
- (10) To Assure Appropriate Class Size. — It shall be the responsibility of local boards of education to determine if any exceptions occur during the school year in the allowed maximums. If additional pupils are enrolled so as to cause assignment of pupils in excess of the allowed maximums, except for an emergency or act of God, it shall be the duty of any affected teacher and of the principal to notify the superintendent, who shall immediately report the deviation to the local board of education. Upon notification of excess deviations in the maximum class size, local boards shall take correctional steps and shall transfer teaching positions between schools, if necessary, to correct the excess deviation. If the local board cannot remedy the situation, it shall immediately apply to the State Board of Education for contingency funds for additional personnel to correct exceptions. Excess deviations which cannot be corrected by transfer of teachers and by use of contingency funds shall be temporarily allowed with permission of the State Board of Education.

At the end of the first month of school each year, the superintendent of each administrative unit shall file a report for each school with the State Board of Education. This report shall be filed on forms furnished by the board and shall indicate the complete organization of each school, the duties of each teacher or other instructional personnel, and the class size or teaching load of each teacher.

It shall be the duty of local boards of education to provide adequate classroom facilities to meet the requirements of this subdivision and of G.S. 115C-301.

- (11) To Determine the Length of the School Day, the School Month and the School Term. — Local boards of education shall determine the length of the school day, the school month and the school term pursuant to the provisions of G.S. 115C-84(a) through (c).

- (12) To Implement the Basic Education Program. — Local boards of education shall implement the Basic Education Program in accordance with rules adopted by the State Board. This implementation shall include provision for the efficient teaching of the course content required by the standard course of study.
- (13) To Elect a Superintendent. — The local boards of education shall elect superintendents subject to the requirements and limitations set forth in G.S. 115C-271.
- (14) To Supply an Office, Equipment and Clerical Assistance for the Superintendent. — It shall be the duty of the various boards of education to provide the superintendent of schools with an office, equipment and clerical assistance as provided in G.S. 115C-277.
- (15) To Prescribe Duties of Superintendent. — The local boards of education shall prescribe the duties of the superintendent as subject to the provisions of G.S. 115C-276(a).
- (16) To Remove a Superintendent, When Necessary. — Local boards of education shall remove a superintendent for cause, pursuant to the provisions of G.S. 115C-274(a).
- (17) To Employ Assistant Superintendent and Supervisors. — Local boards of education have the authority to employ assistant superintendents and supervisors pursuant to the provisions of G.S. 115C-278 and 115C-284(g).
- (18) To Make Rules Concerning the Conduct and Duties of Personnel. — Local boards of education, upon the recommendation of the superintendent, shall have full power to make all just and needful rules and regulations governing the conduct of teachers, principals, and supervisors, the kind of reports they shall make, and their duties in the care of school property.
- (19) To Approve the Assignment of Duties to an Assistant Principal. — Local boards of education shall permit certain duties of the principal to be assigned to an assistant or acting principal pursuant to the provisions of G.S. 115C-289.
- (20) To Provide for Training of Teachers. — Local boards of education are authorized to provide for the training of teachers as provided in G.S. 115C-300.
- (21) To Pay School Employees. — It is the duty of every local board of education to provide for the prompt monthly payment of all salaries due teachers and other school officials and employees, and of all current bills and other necessary operating expenses. Local boards shall provide the State Board with any information needed by it to ensure the prompt monthly payment of employees of local boards who are paid through the central payroll system established under G.S. 115C-12(18). All salaries and bills shall be paid as provided by law for disbursing State and local funds.

The local board shall determine salary schedules of employees pursuant to the provisions of G.S. 115C-273, 115C-285(b), 115C-302(b) and 115C-316(b).

For employees not paid through the central payroll system, the authority for local boards of education to issue salary vouchers shall be a monthly payroll prepared on forms furnished by the State Board of Education and containing all information required by the controller of the State Board of Education. This monthly payroll shall be signed by the principal of each school.

- (22) To Provide School Food Services. — Local boards of education shall provide, to the extent practicable, school food services as provided in Part 2 of Article 17 of this Chapter.

- (23) To Purchase Equipment and Supplies. — They shall contract for equipment and supplies pursuant to the provisions of G.S. 115C-522(a).
- (24) Purchase of Activity Buses with Local Capital Outlay Tax Funds. — Local boards of education are authorized to purchase activity buses with local capital outlay tax funds, and are authorized to maintain these buses in the county school bus garage. Reimbursement to the State Public School Fund shall be made for all maintenance cost including labor, gasoline and oil, repair parts, tires and tubes, anti-freeze, etc. Labor cost reimbursements and local funds may be used to employ additional mechanics so as to insure that all activity buses owned and operated by local boards of education are maintained in a safe mechanical condition. The State Board of Education shall inspect each activity bus and recommend to the board whether the bus should be replaced but replacements will be determined by the local board of education. Such replacement units for activity buses shall be financed with local funds.
- (25) To Secure Liability Insurance. — Local boards of education are authorized to secure liability insurance, as provided in G.S. 115C-42, so as to waive their immunity for liability for certain negligent acts of their employees.
- (26) If a local board of education provides access to its buildings and campus and the student information directory to persons or groups which make students aware of occupational or educational options, the local board of education shall provide access on the same basis to official recruiting representatives of the military forces of the State and of the United States for the purpose of informing students of educational and career opportunities available in the military.
- (27) To Provide Retirement Age. — The local board of education may by resolution provide that every administrative officer whom it elects and every certificated personnel who serve that local school administrative unit shall retire on July 1, coincident with or next following their seventieth birthday, unless continued in service on a year-to-year basis in accordance with regulations adopted by the local board of education.
- (28) To Enter Lease Purchase Contracts for Automobiles. — Local boards may purchase automobiles by installment contracts that create in the property purchased a security interest to secure payment of the purchase money. A contract entered into under this subdivision is subject to the provisions of Article 8 of Chapter 159 of the General Statutes, except for G.S. 159-148(a)(4) and (b)(2). The lease purchase contract shall provide that there be no recourse for default in payments under the contract other than return of the automobile. The taxing power of any tax levying authority is not and may not be pledged directly or indirectly to secure any moneys due the seller.
- (29) To Authorize the Observance of a Moment of Silence. — Local boards of education may adopt policies to authorize the observance of a moment of silence at the commencement of the first class of each day in all grades in the public schools. Such a policy shall provide that the teacher in charge of the room in which each class is held may announce that a period of silence not to exceed one minute in duration shall be observed and that during that period silence shall be maintained and no one may engage in any other activities. Such period of silence shall be totally and completely unstructured and free of guidance or influence of any kind from any sources.

- (30) To Appoint Advisory Councils. — Local boards of education are authorized to appoint advisory councils as provided in G.S. 115C-55.
- (31) Local boards of education shall determine the hours of employment for teacher aides. The Legislative Commission of Salary Schedules for Public School Employees shall include in its report to the General Assembly recommendations regarding hours of employment for teacher aides and other employees. (1955, c. 1372, art. 5, ss. 18, 28, 30, 33; art. 6, s. 6; art. 17, s. 7; c. 1185; 1959, c. 1294; 1963, c. 425; c. 688, s. 3; 1965, c. 584, ss. 4, 6; c. 1185, s. 1; 1969, c. 517, s. 2; c. 538; 1973, c. 770, ss. 1, 2; c. 782, s. 31; 1975, c. 150, s. 1; c. 965, s. 3; 1977, c. 1088, s. 4; 1981, c. 423, s. 1; c. 901, s. 1; 1983 (Reg. Sess., 1984), c. 1019, s. 2, 1; c. 1034, s. 16; 1985, c. 436, s. 1; c. 479, s. 55(c)(4); c. 637; c. 757, s. 145(i); 1985 (Reg. Sess., 1986), c. 975, ss. 3, 11; c. 1014, s. 58.)

Section Set Out Twice. — The section above is effective until the components of the standard course of study have been fully incorporated and implemented as a part of the Basic Education Program. For this section as amended effective at that time, see the following section, also numbered § 115C-47.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 975, s. 25 provides that the provisions of the act shall not be construed to abolish or in any manner affect any supplemental tax or any local taxing district.

Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 243, contains a severability clause.

Effect of Amendments. — Session Laws (1985 Reg. Sess., 1986), c. 975, ss. 3 and 11,

effective July 11, 1986, deleted "or Committeeman" following "Remove a Superintendent" from the catchline to subdivision (16), and in that subdivision deleted "or a committeeman" preceding "for cause" and deleted "115C-59 and" preceding "115C-274(a)," and added subdivision (30).

Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 58, effective July 1, 1986, added subdivision (31).

Legal Periodicals. — For note suggesting that moment of silence statutes may threaten the wall of separation between church and state, in light of *Wallace v. Jaffree*, — U.S. —, 105 S. Ct. 2479, 86 L. Ed. 2d 29 (1985), see 8 *Campbell L. Rev.* 125 (1985).

CASE NOTES

Cited in *Craig v. Buncombe County Bd. of Educ.*, — N.C. App. —, 343 S.E.2d 222 (1986).

§ 115C-47. (For effective date see notes) Powers and duties generally.

In addition to the powers and duties designated in G.S. 115C-36, local boards of education shall have the power or duty:

- (1) To Provide an Adequate School System. — It shall be the duty of local boards of education to provide adequate school systems within their respective local school administrative units, as directed by law.
- (2) To Exercise Certain Judicial Functions and to Participate in Certain Suits and Actions. — Local boards of education shall have the power and authority to exercise certain judicial functions pursuant to the provisions of G.S. 115C-45 and to participate in certain suits and actions pursuant to the provisions of G.S. 115C-44.
- (3) To Divide Local School Administrative Units into Attendance Areas. — Local boards of education shall have authority to divide their various units into attendance areas without regard to district lines.
- (4) To Regulate Extracurricular Activities. — Local boards of education shall make all rules and regulations necessary for the conducting of extracurricular activities in the schools under their supervision, in-

- cluding a program of athletics, where desired, without assuming liability therefor; provided, that all interscholastic athletic activities shall be conducted in accordance with rules and regulations prescribed by the State Board of Education.
- (5) To Fix Time of Opening and Closing Schools. — The time of opening and closing the public schools shall be fixed pursuant to the provisions of G.S. 115C-84(e).
 - (6) To Regulate Fees, Charges and Solicitations. — Local boards of education shall adopt rules and regulations governing solicitations of, sales to, and fund-raising activities conducted by, the students and faculty members in schools under their jurisdiction, and no fees, charges, or costs shall be collected from students and school personnel without approval of the board of education as recorded in the minutes of said board; provided, this subdivision shall not apply to such textbook fees as are determined and established by the State Board of Education. All schedules of fees, charges and solicitations approved by local boards of education shall be reported to the Superintendent of Public Instruction.
 - (7) To Accept and Administer Federal or Private Funds. — Local boards of education shall have power and authority to accept, receive and administer any funds or financial assistance given, granted or provided under the provisions of the Elementary and Secondary Education Act of 1965 (Public Law 89-10, 89th Congress, HR 2362) and under the provisions of the Economic Opportunity Act of 1964 (Public Law 88-452, 88th Congress, S. 2642), or other federal acts or funds from foundations or private sources, and to comply with all conditions and requirements necessary for the receipt, acceptance and use of said funds. In the administration of such funds, local boards of education shall have authority to enter into contracts with and to cooperate with and to carry out projects with nonpublic elementary and secondary schools, community groups and nonprofit corporations, and to enter into joint agreements for these purposes with other local boards of education. Local boards of education shall furnish such information as shall be requested by the State Board of Education, from time to time, relating to any programs related or conducted pursuant to this subdivision.
 - (8) To Sponsor or Conduct Educational Research. — Local boards of education are authorized to sponsor or conduct educational research and special projects approved by the Department of Public Instruction and the State Board of Education that may improve the school system under their jurisdictions. Such research or projects may be conducted during the summer months and the board may use any available funds for such purposes.
 - (9) To Assure Accurate Attendance Records. — When the governing board of any local school administrative unit shall have information that inaccurate school attendance records are being kept, the board concerned shall immediately investigate such inaccuracies and take necessary action to establish and maintain correct records and report its findings and action to the State Board of Education.
 - (10) To Assure Appropriate Class Size. — It shall be the responsibility of local boards of education to determine if any exceptions occur during the school year in the allowed maximums. If additional pupils are enrolled so as to cause assignment of pupils in excess of the allowed maximums, except for an emergency or act of God, it shall be the duty of any affected teacher and of the principal to notify the superintendent, who shall immediately report the deviation to the local

board of education. Upon notification of excess deviations in the maximum class size, local boards shall take correctional steps and shall transfer teaching positions between schools, if necessary, to correct the excess deviation. If the local board cannot remedy the situation, it shall immediately apply to the State Board of Education for contingency funds for additional personnel to correct exceptions. Excess deviations which cannot be corrected by transfer of teachers and by use of contingency funds shall be temporarily allowed with permission of the State Board of Education.

At the end of the first month of school each year, the superintendent of each administrative unit shall file a report for each school with the State Board of Education. This report shall be filed on forms furnished by the board and shall indicate the complete organization of each school, the duties of each teacher or other instructional personnel, and the class size or teaching load of each teacher.

It shall be the duty of local boards of education to provide adequate classroom facilities to meet the requirements of this subdivision and of G.S. 115C-301.

- (11) To Determine the Length of the School Day, the School Month and the School Term. — Local boards of education shall determine the length of the school day, the school month and the school term pursuant to the provisions of G.S. 115C-84(a) through (c).
- (12) To Implement the Basic Education Program. — Local boards of education shall implement the Basic Education Program in accordance with rules adopted by the State Board. This implementation shall include provision for the efficient teaching of the course content required by the Basic Education Program.
- (13) To Elect a Superintendent. — The local boards of education shall elect superintendents subject to the requirements and limitations set forth in G.S. 115C-271.
- (14) To Supply an Office, Equipment and Clerical Assistance for the Superintendent. — It shall be the duty of the various boards of education to provide the superintendent of schools with an office, equipment and clerical assistance as provided in G.S. 115C-277.
- (15) To Prescribe Duties of Superintendent. — The local boards of education shall prescribe the duties of the superintendent as subject to the provisions of G.S. 115C-276(a).
- (16) To Remove a Superintendent, When Necessary. — Local boards of education shall remove a superintendent for cause, pursuant to the provisions of G.S. 115C-274(a).
- (17) To Employ Assistant Superintendents and Supervisors. — Local boards of education have the authority to employ assistant superintendents and supervisors pursuant to the provisions of G.S. 115C-278 and 115C-284(g).
- (18) To Make Rules Concerning the Conduct and Duties of Personnel. — Local boards of education, upon the recommendation of the superintendent, shall have full power to make all just and needful rules and regulations governing the conduct of teachers, principals, and supervisors, the kind of reports they shall make, and their duties in the care of school property.
- (19) To Approve the Assignment of Duties to an Assistant Principal. — Local boards of education shall permit certain duties of the principal to be assigned to an assistant or acting principal pursuant to the provisions of G.S. 115C-289.
- (20) To Provide for Training of Teachers. — Local boards of education are authorized to provide for the training of teachers as provided in G.S. 115C-300.

- (21) To Pay School Employees. — It is the duty of every local board of education to provide for the prompt monthly payment of all salaries due teachers and other school officials and employees, and of all current bills and other necessary operating expenses. Local boards shall provide the State Board with any information needed by it to ensure the prompt monthly payment of employees of local boards who are paid through the central payroll system established under G.S. 115C-12(18). All salaries and bills shall be paid as provided by law for disbursing State and local funds.

The local board shall determine salary schedules of employees pursuant to the provisions of G.S. 115C-273, 115C-285(b), 115C-302(b) and 115C-316(b).

For employees not paid through the central payroll system, the authority for local boards of education to issue salary vouchers shall be a monthly payroll prepared on forms furnished by the State Board of Education and containing all information required by the controller of the State Board of Education. This monthly payroll shall be signed by the principal of each school.

- (22) To Provide School Food Services. — Local boards of education shall provide, to the extent practicable, school food services as provided in Part 2 of Article 17 of this Chapter.
- (23) To Purchase Equipment and Supplies. — They shall contract for equipment and supplies pursuant to the provisions of G.S. 115C-522(a).
- (24) Purchase of Activity Buses with Local Capital Outlay Tax Funds. — Local boards of education are authorized to purchase activity buses with local capital outlay tax funds, and are authorized to maintain these buses in the county school bus garage. Reimbursement to the State Public School Fund shall be made for all maintenance cost including labor, gasoline and oil, repair parts, tires and tubes, anti-freeze, etc. Labor cost reimbursements and local funds may be used to employ additional mechanics so as to insure that all activity buses owned and operated by local boards of education are maintained in a safe mechanical condition. The State Board of Education shall inspect each activity bus and recommend to the board whether the bus should be replaced but replacements will be determined by the local board of education. Such replacement units for activity buses shall be financed with local funds.
- (25) To Secure Liability Insurance. — Local boards of education are authorized to secure liability insurance, as provided in G.S. 115C-42, so as to waive their immunity for liability for certain negligent acts of their employees.
- (26) If a local board of education provides access to its buildings and campus and the student information directory to persons or groups which make students aware of occupational or educational options, the local board of education shall provide access on the same basis to official recruiting representatives of the military forces of the State and of the United States for the purpose of informing students of educational and career opportunities available in the military.
- (27) To Provide Retirement Age. — The local board of education may by resolution provide that every administrative officer whom it elects and every certificated personnel who serve that local school administrative unit shall retire on July 1, coincident with or next following their seventieth birthday, unless continued in service on a year-to-year basis in accordance with regulations adopted by the local board of education.

- (28) To Enter Lease Purchase Contracts for Automobiles. — Local boards may purchase automobiles by installment contracts that create in the property purchased a security interest to secure payment of the purchase money. A contract entered into under this subdivision is subject to the provisions of Article 8 of Chapter 159 of the General Statutes, except for G.S. 159-148(a)(4) and (b)(2). The lease purchase contract shall provide that there be no recourse for default in payments under the contract other than return of the automobile. The taxing power of any tax levying authority is not and may not be pledged directly or indirectly to secure any moneys due the seller.
- (29) To Authorize the Observance of a Moment of Silence. — Local boards of education may adopt policies to authorize the observance of a moment of silence at the commencement of the first class of each day in all grades in the public schools. Such a policy shall provide that the teacher in charge of the room in which each class is held may announce that a period of silence not to exceed one minute in duration shall be observed and that during that period silence shall be maintained and no one may engage in any other activities. Such period of silence shall be totally and completely unstructured and free of guidance or influence of any kind from any sources.
- (30) To Appoint Advisory Councils. — Local boards of education are authorized to appoint advisory councils as provided in G.S. 115C-55.
- (31) Local boards of education shall determine the hours of employment for teacher aides. The Legislative Commission of Salary Schedules for Public School Employees shall include in its report to the General Assembly recommendations regarding hours of employment for teacher aides and other employees. (1955, c. 1372, art. 5, ss. 18, 28, 30, 33; art. 6, s. 6; art. 17, s. 6; c. 1185; 1959, c. 1294; 1963, c. 425; c. 688, s. 3; 1965, c. 584, ss. 4, 6; c. 1185, s. 1; 1969, c. 517, s. 2; c. 539; 1973, c. 770, ss. 1, 2; c. 782, s. 31; 1975, c. 150, s. 1; c. 965, s. 3; 1977, c. 1088, s. 4; 1981, c. 423, s. 1; c. 901, s. 1; 1983 (Reg. Sess., 1984), c. 1019, s. 2.1; c. 1034, s. 16; 1985, c. 436, s. 1; c. 479, s. 55(c)(4), 55(c)(6); c. 637; c. 757, s. 145(i); 1985 (Reg. Sess., 1986), c. 975, ss. 3, 11; c. 1014, s. 58.)

Section Set Out Twice. — The section above is effective when the components of the standard course of study have been fully incorporated and implemented as a part of the Basic Education Program. For this section as in effect until that time, see the preceding section, also numbered § 115C-47.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 975, s. 25 provides that the provisions of the act shall not be construed to abolish or in any manner affect any supplemental tax or any local taxing district.

Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 243, contains a severability clause.

Effect of Amendments. —

The 1985 amendment by c. 479, s. 55(c)(6), effective when the components of the standard course of study have been fully incorporated and implemented as a part of the Basic Education Program, substitutes "Basic Education

Program" for "standard course of study" at the end of subdivision (12).

Session Laws 1985 (Reg. Sess., 1986), c. 975, ss. 3 and 11, effective July 11, 1986, deleted "or Committeeman" following "Remove a Superintendent" from the catchline to subdivision (16) and in that subdivision deleted "or a committeeman" preceding "for cause" and deleted "115C-59 and" preceding "115C-274(a)," and added subdivision (30).

Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 58, effective July 1, 1986, added subdivision (31).

Legal Periodicals. — For note suggesting that moment of silence statutes may threaten the wall of separation between church and state, in light of *Wallace v. Jaffree*, — U.S. —, 105 S. Ct. 2479, 86 L. Ed. 2d 29 (1985), see 8 *Campbell L. Rev.* 125 (1985).

CASE NOTES

Cited in *Craig v. Buncombe County Bd. of Educ.*, — N.C. App. —, 343 S.E.2d 222 (1986).

ARTICLE 6.

Advisory Councils.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 975, s. 1 rewrote the heading to this Article, which formerly read "School Committees."

§ 115C-54: Repealed by Session Laws 1985 (Reg. Sess., 1986), c. 975, s. 1, effective July 11, 1986.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 975, s. 25 provides that the provisions of the act shall not be construed to abolish or in any manner affect any supplemental tax or any local taxing district.

§ 115C-55. Advisory councils.

A board of education may appoint an advisory council for any school or schools within the local school administrative unit. The purpose and function of an advisory council shall be to serve in an advisory capacity to the board on matters affecting the school or schools for which it is appointed. The organization, terms, composition and regulations for the operation of such advisory council shall be determined by the board. (1955, c. 1372, art. 7, s. 2; 1957, c. 686, s. 2; 1965, c. 584, s. 8; 1981, c. 423, s. 1; 1985 (Reg. Sess., 1986), c. 975, s. 1.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 975, s. 25 provides that the provisions of the act shall not be construed to abolish or in any manner affect any supplemental tax or any local taxing district.

Effect of Amendments. — The 1985 (Reg.

Sess., 1986) amendment, effective July 11, 1986, rewrote the catchline to this section, deleted the former first paragraph, relating to school committees, and deleted "county" preceding "board of education" in the present first sentence.

§§ 115C-56 to 115C-59: Repealed by Session Laws 1985 (Reg. Sess., 1986), c. 975, s. 1, effective July 11, 1986.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 975, s. 25 provides that the provisions of the act shall not be construed to abol-

ish or in any manner affect any supplemental tax or any local taxing district.

SUBCHAPTER III. SCHOOL DISTRICTS AND UNITS.

ARTICLE 7.

Organization of Schools.

§ 115C-69. Types of districts defined.

The term "district" here used is defined to mean any convenient territorial division or subdivision of a county, created for the purpose of maintaining within its boundaries one or more public schools. It may include one or more incorporated towns or cities, or parts thereof, or one or more townships, or parts thereof, all of which territory is included in a common boundary. There shall be three different kinds of districts:

- (2) The "local tax district" is a territorial division of a local school administrative unit under the control of the local board of education, having in addition to State and county funds, a special local tax fund voted by the people for supplementing State and county funds.

(1955, c. 1372, art. 1, s. 7; 1965, c. 584, s. 1; 1981, c. 423, s. 1; 1985 (Reg. Sess., 1986), c. 975, s. 12.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 975, s. 25 provides that the provisions of the act shall not be construed to abol-

ish or in any manner affect any supplemental tax or any local taxing district.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 11, 1986, deleted "county" preceding "local board of education" in subdivision (2).

§ 115C-70: Repealed by Session Laws 1985 (Reg. Sess., 1986), c. 975, s. 24, effective July 11, 1986.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 975, s. 25 provides that the provisions of the act shall not be construed to abol-

ish or in any manner affect any supplemental tax or any local taxing district.

§ 115C-73. Enlarging tax districts and city units by permanently attaching contiguous property.

The county boards of education with the approval of the State Board of Education may transfer from nontax territory and attach permanently to local tax districts or to city school administrative units, real property contiguous to said local tax districts or city school administrative units, upon the written petition of the owners thereof and the taxpayers of the families living on such real property, and there shall be levied upon the property of each individual in the area so attached, including landowners and tenants, the same tax as is levied upon other property in said district or unit: Provided, that such transfer shall be subject to the approval of the board of education of such city unit: Provided, the petition must be signed by a majority of the persons who are the owners thereof and a majority of the taxpayers of the families living on such real property on the date the petition is filed with the county board of education: Provided, further, that a person or corporation owning only an easement

in real property shall not be considered an owner of said property within contemplation of this section: Provided, further that no right of action or defense founded upon the invalidity of such transfer shall be asserted, nor shall the validity of such transfer be open to question in any court upon any ground whatever, except in an action or proceeding commenced within 60 days after the approval of such transfer is given by the State Board of Education.

Any qualified voter residing in the area attached shall be permitted to vote in any election for members of the board of education having jurisdiction over the attached area. (1955, c. 1372, art. 8, s. 4; 1959, c. 573, s. 4; 1971, c. 672; 1973, c. 1155; 1981, c. 423, s. 1; 1985 (Reg. Sess., 1986), c. 975, s. 13.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 975, s. 25 provides that the provisions of the act shall not be construed to abolish or in any manner affect any supplemental tax or any local taxing district.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 11, 1986, deleted "or the committee of such tax district, as the case may be" at the end of the first proviso of the first paragraph.

SUBCHAPTER IV. EDUCATION PROGRAM.

ARTICLE 8.

General Education.

Part 2. Calendar.

§ 115C-84. Length of school day, month, and term; Veterans Day.

(b) **School Month.** — A school month shall consist of 20 teaching days. School shall not be taught on Saturdays unless the needs of agriculture, or other conditions in the unit make it desirable that school be taught on such days. Whenever it is desirable to complete the school term of 180 days in a shorter term than nine calendar months, the board of education of any local school administrative unit may, in its discretion, require that school shall be taught on legal holidays, except Sundays, and in accordance with the custom and practice of such community.

(1955, c. 1372, art. 5, ss. 18, 19; 1957, c. 262; 1963, c. 425; c. 1223, s. 2; 1965, c. 1185, s. 1; 1969, c. 517, s. 2; c. 678; 1971, c. 85; c. 90, s. 1; 1973, c. 1137; 1977, c. 1128; 1979, c. 1069, s. 1.1; 1981, c. 423, s. 1; 1981 (Reg. Sess., 1982), c. 1282, s. 15.1; 1985, c. 791, ss. 7, 8; 1985 (Reg. Sess., 1986), c. 975, s. 14.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 975, s. 25 provides that the provisions of the act shall not be construed to abolish or in any manner affect any supplemental tax or any local taxing district.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 11, 1986, deleted "or district" following "or other conditions in the unit" in the second sentence of subsection (b).

ARTICLE 9.

Special Education.

Part 1. State Policy.

§ 115C-106. Policy.

CASE NOTES

Failure of county and state boards to provide free appropriate public education to child who suffered from dyslexia was a violation of this section and the parallel federal

statute, the Education for All Handicapped Children Act, 20 U.S.C. §§ 1400-1420. Hall v. Vance County Bd. of Educ., 774 F.2d 629 (4th Cir. 1985).

Part 2. Nondiscrimination in Education.

§ 115C-111. Free appropriate education for all children with special needs.

CASE NOTES

Failure of county and state boards to provide free appropriate public education to child who suffered from dyslexia was a violation of this section and the parallel federal

statute, the Education for All Handicapped Children Act, 20 U.S.C. §§ 1400-1420. Hall v. Vance County Bd. of Educ., 774 F.2d 629 (4th Cir. 1985).

§ 115C-115. (Effective July 1, 1987) Placements in private schools, out-of-state schools and schools in other local educational agencies.

The board shall adopt rules and regulations to assure that:

- (1) There be no cost to the parents or guardian for the placement of a child in a private school, out-of-school or a school in another local education agency if the child was so placed by the Board or by the appropriate local educational agency as the means of carrying out the requirement of this Article or any other applicable law requiring the provision of special education and related services to children within the State.
- (2) No child shall be placed by the Board or by the local educational agency in a private or out-of-state school unless the Board has determined that the school meets standards that apply to State and local educational agencies and that the child so placed will have all the rights he would have if served by a State or local educational agency.
- (3) If the placement of the child in a private school, or an out-of-state school determined by the Superintendent of Public Instruction to be the most cost-effective way to provide an appropriate education to that child and the child is not currently being educated by the Department of Human Resources or the Department of Correction, the State will bear a portion of the cost of the placement of the child. The local school administrative unit shall pay an amount equal to what it receives per pupil from the State Public School Fund and from other

State and federal funds for children with special needs for that child. The State shall pay the full cost of any remainder up to a maximum of fifty percent (50%) of the total cost. If the placement of the child in a school in another local educational agency is determined by the local superintendents to be the most cost effective way to provide an appropriate education to that child and the child is not currently being educated by the Department of Human Resources or the Department of Correction, the two local educational agencies shall enter into an agreement concerning the payment for services. The State is not obligated to provide any additional funds in this case. The State and local educational agencies shall be excused from payment of the costs of special education and related services in a private school if a child is placed in that school by his parents or guardian against the advice of the State or a local educational agency. (1977, c. 927, s. 1; 1979, 2nd Sess., c. 1299, s. 2; 1981, c. 423, s. 1; 1983, c. 768, s. 7; 1985, c. 465; 1985 (Reg. Sess., 1986), c. 1014, s. 76(a).)

For this section as in effect until July 1, 1987, see the main volume.

Editor's Note. — Section 2 of Session Laws 1985, c. 465, is amended by s. 76(a) of Session Laws 1985 (Reg. Sess., 1986), c. 1014, so as to change the effective date of the amendment by

Session Laws 1985, c. 465, from July 1, 1986 to July 1, 1987. Section 76 of c. 1014 is effective June 30, 1986.

Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 243, contains a severability clause.

CASE NOTES

Stated in *Hall v. Vance County Bd. of Educ.*, 774 F.2d 629 (4th Cir. 1985).

Part 13. Budget Analysis and Departmental Funding.

§ 115C-144. Departmental requests.

All budget requests for funding of new or existing or for the expansion of existing programs of special education and related services for children with special needs, aged birth through 21, to be furnished or provided by the Departments of Human Resources and Correction shall be annually submitted by those departments to the Board for review and comment prior to presentation by the respective department to the Governor and Advisory Budget Commission. The function of the Advisory Budget Commission under this section applies only if the Director of the Budget consults with the Commission in preparation of the budget. (1977, c. 927, s. 1; 1981, c. 423, s. 1; 1985 (Reg. Sess., 1986), c. 955, ss. 15, 16.)

Editor's Note. — Section 1 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "This act may be cited as the Separation of Powers Act of 1986."

Section 127 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "If any part of this act shall be declared invalid by any court, this shall not affect any other part of this act."

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 1, 1986, substituted "to the Governor and Advisory Budget Commission" for "to the Advisory Budget Commission" in the first sentence and added the second sentence.

ARTICLE 10A.

Testing.

Part 1. Commission on Testing.

§ 115C-174.1. Commission established; purpose.

There is established a Commission on Testing for the purpose of advising the State Board of Education on all matters pertaining to tests and testing from kindergarten through the 12th grades. This Commission shall assume all of the functions previously performed by the Annual Testing Commission and by the Competency Testing Commission and advise the State Board of Education on matters pertaining to the selection, development, and utilization of achievement tests designed to measure student achievement in the areas specified in the Basic Education Program. (1985 (Reg. Sess., 1986), c. 1014, s. 74(a).)

Editor's Note. — Section 74(b) of Session Laws 1985 (Reg. Sess., 1986), c. 1014, makes this Article effective July 15, 1986.

Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 243, contains a severability clause.

Where appropriate, historical citations from

former Articles 11 and 12 of this chapter, which were repealed by Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 74 (a), have been added to corresponding sections in new Article 10A.

§ 115C-174.2. Membership of Commission.

(a) The Governor shall appoint the members of the Commission.

(b) The Commission shall be composed of 17 voting members, of whom five shall be classroom teachers currently employed to teach in grades 1, 2, 3, 6, and 8; four shall be currently employed high school teachers, one each from the areas of English, mathematics, social studies, and science; two shall be teachers of exceptional children, one of the educable mentally handicapped and the other of the learning disabled; one shall be a test psychometrician; one shall be a test coordinator; one shall be a principal; one shall be a superintendent; and two shall be professional educators from the faculties of institutions of higher education in the State.

(c) The Superintendent of Public Instruction, or his designee, shall serve as an ex officio, nonvoting member of the Commission on Testing. (1977, c. 522, s. 2; c. 541, s. 3; 1981, c. 423, s. 1; 1981 (Reg. Sess., 1982), c. 1189, s. 2; 1983, c. 627, s. 2; 1985 (Reg. Sess., 1986), c. 1014, s. 74(a).)

§ 115C-174.3. Term of office.

The regular term of office for all members shall be four years except that, of the initial appointments under this part, half shall be appointed for a term of two years and the remainder for a term of four years. All subsequent appointments shall be for a term of four years. (1985 (Reg. Sess., 1986), c. 1014, s. 74(a).)

§ 115C-174.4. Chairman.

The superintendent named to the Commission shall serve as chairman of the Commission. The Commission shall elect from its membership a vice-chairman to serve in the absence of the chairman. (1985 (Reg. Sess., 1986), c. 1014, s. 74(a).)

§ 115C-174.5. Compensation of members.

The members shall be entitled to compensation for each day spent on the work of the Commission as approved by the State Board of Education and receive reimbursement for travel and subsistence expenses incurred in the performance of their duties at rates specified in G.S. 138-5 or 138-6, whichever is applicable to the individual member. All currently employed teachers serving on the Commission shall receive full pay for each day spent on the work of the Commission without any reduction in salary for a substitute teacher's pay. (1985 (Reg. Sess., 1986), c. 1014, s. 74(a).)

§ 115C-174.6. Duties of Commission.

(a) The members of the Commission shall secure copies of tests designed to measure academic achievement. Each of these tests shall be examined carefully and the Commission shall file with the State Board of Education a written evaluation of each of these tests along with appropriate recommendations. In evaluating a test, the Commission shall give special consideration to the suitability of a test to the instructional level or special education program for which it is intended to be used and the validity of the test.

(b) The State Board of Education may call on the Commission for advice and assistance in the development of new tests designed for use in the Statewide Testing Program, if the Board has determined that appropriate tests are not available for purchase.

(c) The State Board of Education may call on the Commission to make recommendations on minimum passing scores whenever necessary.

(d) The State Board of Education may call on the Commission to conduct public forums on testing issues and to report its findings to the Board. (1977, c. 522, s. 3; c. 541, s. 4; 1981, c. 423, s. 1; 1985 (Reg. Sess., 1986), c. 1014, s. 74(a).)

§§ 115C-174.7 to 115C-174.9: Reserved for future codification purposes.

Part 2. Statewide Testing Program.

§ 115C-174.10. Purposes of the Statewide Testing Program.

The three testing programs in this Article have three purposes: (i) to assure that all high school graduates possess those minimum skills and that knowledge thought necessary to function as a member of society; (ii) to provide a means of identifying strengths and weaknesses in the education process; and (iii) to establish additional means for making the education system accountable to the public for results. (1977, c. 522, s. 1; 1981, c. 423, s. 1; 1985 (Reg. Sess., 1986), c. 1014, s. 74(a).)

§ 115C-174.11. Components of the testing program.

(a) Annual Testing Program. — In order to assess the effectiveness of the educational process, and to ensure that each pupil receives the maximum educational benefit from the educational process, the State Board of Education shall implement an annual statewide testing program in basic subjects. It is the purpose of this testing program to help local school systems and teachers identify and correct student needs in basic skills rather than to provide a tool for comparison of individual students or to evaluate teacher performance. The annual testing program shall be conducted each school year for the first, second, third, sixth and eighth grades. Students in these grade levels who are enrolled in special education programs or who have been officially designated as eligible for participation in such programs may be excluded from the testing program if special testing procedures are required for testing such students. The State Board of Education shall select annually the type or types of tests to be used in the testing program. If norm-referenced tests are used in the first or second grade, the tests shall not be used as primary, definitive, or exclusive criteria to make decisions with respect to grade promotion or placement in special education programs.

(b) Competency Testing Program.

- (1) The State Board of Education shall adopt tests or other measurement devices which may be used to assure that graduates of the public high schools and graduates of nonpublic schools supervised by the State Board of Education pursuant to the provisions of Part 1 of Article 39 of this Chapter possess the skills and knowledge necessary to function independently and successfully in assuming the responsibilities of citizenship.
- (2) The tests shall be administered annually to all tenth grade students in the public schools. Students who fail to attain the required minimum standard for graduation in the tenth grade shall be given remedial instruction and additional opportunities to take the test up to and including the last month of the twelfth grade. Students who fail to pass parts of the test shall be retested on only those parts they fail. Students in the tenth grade who are enrolled in special education programs or who have been officially designated as eligible for participation in such programs may be excluded from the testing programs.
- (3) The State Board of Education may develop and validate alternate means and standards for demonstrating minimum competence. These standards, which must be more difficult than the tests adopted pursuant to subdivision (1) of this subsection, may be passed by students in lieu of the testing requirement of subdivision (2) of this subsection.
- (4) Funds appropriated for the purpose of remediation support for students who fail the high school competency test shall be distributed in accordance with rules promulgated by the State Board of Education. The State Board of Education shall allocate remediation funds to institutions administered by the Department of Human Resources on the same basis as funds allocated to other local education agencies.

(c) Competency Based Curriculum Testing. — In order to provide achievement information and educational accountability as part of the Basic Education Program, the State Board of Education may acquire, in the most cost-efficient manner, achievement tests and test information to evaluate achievement in those grades and courses as specified in the Basic Education Program. Information from these tests may be used as one criterion by teachers and local school personnel in arriving at student grades and in making administrative decisions. (1977, c. 522, s. 1; c. 541, s. 1; 1981, c. 423, s. 1; 1983, c. 627, s. 1; 1985, c. 409, ss. 1, 2; 1985 (Reg. Sess., 1986), c. 1014, s. 74(a).)

§ 115C-174.12. Responsibilities of agencies.

(a) The State Board of Education shall review the recommendations of the Commission on Testing and select the tests that it believes will provide the best measures of the levels of academic achievement attained by students in various subject areas. The State Board of Education shall also establish policies and guidelines necessary for carrying out the provisions of this Article.

(b) The Superintendent of Public Instruction shall be responsible, under policies adopted by the State Board of Education, for the statewide administration of the testing program provided by this Article and for providing necessary staff services to the Commission.

(c) Local boards of education shall cooperate with the State Board of Education in implementing the provisions of this Article, including the regulations and policies established by the State Board of Education. Local school administrative units shall use the annual and competency testing programs to fulfill the purposes set out in this Article. Local school administrative units are encouraged to continue to develop local testing programs designed to diagnose student needs further. (1977, c. 522, ss. 4-6; c. 541, ss. 2, 5-7; 1981, c. 423, ss. 1; 1985 (Reg. Sess., 1986), c. 1014, s. 74(a).)

§ 115C-174.13. Public records exemption.

Any written material containing the identifiable scores of individual students on any test taken pursuant to the provisions of this Article is not a public record within the meaning of G.S. 132-1 and shall not be made public by any person, except as permitted under the provisions of the Family Educational and Privacy Rights Act of 1974, 20 U.S.C. 1232g. (1977, c. 522, s. 7; c. 541, s. 8; 1981, c. 423, s. 1; 1985 (Reg. Sess., 1986), c. 1014, s. 74(a).)

§ 115C-174.14. Provisions for nonpublic schools.

All components of the Statewide Testing Program shall be made available to nonpublic schools in the manner prescribed in G.S. 115C-551 and G.S. 115C-559. (1977, c. 522, s. 8; c. 541, s. 9; 1981, c. 423, s. 1; 1985 (Reg. Sess., 1986), c. 1014, s. 74(a).)

ARTICLE 11.***High School Competency Testing.***

§§ 115C-175 to 115C-188: Repealed by Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 74(a), effective July 15, 1986.

Cross References. — For present provisions as to testing, see § 115C-174.1 et seq.

Editor's Note. — Session Laws 1985 (Reg.

Sess., 1986), c. 1014, s. 243, contains a severability clause.

ARTICLE 12.

Statewide Testing Program.

§§ 115C-189 to 115C-202: Repealed by Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 74(a), effective July 15, 1986.

Cross References. — For present provisions as to testing, see § 115C-174.1 et seq.

Sess., 1986), c. 1014, s. 243, contains a severability clause.

Editor's Note. — Session Laws 1985 (Reg.

ARTICLE 17.

Supporting Services.

Part 1. Transportation.

§ 115C-243. Use of school buses by senior citizen groups.

(f) Before any agreement under this section may be signed, the State Board of Education shall adopt a uniform schedule of charges for the use of buses under this section. Such schedule shall include a charge by the hour and by the mile which shall cover all costs both fixed and variable, including depreciation, gasoline, fuel, labor, maintenance, and insurance. The schedule may be amended by the State Board of Education. The schedule of charges adopted by the local board of education under subsection (c) may vary from the State schedule only to cover changes in wages. Prior to taking any action under this subsection, the State Board of Education may consult with the Advisory Budget Commission. (1977, 2nd Sess., c. 1280, s. 1; 1981, c. 423, s. 1; 1983, c. 717, s. 92; 1985 (Reg. Sess., 1986), c. 955, ss. 17, 18.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Section 1 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "This act may be cited as the Separation of Powers Act of 1986."

Section 127 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "If any part of this act

shall be declared invalid by any court, this shall not affect any other part of this act."

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 1, 1986, deleted "after consultation with the Advisory Budget Commission" following "State Board of Education" in two places in subsection (f) and added the last sentence of subsection (f).

§ 115C-246. School bus routes.

(d) Repealed by Session Laws 1985 (Reg. Sess., 1986), c. 975, s. 24, effective July 11, 1986.

(1955, c. 1372, art. 21, s. 7; 1959, c. 573, s. 15; 1963, c. 990, ss. 2, 3; 1965, c. 1095, ss. 2, 3; 1981, c. 423, s. 1; 1985 (Reg. Sess., 1986), c. 975, s. 24.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 975, s. 25 provides that the pro-

visions of the act shall not be construed to abolish or in any manner affect any supplemental tax or any local taxing district.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 11,

1986, deleted subsection (d), relating to requests by the school committee to change school bus routes.

SUBCHAPTER V. PERSONNEL.

ARTICLE 18.

Superintendents.

§ 115C-272. Residence, oath of office, and salary of superintendent.

(b) Superintendents shall be paid promptly when their salaries are due provided the legal requirements for their employment and service have been met. All superintendents employed by any local school administrative unit who are paid from local funds shall be paid promptly as provided by law and as State allotted superintendents are paid. Superintendents paid from State funds shall be paid as follows:

- (1) Salary payments to superintendents made through the central payroll system shall be made monthly on the statewide payroll date, as provided in G.S. 115C-12(18). Salary payments to superintendents made through a local payroll system may be made monthly on the basis of each calendar month of service or on the statewide payroll date for superintendents, at the discretion of the local board. Included within their term of employment shall be annual vacation leave at the same rate provided for State employees. Included within the 12 months' employment each local board of education shall designate the same or an equivalent number of legal holidays as those designated by the State Personnel Commission for State employees.
- (2) Notwithstanding any provisions of this section to the contrary no person shall be entitled to pay for any vacation day not earned by that person. Vacation days shall not be used for extending the term of employment of individuals and shall not be cumulative from one fiscal year to another fiscal year: Provided, that superintendents may accumulate annual vacation leave days as follows: annual leave may be accumulated without any applicable maximum until December 31 of each year. On December 31 of each year, any superintendent with more than 30 days of accumulated leave shall have the excess accumulation cancelled so that only 30 days are carried forward to January 1 of the next year. All vacation leave taken by the superintendent will be upon the authorization of his immediate supervisor and under policies established by the local board of education. An employee shall be paid in a lump sum for accumulated annual leave not to exceed a maximum of 240 hours when separated from service due to resignation, dismissal, reduction in force, death, or service retirement. If the last day of terminal leave falls on the last workday in the month, payment shall be made for the remaining nonworkdays in that month. Employees retiring on disability retirement may exhaust annual leave rather than be paid in a lump sum. The provisions of this subdivision shall be accomplished without additional State and local funds being appropriated for this purpose. The State Board of Education shall adopt rules and regulations for the administration of this subdivision.

- (3) Each local board of education shall sustain any loss by reason of an overpayment to any superintendent paid from State funds.
- (4) All of the foregoing provisions of this section shall be subject to the requirement that at least fifty dollars (\$50.00), or other minimum amount required by federal social security laws, of the compensation of each school employee covered by the Teachers' and State Employees' Retirement System or otherwise eligible for social security coverage shall be paid in each of the four quarters of the calendar year.

(1955, c. 1372, art. 6, s. 1; art. 17, s. 9; art. 18, s. 6; 1961, c. 1085; 1971, c. 1052; 1973, c. 647, s. 1; 1975, cc. 383, 608; c. 834, ss. 1, 2; 1979, c. 600, ss. 1-5; 1981, c. 423, s. 1; c. 946, s. 1; 1983, c. 872, s. 1; 1985, c. 757, s. 145(c); 1985 (Reg. Sess., 1986), c. 975, s. 15.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 975, s. 25 provides that the provisions of the act shall not be construed to abolish or in any manner affect any supplemental tax or any local taxing district.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 11, 1986, deleted "or school district" following "school administrative unit" in the second sentence of subsection (b).

§ 115C-276. Duties of superintendent.

(g) To Familiarize Himself with and to Implement State Policies and Rules. — It shall be the duty of the superintendent to keep himself thoroughly informed as to all policies promulgated and rules adopted by the State Superintendent of Public Instruction and the State Board of Education, for the organization and government of the public schools. The superintendent shall notify and inform his board of education, supervisors, principals, teachers, janitors, bus drivers, and all other persons connected with the public schools, of such policies and rules. In the performance of these duties, the superintendent shall confer, work, and plan with all school personnel to achieve the best methods of instruction, school organization and school government.

(j) To Assist the Local Board in Electing School Personnel. — It shall be the duty of the superintendent to recommend and the board of education to elect all principals, teachers, and other school personnel in the administrative unit.

(1955, c. 1372, art. 5, s. 24; art. 6, ss. 3-6, 10, 15; art. 17, s. 6; art. 18, s. 7; 1959, c. 1294; 1963, c. 688, s. 3; 1965, c. 584, ss. 5, 6, 16; 1969, c. 539; 1973, c. 770, ss. 1, 2; 1975, c. 965, s. 3; 1977, c. 1088, s. 4; 1981, c. 423, s. 1; 1985 (Reg. Sess., 1986), c. 975, ss. 17, 18, 24.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 975, s. 25 provides that the provisions of the act shall not be construed to abolish or in any manner affect any supplemental tax or any local taxing district.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 11,

1986, deleted "the school committees" following "his board of education" near the beginning of the second sentence of subsection (g), rewrote the first paragraph of subsection (j), and deleted the former second paragraph of subsection (j), relating to the duty of the city superintendent to record in the minutes the action of the city board of education in the election of principals, teachers and other school personnel.

ARTICLE 19.

*Principals and Supervisors.***§ 115C-284. Method of selection and requirements.**

(e) It shall be unlawful for any board of education to employ or keep in service any principal or supervisor who neither holds nor is qualified to hold a certificate in compliance with the provision of the law or in accordance with the regulations of the State Board of Education.

(1955, c. 1372, art. 5, ss. 4, 27; art. 6, s. 6; art. 18, ss. 1-4; 1963, c. 688, s. 3; 1965, c. 584, ss. 6, 20.1; 1969, c. 539; 1971, c. 1188, s. 1; 1973, cc. 236, 733; c. 770, ss. 1, 2; 1975, c. 437, s. 7; c. 686, s. 1; c. 731, ss. 1, 2; c. 965, s. 3; 1977, c. 1088, s. 4; 1981, c. 423, s. 1; 1983 (Reg. Sess., 1984), c. 1103, s. 4; 1985 (Reg. Sess., 1986), c. 975, s. 16.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 975, s. 25 provides that the provisions of the act shall not be construed to abolish or in any manner affect any supplemental tax or any local taxing district.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 11, 1986, deleted "or school committee" following "any board of education" near the beginning of subsection (e).

§ 115C-285. Salary.

(a) Principals and supervisors shall be paid promptly when their salaries are due provided the legal requirements for their employment and service have been met. All principals and supervisors employed by any local school administrative unit who are to be paid from local funds shall be paid promptly as provided by law and as state-allotted principals and supervisors are paid.

Principals and supervisors paid from State funds shall be paid as follows:

- (1) Classified principals and state-allotted supervisors shall be employed for a term of 12 calendar months. Salary payments to classified principals and state-allotted supervisors made through the central payroll system shall be made monthly on the statewide payroll date, as provided in G.S. 115C-12(18). Salary payments to classified principals and state-allotted supervisors made through a local payroll system may be made monthly at the end of each calendar month of service or on the statewide payroll date for such employees, at the discretion of the local board. They shall earn annual vacation leave at the same rate provided for State employees. On a day that employees are required to report for a workday but pupils are not required to attend school due to inclement weather, an employee may elect not to report due to hazardous travel conditions and to take one of his annual vacation days or to make up the day at the time agreed upon by the employee and his immediate supervisor. They shall be provided by the board the same or an equivalent number of legal holidays as those designated by the State Personnel Commission for State employees.
- (2) Supervisors and classified principals paid on an hourly or other basis whether paid from State or from local funds may accumulate annual vacation leave days as follows: annual leave may be accumulated without any applicable maximum until December 31 of each year. On

December 31 of each year, any supervisor or principals with more than 30 days of accumulated leave shall have the excess accumulation cancelled so that only 30 days are carried forward to January 1 of the next year. All vacation leave taken by the employee will be upon the authorization of his immediate supervisor and under policies established by the local board of education. An employee shall be paid in a lump sum for accumulated annual leave not to exceed a maximum of 240 hours when separated from service due to resignation, dismissal, reduction in force, death, or service retirement. If the last day of terminal leave falls on the last workday in the month, payment shall be made for the remaining nonworkdays in that month. Employees retiring on disability retirement may exhaust annual leave rather than be paid in a lump sum. The provisions of this subdivision shall be accomplished without additional State and local funds being appropriated for this purpose. The State Board of Education shall adopt rules and regulations for the administration of this subdivision.

- (3) Notwithstanding any provisions of this section to the contrary no person shall be entitled to pay for any vacation day not earned by that person. Vacation days shall not be used for extending the term of employment of individuals and shall not be cumulative from one fiscal year to another fiscal year, except as provided in subdivision (5) of this section.
- (4) Each local board of education shall sustain any loss by reason of an overpayment to any principal or supervisor paid from State funds.
- (5) All of the foregoing provisions of this section shall be subject to the requirement that at least fifty dollars (\$50.00), or other minimum amount required by federal social security laws, of the compensation of each school employee covered by the Teachers' and State Employees' Retirement System or otherwise eligible for social security coverage shall be paid in each of the four quarters of the calendar year.
- (6) The State Board of Education, in fixing the State standard salary schedule of principals as authorized by law, shall provide that principals who entered the armed or auxiliary forces of the United States after September 16, 1940, and who left their positions for such service, shall be allowed experience increments for the period of such service as though the same had not been interrupted thereby, in the event such persons return to the position of teachers, principals or superintendents in the public schools of the State after having been honorably discharged from the armed or auxiliary forces of the United States.
- (7) All persons employed as principals in the schools and institutions listed in subsection (p) of G.S. 115C-325 shall be compensated at the same rate as are teachers in the public schools in accordance with the salary schedule adopted by the State Board of Education.

(1955, c. 1372, art. 5, s. 32; art. 6, s. 13; art. 17, s. 9; art. 18, s. 6; 1961, c. 1085; 1965, c. 584, s. 3; 1971, c. 1052; 1973, c. 315, s. 2; c. 647, s. 1; 1975, c. 383; c. 437, s. 9; c. 608; c. 834, ss. 1, 2; 1979, c. 600, ss. 1-5; 1981, c. 423, s. 1; c. 639, s. 4; c. 946, s. 2; 1983, c. 872, s. 2; 1985, c. 757, s. 145(d); 1985 (Reg. Sess., 1986), c. 975, s. 15.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 975, s. 25 provides that the provisions of the act shall not be construed to abolish or in any manner affect any supplemental tax or any local taxing district.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 11, 1986, deleted "or school district" following "school administrative unit" in the second sentence of the first paragraph of subsection (a).

§ 115C-288. Powers and duties of principal.

(d) To Conduct Fire Drills and Inspect for Fire Hazards. — It shall be the duty of the principal to conduct a fire drill during the first week after the opening of school and thereafter at least one fire drill each school month, in each building in his charge, where children are assembled. Fire drills shall include all pupils and school employees, and the use of various ways of egress to simulate evacuation of said buildings under various conditions, and such other regulations as shall be prescribed for fire safety by the Commissioner of Insurance, the Superintendent of Public Instruction and the State Board of Education. A copy of such regulations shall be kept posted on the bulletin board in each building.

It shall be the duty of each principal to inspect each of the buildings in his charge at least twice each month during the regular school session. This inspection shall include cafeterias, gymnasiums, boiler rooms, storage rooms, auditoriums and stage areas as well as all classrooms. This inspection shall be for the purpose of keeping the buildings safe from the accumulation of trash and other fire hazards.

It shall be the duty of the principal to file two copies of a written report once each month during the regular school session with the superintendent of his local school administrative unit, one copy of which shall be transmitted by the superintendent to the chairman of the local board of education. This report shall state the date the last fire drill was held, the time consumed in evacuating each building, that the inspection has been made as prescribed by law and such other information as is deemed necessary for fire safety by the Commissioner of Insurance, the Superintendent of Public Instruction and the State Board of Education.

It shall be the duty of the principal to minimize fire hazards pursuant to the provisions of G.S. 115C-525.

(1955, c. 1372, art. 17, ss. 6, 8; 1957, c. 843; 1959, c. 573, s. 13; c. 1294; 1965, c. 584, s. 15; 1981, c. 423, s. 1; 1985 (Reg. Sess., 1986), c. 975, s. 4.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 975, s. 25 provides that the provisions of the act shall not be construed to abolish or in any manner affect any supplemental tax or any local taxing district.

Effect of Amendments. — The 1985 (Reg.

Sess., 1986) amendment, effective July 11, 1986, substituted "to file two copies of a written report" for "to file a written report" and "with the superintendent of his local school administrative unit" for "with his local school committee, and two copies of this report with the superintendent of his local school administrative unit" in the first sentence of the third paragraph of subsection (d).

ARTICLE 20.

*Teachers.***§ 115C-295. Minimum age and certificate prerequisites.**

(b) It shall be unlawful for any board of education to employ or keep in service any teacher who neither holds nor is qualified to hold a certificate in compliance with the provision of the law or in accordance with the regulations of the State Board of Education. (1955, c. 1372, art. 18, ss. 1, 4; 1975, c. 437, s. 7; c. 731, ss. 1, 2; 1981, c. 423, s. 1; 1985 (Reg. Sess., 1986), c. 975, s. 16.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 975, s. 25 provides that the provisions of the act shall not be construed to abolish or in any manner affect any supplemental tax or any local taxing district.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 11, 1986, deleted "or school committee" following "board of education" near the beginning of subsection (b).

CASE NOTES

"Temporary Personnel" Not Included in Definition of "Probationary Teacher". — The General Assembly did not intend that the "temporary personnel" authorized by this section be included within the definition of "pro-

bationary teacher" contained in § 115C-325 (a)(5). *Campbell v. Board of Educ.*, 76 N.C. App. 495, 333 S.E.2d 507 (1985), cert. denied, 315 N.C. 390, 338 S.E.2d 878 (1986).

§ 115C-299. Hiring of teachers.

(b) No person otherwise qualified shall be denied the right to receive credentials from the State Board of Education, to receive training for the purpose of becoming a teacher, or to engage in practice teaching in any school on the grounds that such person is totally or partially blind; nor shall any local board of education refuse to employ such a person on such grounds. (1955, c. 1372, art. 5, s. 4; 1971, c. 949; 1981, c. 423, s. 1; 1985 (Reg. Sess., 1986), c. 975, s. 5.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 975, s. 25 provides that the provisions of the act shall not be construed to abolish or in any manner affect any supplemental tax or any local taxing district.

Effect of Amendments. — The 1985 (Reg.

Sess., 1986) amendment, effective July 11, 1986, substituted "that such person" for "he" and substituted "nor shall any local board of education refuse to employ such a person on such grounds" for "nor shall any school district refuse to engage a teacher on such grounds, so long as such blind teacher is able to carry out the duties of the position for which he applies in the school district" in subsection (b).

§ 115C-302. Salary and vacation.

(a) Teachers shall be paid promptly when their salaries are due provided the legal requirements for their employment and service have been met. All teachers employed by any local school administrative unit who are to be paid from local funds shall be paid promptly as provided by law and as state-allotted teachers are paid.

Teachers paid State funds shall be paid as follows:

- (1) Academic Teachers. — Regular state-allotted teachers shall be employed for a period of 10 calendar months. Salary payments to regular state-allotted teachers made through the central payroll system shall be made monthly on the statewide payroll date, as provided in G.S. 115C-12(18). Salary payments to regular state-allotted teachers made through a local payroll system may be made monthly at the end of each calendar month of service or on the statewide payroll date for such employees, at the discretion of the local board: Provided, that any individual teacher may be paid in 12 monthly installments of the teacher so requests on or before the first day of the school year. Such request shall be filed in the local school administrative unit which employs the teacher. The payment of the annual salary in 12 installments instead of 10 shall not increase or decrease said annual salary nor in any other way alter the contract made between the teacher and the said local school administrative unit; nor shall such payment apply to any teacher who is employed for a period of less than 10 months. Included within the 10 calendar months employment shall be annual vacation leave at the same rate provided for State employees, computed at one twelfth (1/12) of the annual rate for State employees for each calendar month of employment; which shall be provided by each local board of education at a time when students are not scheduled to be in regular attendance. Included within the 10 calendar months employment each local board of education shall designate the same or an equivalent number of legal holidays occurring within the period of employment for academic teachers as those designated by the State Personnel Commission for State employees; on a day that employees are required to report for a workday but pupils are not required to attend school due to inclement weather, a teacher may elect not to report due to hazardous travel conditions and to take one of his annual vacation days or to make up the day at a time agreed upon by the employee and his immediate supervisor or principal. Within policy adopted by the State Board of Education, each local board of education shall develop rules and regulations designating what additional portion of the 10 calendar months not devoted to classroom teaching, holidays, or annual leave shall apply to service rendered before the opening of the school term, during the school term, and after the school term and to fix and regulate the duties of state-allotted teachers during said period, but in no event shall the total number of workdays exceed 200 days. Local boards of education shall consult with the employed public school personnel in the development of the 10-calendar-months schedule.
- (2) Occupational Education Teachers. — State-allotted months of employment to local boards of education as provided by the State Board of Education shall be used for the employment of teachers of occupational education for a term of employment as determined by the local boards of education. Salary payments to these occupational education teachers made through the central payroll system shall be made monthly on the statewide payroll date, as provided in G.S.

115C-12(18). Salary payments to these occupational education teachers made through a local payroll system may be made monthly at the end of each calendar month of service or on the statewide payroll date for these employees, at the discretion of the local board: Provided, that local boards shall not reduce the term of employment for any vocational agriculture teacher personnel position that was 12 calendar months for the 1982-83 school year for any school year thereafter: Provided, that any individual teacher employed for a term of 10 calendar months may be paid in 12 monthly installments if the teacher so requests on or before the first day of the school year. Such request shall be filed in the administrative unit which employs the teacher. The payment of the annual salary in 12 installments instead of 10 shall not increase or decrease said annual salary nor in any other way alter the contract made between the teacher and the said administrative unit. Included within their term of employment shall be the same rate of annual vacation leave and legal holidays provided under the same conditions as set out in subdivision (1) above, but in no event shall the total workdays for a 10-month employee exceed 200 days in a 10-month schedule and the workweek shall constitute five days for all occupational teachers regardless of the employment period.

No deductions shall be made from salaries of teachers of vocational agriculture and home economics whose salaries are paid in part from State and federal vocational funds while in attendance upon community, county and State meetings called for the specific purpose of promoting the agricultural interests of North Carolina, when such attendance is approved by the superintendent of the administrative unit and the State Director of Vocational Education.

- (3) Notwithstanding any provisions of this section to the contrary no person shall be entitled to pay for any vacation day not earned by that person. The first 10 days of annual vacation leave earned by a teacher during any fiscal year period shall be scheduled to be used in the school calendar adopted by the respective local boards of education. Vacation days shall not be used for extending the term of employment of individuals. Teachers may accumulate annual vacation leave days as follows: annual leave may be accumulated without any applicable maximum until December 31 of each year. On December 31 of each year, any teachers with more than 30 days of accumulated leave shall have the excess accumulation cancelled so that only 30 days are carried forward to January 1 of the next year. All vacation leave taken by the teacher will be upon the authorization of his immediate supervisor and under policies established by the local board of education. An employee shall be paid in a lump sum for accumulated annual leave not to exceed a maximum of 240 hours when separated from service due to resignation, dismissal, reduction in force, death, or service retirement. If the last day of terminal leave falls on the last workday in the month, payment shall be made for the remaining nonworkdays in that month. Employees retiring on disability retirement may exhaust annual leave rather than be paid in a lump sum. The provisions of this subdivision shall be accomplished without additional State and local funds being appropriated for this purpose. The State Board of Education shall adopt rules and regulations for the administration of this subdivision.
- (4) Each local board of education shall sustain any loss by reason of an overpayment to any teacher paid from State funds.

- (5) All of the foregoing provisions of this section shall be subject to the requirement that at least fifty dollars (\$50.00), or other minimum amount required by federal social security laws, of the compensation of each school employee covered by the Teachers' and State Employees' Retirement System or otherwise eligible for social security coverage shall be paid in each of the four quarters of the calendar year.
- (6) The State Board of Education, in fixing the State standard salary schedule of teachers as authorized by law, shall provide that teachers who entered the armed or auxiliary forces of the United States after September 16, 1940, and who left their positions for such service shall be allowed experience increments for the period of such service as though the same had not been interrupted thereby, in the event such persons return to the position of teachers, principals and superintendents in the public schools of the State after having been honorably discharged from the armed or auxiliary forces of the United States.

(c) Every local board of education may adopt, as to teachers not paid out of State funds, a salary schedule similar to the State salary schedule, but it likewise shall recognize a difference in salaries based on different duties, training, experience, professional fitness, and continued service in the same school system; but if any local board of education shall fail to adopt such a schedule, the State salary schedule shall be in force. No teacher shall receive a salary higher than that provided in the salary schedule, unless by action of the board of education a higher salary is allowed for special fitness, special duties, or under extraordinary circumstances.

Whenever a higher salary is allowed, the minutes of the board shall show what salary is allowed and the reason for the same: Provided, that a board of education may authorize the superintendent to supplement the salaries of all teachers from local funds, and the minutes of the board shall show what increase is allowed each teacher.

(1955, c. 1372, art. 5, s. 32; art. 17, s. 9; art. 18, ss. 6, 7; 1961, c. 1085; 1965, c. 584, ss. 3, 16; 1971, c. 1052; 1973, c. 315, s. 2; c. 647, s. 1; 1975, cc. 383, 608; c. 834, ss. 1, 2; 1979, c. 600, ss. 1-5; 1981, c. 423, s. 1; c. 639, s. 1; c. 947, s. 1; 1983, c. 761, s. 90; c. 768, s. 9; c. 872, ss. 3, 4; 1983 (Reg. Sess., 1984), c. 1103, s. 8; 1985, c. 757, s. 145(e), (f); c. 791, s. 5(c); 1985 (Reg. Sess., 1986), c. 975, ss. 6, 15, 24.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 975, s. 25 provides that the provisions of the act shall not be construed to abolish or in any manner affect any supplemental tax or any local taxing district.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 11, 1986, deleted "or school district" following "school administrative unit" in the second sentence of the first paragraph of subsection (a), rewrote the proviso of the second paragraph of

subsection (c), which read "Provided, that a county board of education, upon the recommendation of the committee of a district, may authorize the committee and the superintendent to supplement the salaries of all teachers of the district from funds derived from taxes within such district, and the minutes of the board shall show what increase is allowed each teacher in such district", and deleted a former second proviso of the second paragraph of subsection (c), relating to the supplementation of the salaries of teachers when one or more local tax districts have been combined to create an administrative district.

§ 115C-303. Withholding of salary.

(a) No teacher shall be placed on the payroll of a local school administrative unit unless he holds a certificate as required by law, and unless a copy of the teacher's contract has been filed with the superintendent. No teacher may be paid more than he is due under the local school salary schedule in force in the local school administrative unit. Substitute and interim teachers shall be paid under rules of the State Board of Education.

(1955, c. 1372, art. 6, ss. 11, 13; 1975, c. 437, ss. 8, 9; 1981, c. 423, s. 1; 1985 (Reg. Sess., 1986), c. 975, s. 19.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 975, s. 25 provides that the provisions of the act shall not be construed to abol-

ish or in any manner affect any supplemental tax or any local taxing district.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 11, 1986, deleted "or special taxing district" at the end of the second sentence of subsection (a).

§ 115C-305. Appeals to board of education and to superior court.

CASE NOTES

This section indicates an intention to extend the right of appeal in public school personnel decisions far beyond the confines of the former law. *Warren v. Buncombe County Bd. of Educ.*, — N.C. App., 343 S.E.2d 225 (1986).

Appeal of Acceptance of Resignation. — Principal who delivered a letter of resignation

to school superintendent and one week later sought unsuccessfully to withdraw it had the right under this section to appeal from the decision of the county board of education approving acceptance of his resignation. *Warren v. Buncombe County Bd. of Educ.*, — N.C. App., 343 S.E.2d 225 (1986).

ARTICLE 21.

Other Employees.

§ 115C-315. Hiring of school personnel.

(f) **Employing Persons Not Holding Nor Qualified to Hold Certificate.** — It shall be unlawful for any board of education to employ or keep in service any professional person who neither holds nor is qualified to hold a certificate in compliance with the provisions of the law or in accordance with the regulations of the State Board of Education. (1955, c. 1372, art. 5, s. 4; art. 18, ss. 1-4; 1965, c. 584, s. 20.1; 1973, c. 236; 1975, c. 437, s. 7; c. 686, s. 1; c. 731, ss. 1, 2; 1981, c. 423, s. 1; 1983 (Reg. Sess., 1984), c. 1103, s. 9; 1985 (Reg. Sess., 1986), c. 975, s. 16.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 975, s. 25 provides that the provisions of the act shall not be construed to abolish or in any manner affect any supplemental tax or any local taxing district.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 11, 1986, deleted "or school committee" following "board of education" near the beginning of subsection (f).

§ 115C-316. Salary and vacation.

(a) School officials and other employees shall be paid promptly when their salaries are due provided the legal requirements for their employment and service have been met. All school officials and other employees employed by any local school administrative unit who are to be paid from local funds shall be paid promptly as provided by law and as state-allotted school officials and other employees are paid.

Public school employees paid from State funds shall be paid as follows:

- (1) Employees Other than Superintendents, Supervisors and Classified Principals on an Annual Basis. — Salary payments to employees other than superintendents, supervisors, and classified principals employed on an annual basis made through the central payroll system shall be made monthly on the statewide payroll date, as provided in G.S. 115C-12(18). Salary payments to these employees made through a local payroll system may be made monthly at the end of each calendar month of service or on the statewide payroll date for these employees, at the discretion of the local board. Included within their term of employment shall be annual vacation leave at the same rate provided for State employees, computed at one-twelfth (1/12) of the annual rate for state employees for each calendar month of employment. On a day that employees are required to report for a work-day but pupils are not required to attend school due to inclement weather, an employee may elect not to report due to hazardous travel conditions and to take one of his annual vacation days or to make up the day at a time agreed upon by the employee and his immediate supervisor or principal. Included within their term of employment each local board of education shall designate the same or an equivalent number of legal holidays as those designated by the State Personnel Commission for State employees.
- (2) School Employees Paid on an Hourly or Other Basis. — Salary payments to employees other than those covered in G.S. 115C-272(b)(1), 115C-285(a)(1) and (2), 115C-302(a)(1) and (2), and 115C-316(a)(1) made through the central payroll system shall be made monthly on the statewide payroll date, as provided in G.S. 115C-12(18). Salary payments to these employees made through a local payroll system may be made at a time determined by each local board of education or may be made monthly on the statewide payroll date for these employees, at the discretion of the local board. Expenditures for the salary of these employees from State funds shall be within allocations made by the State Board of Education and in accordance with rules and regulations approved by the State Board of Education concerning allocations of State funds: Provided, that any individual school employee employed for a term of 10 calendar months may be paid in 12 monthly installments if the employee so requests on or before the first day of the school year. Such request shall be filed in the administrative unit which employs the employee. The payment of the annual salary in 12 installments instead of 10 shall not increase or decrease said annual salary nor in any other way alter the contract between the employee and the said administrative unit. Included within the term of employment shall be provided for full-time employees annual vacation leave at the same rate provided for State employees, computed at one-twelfth (1/12) of the annual rate for State employees for each calendar month of employment, to be taken under policies determined by each local board of education. On a day that employees are

required to report for a workday but pupils are not required to attend school due to inclement weather, an employee may elect not to report due to hazardous travel conditions and to take one of his annual vacation days or to make up the day at a time agreed upon by the employee and his immediate supervisor or principal. Included within their term of employment, each local board of education shall designate the same or an equivalent number of legal holidays occurring within the period of employment as those designated by the State Personnel Commission for State employees.

- (3) Notwithstanding any provisions of this section to the contrary no person shall be entitled to pay for any vacation day not earned by that person. The first 10 days of annual leave earned by a 10- or 11-month employee during any fiscal year period shall be scheduled to be used in the school calendar adopted by the respective local boards of education. Vacation days shall not be used for extending the term of employment of individuals. Ten- or 11-month employees may accumulate annual vacation leave days as follows: annual leave may be accumulated without any applicable maximum until December 31 of each year. On December 31 of each year, any of these employees with more than 30 days of accumulated leave shall have the excess accumulation cancelled so that only 30 days are carried forward to January 1 of the next year. All vacation leave taken by these employees will be upon the authorization of their immediate supervisor and under policies established by the local board of education. An employee shall be paid in a lump sum for accumulated annual leave not to exceed a maximum of 240 hours when separated from service due to resignation, dismissal, reduction in force, death or service retirement. If the last day of terminal leave falls on the last workday in the month, payment shall be made for the remaining nonworkdays in that month. Employees retiring on disability retirement may exhaust annual leave rather than be paid in a lump sum. The provisions of this subdivision shall be accomplished without additional State and local funds being appropriated for this purpose. The State Board of Education shall adopt rules and regulations for the administration of this subdivision.
- (4) Twelve-month school employees other than superintendents, supervisors and classified principals paid on an hourly or other basis whether paid from State or from local funds may accumulate annual vacation leave days as follows: annual leave may be accumulated without any applicable maximum until December 31 of each year. On December 31 of each year, any employee with more than 30 days of accumulated leave shall have the excess accumulation cancelled so that only 30 days are carried forward to January 1 of the next year. All vacation leave taken by the employee will be upon the authorization of his immediate supervisor and under policies established by the local board of education. An employee shall be paid in a lump sum for accumulated annual leave not to exceed a maximum of 240 hours when separated from service due to resignation, dismissal, reduction in force, death, or service retirement. If the last day of terminal leave falls on the last workday in the month, payment shall be made for the remaining nonworkdays in that month. Employees retiring on disability retirement may exhaust annual leave rather than be paid in a lump sum. The provisions of this subdivision shall be accomplished without additional State and local funds being appropriated for this purpose. The State Board of Education shall adopt rules and regulations for the administration of this subdivision.

- (5) All of the foregoing provisions of this section shall be subject to the requirement that at least fifty dollars (\$50.00), or other minimum amount required by federal social security laws, of the compensation of each school employee covered by the Teachers' and State Employees' Retirement System or otherwise eligible for social security coverage shall be paid in each of the four quarters of the calendar year.
- (6) Each local board of education shall sustain any loss by reason of an overpayment to any school official or other employee paid from State funds.

(1955, c. 1372, art. 5, s. 32; art. 18, s. 6; 1961, c. 1085; 1965, c. 584, s. 3; 1971, c. 1052; 1973, c. 647, s. 1; 1975, cc. 383, 608; c. 834, ss. 1, 2; 1979, c. 600, ss. 1-5; 1981, c. 423, s. 1; c. 639, ss. 2, 3; c. 730, s. 1; c. 946, s. 3; c. 947, s. 2; 1983, c. 872, ss. 5-7; 1985, c. 757, s. 145(g), (h); 1985 (Reg. Sess., 1986), c. 975, s. 15.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 975, s. 25 provides that the provisions of the act shall not be construed to abolish or in any manner affect any supplemental tax or any local taxing district.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 11, 1986, deleted "or school district" following "school administrative unit" in the second sentence of the first paragraph of subsection (a).

ARTICLE 22.

General Regulations.

Part 1. Health Certificate.

§ 115C-323. Employee health certificate.

All public school employees upon initial employment, and those who have been separated from public school employment more than one school year, including superintendents, supervisors, principals, teachers, and any other employees in the public schools of the State, shall file in the office of the superintendent, before assuming his duties, a certificate from a physician licensed to practice medicine in the State of North Carolina, certifying that said person does not have tuberculosis in the communicable form, or other communicable disease, or any disease, physical or mental, which would impair the ability of the said person to perform effectively his duties. A local school board or a superintendent may require any person herein named to take a physical examination when deemed necessary.

Any public school employee who has been absent for more than 40 successive school days because of a communicable disease must, before returning to work, file with the superintendent a physician's certificate certifying that the individual is free from any communicable disease.

The examining physician shall make the aforesaid certificates on an examination form supplied by the Superintendent of Public Instruction. The certificate shall be issued only after a physical examination has been made at the time of the certification, and such examination shall be in accordance with rules and regulations adopted by the Superintendent of Public Instruction, with approval of the Secretary of Human Resources, and such rules and regulations may include the requirement of an X-ray chest examination for all new employees of the public school system.

It shall be the duty of the superintendent of the school in which the person is employed to enforce the provisions of this section.

Any person violating any of the provisions of this section shall be guilty of a misdemeanor and subject to a fine or imprisonment in the discretion of the court. (1955, c. 1372, art. 17, s. 1; 1957, c. 1357, ss. 2, 14; 1973, c. 476, s. 128; 1975, c. 72; 1981, c. 423, s. 1; 1985 (Reg. Sess., 1986), c. 975, s. 20.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 975, s. 25 provides that the provisions of the act shall not be construed to abolish or in any manner affect any supplemental tax or any local taxing district.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 11, 1986, substituted "principals" for "district principals, building principals" in the first sentence of the first paragraph.

Part 3. Principal and Teacher Employment Contracts.

§ 115C-325. System of employment for public school teachers.

- (p) Section Applicable to Certain Institutions. — Notwithstanding any law or regulation to the contrary and notwithstanding the teacher's salary schedule as adopted by the State Board of Education, this section shall apply to all persons defined as teachers by this section who serve as teachers in the schools and institutions of the Departments of Human Resources and Correction regardless of the age of the students they teach and regardless of whether they accept noninstructional assignments. (1955, c. 664; 1967, c. 223, s. 1; 1971, c. 883; c. 1188, s. 2; 1973, c. 315, s. 1; c. 782, ss. 1-30; 1979, c. 864, s. 2; 1981, c. 423, s. 1; c. 538, ss. 1-3; c. 731, s. 1; c. 1127, ss. 39, 40; 1981 (Reg. Sess., 1982), c. 1282, s. 30; 1983, c. 770, ss. 1-15; 1983 (Reg. Sess., 1984), c. 1034, s. 34; 1985, c. 791, s. 5(a), (b); 1985 (Reg. Sess., 1986), c. 1014, s. 60(a).)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 243, contains a severability clause.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 1, 1984, rewrote subsection (p).

CASE NOTES

Applicability of Section. — This section governs the hiring, firing, tenure and resignation of public school teachers; and its definition of "teacher" includes those who directly supervise teaching, as plaintiff did when he was principal of high school. *Warren v. Buncombe County Bd. of Educ.*, — N.C. App. —, 343 S.E.2d 225 (1986).

"Temporary Personnel" Not Included In "Probationary Teacher". — The General Assembly did not intend that the "temporary personnel" authorized by § 115C-295 be included within the definition of "probationary teacher" contained in subsection (a)(5) of this section. *Campbell v. Board of Educ.*, 76 N.C. App. 495,

333 S.E.2d 507 (1985), cert. denied, 315 N.C. 390, 338 S.E.2d 878 (1986).

Legislature intended in subsection (d) (2), to protect persons who have served as principals and supervisors for at least three consecutive years regardless of whether this time was served prior to obtaining career teacher status. *Faison v. New Hanover County Bd. of Educ.*, 75 N.C. App. 334, 330 S.E.2d 511 (1985) (decided under facts existing prior to 1983 amendment).

Director of vocational education, demoted without statutory procedural safeguards, was entitled to salary adjustment to compensate him for any loss of salary

and benefits which he suffered because of his improper demotion. *Faison v. New Hanover County Bd. of Educ.*, 75 N.C. App. 334, 330 S.E.2d 511 (1985).

Grounds for Dismissal — Insubordination. —

In accord with 1st paragraph in main volume. See *Crump v. Board of Educ.*, — N.C. App. —, 339 S.E.2d 483 (1986).

The Board of Education's dismissal of a driver's education instructor on the ground of insubordination would be upheld, where there was substantial evidence to support the Board's conclusion that by twice driving alone with a female student, after a complaint from a female student about his conduct, the instructor willfully disregarded and refused to obey the principal's reasonable directive that at least two students be in the car any time a female was taking the road work phase of driver's education. *Crump v. Board of Educ.*, — N.C. App. —, 339 S.E.2d 483 (1986).

Right to Resign. — A public school teacher

can resign whenever he sees fit, though not necessarily with impunity, and his superintendent has the authority to accept the resignation. *Warren v. Buncombe County Bd. of Educ.*, — N.C. App. —, 343 S.E.2d 225 (1986).

Approval of Resignation. — When plaintiff resigned his position as principal of high school and superintendent accepted it, it was final; the subsequent approval of the resignation by the county board of education was a gratuitous, meaningless formality. *Warren v. Buncombe County Bd. of Educ.*, — N.C. App. —, 343 S.E.2d 225 (1986).

Scope of Judicial Review. —

On appeal of dismissal, review was limited to determining whether the superior court correctly decided that the Board's decision to dismiss plaintiff on the grounds of immorality and insubordination was supported by substantial evidence in light of the whole record. *Crump v. Board of Educ.*, — N.C. App. —, 339 S.E.2d 483 (1986).

ARTICLE 24A.

Certified Personnel Evaluation Pilot Program.

§ 115C-362. Certified School Personnel Evaluation Pilot Program.

The State Board of Education shall develop and implement a certified school personnel evaluation pilot program. In this program, certified school personnel shall be evaluated by outside evaluators. Teachers shall be evaluated using the Performance and Appraisal Instrument and Process System developed by the State Board of Education. The State Board of Education shall develop a separate Performance and Appraisal Instrument and Process to evaluate principals and assistant principals. Each employee shall be given the results of his evaluation and shall be encouraged to use the results to improve the way he does his job.

Nine local school administrative units shall be selected by the State Board to participate in the pilot program from units that volunteer to participate. Units that do not wish to participate shall not be compelled to do so. In three units, all of the principals and assistant principals shall be evaluated, in three units, all of the teachers shall be evaluated, and in three units all of the principals, assistant principals, and teachers shall be evaluated. The evaluators shall be selected and trained by the local boards of education and the Department of Public Instruction.

Program planning shall take place from July 1, 1985, through June 30, 1986. Program implementation shall take place from July 1, 1986, through June 30, 1990. Evaluations shall begin January 1, 1987.

The State Board shall report on the implementation of the pilot program by February 1 of each year to the President of the Senate, the Speaker of the House of Representatives, the Fiscal Research Division, the chairmen of the Appropriations Base Budget, Appropriations Expansion Budget, Ways and Means, Appropriations Base Budget on Education, and Education Committees in the Senate, and the chairmen of the Appropriations Base Budget, Appropri-

ations Expansion Budget, Appropriations Base Budget on Education, Appropriations Expansion Budget on Education and Education Committees in the House of Representatives. The report for the first year shall indicate which local school administrative units have volunteered and been selected to participate in the program, which employees will be evaluated in each of those units, and the projected cost of implementing the program in each of those units in ensuing years. (1985, c. 479, s. 38; 1985 (Reg. Sess., 1986), c. 1014, ss. 61, 62.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 243, contains a severability clause.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, rewrote the last sen-

tence of the second paragraph, which read "The evaluators shall be selected and trained by the State Board of Education" and added the last sentence of the third paragraph.

ARTICLE 24B.

Career Development Pilot Program.

§ 115C-363.2. Elements of the Plan.

(g) The Plan for administrators shall be designed to give each employee clear opportunities for advancement, recognition, and increased pay if the employee demonstrates high effectiveness in the position, including superintendent, associate superintendent, or assistant superintendent. Levels of differentiation shall be based on the employee's initiative and desire to increase the employee's professional abilities and the employee's success in doing so. The Plan for administrators shall include methods and instruments of evaluation that will determine what level of performance, effort, and ability and what accomplishments warrant different salary classifications, and at what point dismissal or reassignment of an administrator is warranted.

The Plan for administrators shall be comparable to the Plan for instructional personnel and instructional support personnel except that the evaluation shall be the responsibility of the local superintendent or the superintendent's designee. However, trained evaluators shall assist the superintendent or the superintendent's designee with the evaluations. The salary differentiation steps for administrators shall track the salary differentiation steps for teachers as defined in this Article. The superintendent shall be evaluated by the local school board using performance standards developed by the State Board of Education or by local boards of education. (1985, c. 479, s. 42; 1985 (Reg. Sess., 1986), c. 1014, s. 230(a)-(c).)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 243, contains a severability clause.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 1, 1986, substituted "in the position, including superin-

tendent, associate superintendent, or assistant superintendent" for "as an instructional leader or school manager" in the first sentence of the first paragraph of subsection (g), substituted "comparable to" for "the same as" in the first sentence of the second paragraph of subsection (g), and added the last sentence of the second paragraph of subsection (g).

§ 115C-363.3. Levels of differentiation, salary, and evaluation requirements.

(a) During the first and second years of employment, the employee shall be assigned "initial status" and shall be paid in accordance with the State base salary schedule. A mentor or a support team shall be assigned to the employee for assistance and professional development. The employee shall be formally observed at least twice each year by the principal or the principal's designee and at least twice by a trained evaluator, and shall be formally evaluated at least once each year by the principal or the principal's designee.

(b) During the third year of employment, the employee who is fully certified shall be assigned "provisional status" and shall be paid on the State base salary schedule. The employee shall be formally observed at least twice by the principal or the principal's designee and at least twice by a trained evaluator, and shall be formally evaluated by the principal or the principal's designee.

If the employee has completed at least 30 hours of effective teaching training as provided in G.S. 115C-363.7 and if the employee's evaluation has been at least at standard in all functions as defined in the Performance Appraisal System, the principal shall recommend to the superintendent, and the superintendent shall review the evaluation and recommend to the board, the employee for Career Status I at the end of the provisional year. If the employee has not completed the training or if the employee's evaluation has not been at least standard in all functions, the principal shall recommend the employee for contract termination.

A "career teacher", as defined in G.S. 115C-325, not recommended for Career Status I may request a review by a three-member appeals panel chosen from a roster of trained evaluators. One member of the panel shall be chosen by the principal and approved by the superintendent, one shall be chosen by the employee, and one shall be chosen jointly by the principal and the employee. The panel shall report its findings to the employing local board of education and the local board shall take final action on the matter.

(c) An employee shall have "Career Status I" if the employee was recommended and approved for Career Status I as provided in subsection (b) of this section. An employee in Career Status I, other than a superintendent, assistant superintendent, or associate superintendent, is a "career teacher" as defined in G.S. 115C-325. The employee shall receive a salary of one step over the State salary that would otherwise have applied. The employee shall be formally observed at least once each year and evaluated by the principal or the principal's designee, and may also be formally observed by a trained evaluator.

For purposes of the pilot, no earlier than the first year in Career Status I, an employee who otherwise meets all requirements may apply for Career Status II. During the year the employee applies, the employee shall be formally observed at least twice by the principal and at least twice by a trained evaluator and formally evaluated at least once by the principal or the principal's designee. The employee shall also prepare during that year and submit a portfolio that includes the employee's attendance records, indicators of professional growth, any unique assignments or leadership roles, valid certification, acceptable ratings on recent evaluations, additional duties and responsibilities and the time they required, and the employee's years of experience. If the employee's evaluation has been a combination of ratings of above standard and higher as defined in the Performance Appraisal System, the principal may, on the basis of the evaluation(s), the portfolio, and any interview, recommend to the superintendent, and the superintendent shall review the evaluation information and recommend to the local board, the employee for promotion to Career Status II. If the employee is not recommended for promotion to Career Status II, the employee shall remain in Career Status I.

An employee not recommended for Career Status II may request a review by a three-member appeals panel chosen from a roster of trained evaluators. One member of the panel shall be chosen by the principal and approved by the superintendent, one shall be chosen by the employee, and one shall be chosen jointly by the principal and the employee. The panel shall report its findings to the employing local board of education and the local board shall take final action on the matter.

(d) An employee shall have "Career Status II" if the employee is recommended for promotion to Career Status II as provided in subsection (c) of this section and the employee is granted that status by the local board. The employee shall receive a salary of two steps over the State salary that would otherwise have applied if the employee had not participated in the pilot program. The employee shall be formally observed at least once and evaluated by the principal or the principal's designee and may also be formally observed by a trained evaluator during the year the employee is granted this status. This process will be continued in subsequent years while in this status.

A Career Status II employee whose evaluation(s) indicate(s) that the employee is not maintaining a combination of ratings of above standard and higher performance shall be formally observed at least twice by the principal or the principal's designee and at least twice by a trained evaluator and formally evaluated once during the next year. If these additional observations and evaluation indicate the employee is not maintaining above standard or higher performance, the principal shall recommend that the employee be reclassified to Career Status I. If the employee is reclassified, the employee may receive no more than the salary appropriate for a person in Career Status I.

A Career Status II employee may move voluntarily to Career Status I. A Career Status II employee recommended for reclassification may request a review of the decision by a three-member appeals panel chosen from a roster of trained evaluators. One member of the panel shall be chosen by the principal and approved by the superintendent, one shall be chosen by the employee, and one shall be chosen jointly by the principal and the employee. The panel shall report its findings to the employing local board of education and the local board shall take final action on the matter. An involuntary reclassification may not be considered a demotion for the purposes of G.S. 115C-325.

(e) Career Status III. — For purposes of the pilot, no earlier than the second year in Career Status II may a participant in the Career Development Program apply for Career Status III. (1985, c. 479, s. 43; 1985 (Reg. Sess., 1986), c. 1014, s. 230(d)-(i).)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 243, contains a severability clause.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 1, 1986, rewrote the last sentence of subsection (a),

rewrote the last sentence of the first paragraph of subsection (b), rewrote the second paragraph of subsection (b), rewrote the first and second paragraphs of subsection (c), rewrote the first and second paragraphs of subsection (d), and added subsection (e).

§ 115C-363.10. Report to the General Assembly.

Beginning in 1986, The State Board shall report on February 1 of each year to the President of the Senate, the Speaker of the House of Representatives, and the chairmen of the Appropriations Base Budget Committee, the Appropriations Expansion Budget Committee, the Appropriations Base Budget Committee on Education, and the Appropriations Expansion Budget Committee on Education of the Senate and the House of Representatives, and the

Fiscal Research Division on the continuing development and the implementation of the Career Development Plan.

The report shall include a description of the progress of the pilot, the distributions of ratings, the numbers and percentages of staff on each of the various levels of status, and the criteria for Career Status II, bearing in mind the intent of the General Assembly to establish Career Status III. The report shall also include specific criteria for eligibility for Career Status III. (1985, c. 479, s. 50; 1985 (Reg. Sess., 1986), c. 1014, s. 230(j).)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 243, contains a severability clause.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 1, 1986, rewrote the second paragraph.

§ 115C-363.11. Salary under the Plan.

(a) During each year of the pilot, the stipend for successful completion of the Effective Teaching Training Program shall be paid to those who are new to the Pilot Program.

(1985, c. 479, s. 51; 1985 (Reg. Sess., 1986), c. 1014, s. 230(k).)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 1, 1986, rewrote subsection (a).

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 243, contains a severability clause.

§§ 115C-363.12 to 115C-363.14: Reserved for future codification purposes.

ARTICLE 24C.

Teacher Enhancement Program.

Part 1. Office of Teacher Recruitment.

§ 115C-363.15. Office of Teacher Recruitment established; purpose.

There is established in the Department of Public Instruction an Office of Teacher Recruitment. The purposes of the Office are to identify which local school administrative units need teachers and the subject areas in which they need them and to coordinate and administer a comprehensive teacher recruitment effort. The Office shall administer its programs to as to encourage members of minority groups and individuals who may not otherwise consider undertaking or continuing a career in teaching to go into and remain in the teaching profession. (1985 (Reg. Sess., 1986), c. 1014, s. 63(a).)

Editor's Note. — Section 63(i) of Session Laws 1985 (Reg. Sess., 1986), c. 1014, makes this Article effective July 15, 1986.

Section 63(g) of Session Laws 1985 (Reg. Sess., 1986), c. 1014, provides: "Scholarship loans and grants shall be made pursuant to the

scholarship loan and grant programs established in subsection (a) of this section beginning with the 1987-88 school year.

Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 243, contains a severability clause.

§ 115C-363.16. Development and analysis of data on teacher supply and demand.

The Office of Teacher Recruitment shall develop and analyze data on the current and projected subject area and geographical area need for teachers. The Director of the Office shall appoint a Teacher Supply and Demand Coordinator to carry out this function. (1985 (Reg. Sess., 1986), c. 1014, s. 63(a).)

§ 115C-363.17. Recruitment of prospective teachers in the high schools.

(a) The Office of Teacher Recruitment shall coordinate a High School Teacher Recruitment Program. The Director of the Office shall appoint a High School Recruitment Coordinator to carry out this function.

(b) A teacher recruitment program shall be located in each high school in the State. The purpose of these programs is to improve the image of the teaching profession, to provide information about teaching as a profession, and to formally identify and attract talented high school students into the teaching profession.

(c) The principal of each high school in the State shall select a teacher to serve as the teacher recruiting officer in that school. The teacher recruiting officer shall receive an annual stipend for performing this function.

(d) The Office of Teacher Recruitment shall sponsor at least one meeting each year to bring the teacher recruiting officers together for training and for sharing ideas. The Office shall also produce program guides, information about teaching as a career, and other written materials for the use of the teacher recruiting officers. (1985 (Reg. Sess., 1986), c. 1014, s. 63(a).)

§ 115C-363.18. Coordination of efforts with the business community and major education organizations.

(a) The Office of Teacher Recruitment shall encourage the business community to work cooperatively with local schools to develop recruiting programs aimed at attracting and retaining capable teachers. The Office shall encourage the business community to assist in a variety of ways including the creation of summer employment opportunities for teachers, placement efforts aimed at finding suitable employment for spouses of teachers, and working with school administrators to develop teacher recruiting programs.

(b) The Office of Teacher Recruitment shall encourage major education associations to coordinate a long-range program aimed at promoting teaching as a career. The Office shall encourage these associations to assist in identifying local resources, coordinating local activities and events, and producing material aimed at promoting teaching as a career choice. (1985 (Reg. Sess., 1986), c. 1014, s. 63(a).)

§ 115C-363.19. Tuition grants for certain areas of need.

(a) The Office of Teacher Recruitment shall administer a Tuition Grant Program. The Program shall provide scholarship loans to individuals with skills in a subject area of high need who hold college degrees but do not have teacher certification, and to certified teachers who agree to retraining for certification in subject areas of high need.

(b) A recipient of a tuition scholarship loan shall receive a grant toward the actual amount of his tuition cost, up to one thousand dollars (\$1,000).

(c) Tuition scholarship loans shall be made to individuals who agree to become certified in a subject of high need and who agree to work in a region or local school administrative unit of need. Recipients shall be selected by the Superintendent of Public Instruction.

(d) All scholarship loans shall be evidenced by notes made payable to the State Board of Education that bear interest at the rate of ten percent (10%) per year beginning September 1 after the recipient completes his course work for certification or after termination of the scholarship loan, whichever is earlier. The scholarship loan may be terminated by the recipient withdrawing from school or by the recipient not meeting the standards set by the State Board.

(e) The State Board shall forgive the loan if, within four years after completing the course work, the recipient teaches for two years in the subject area and the geographical area agreed upon when the loan was made.

(f) All funds appropriated to or otherwise received by the Tuition Grant Program, all funds received as repayment of scholarship loans, and all interest earned on these funds shall be placed in a revolving fund. This revolving fund may be used only for scholarship loans granted under the Tuition Grant Program. (1985 (Reg. Sess., 1986), c. 1014, s. 63(a).)

§ 115C-363.20. Teacher Aide and Substitute Teacher Retraining Program.

(a) The Office of Teacher Recruitment shall administer a Teacher Aide and Substitute Teacher Retraining Program. The program shall provide one-year scholarship loans to currently employed teacher aides and substitute teachers who hold college degrees and who agree to retraining for certification in subject areas of high need.

(b) A recipient of a scholarship loan under this program shall receive the actual amount of the tuition cost up to one thousand dollars (\$1,000) and the minimum salary for a teacher aide on the State salary schedule.

(c) Retraining scholarship loans shall be made to individuals who:

- (1) Are sponsored by a local school administrative unit by which they are currently employed as a teacher aide or substitute teacher and which agrees to employ them as a teacher after they are retrained;
- (2) Agree to enter a college program full time and secure certification in a specified area; and
- (3) Agree to accept a teaching position in the local school administrative unit that sponsored them.

Recipients shall be selected by the Superintendent of Public Instruction.

(d) All retraining scholarship loans shall be evidenced by notes made payable to the State Board of Education that bear interest at the rate of ten percent (10%) per year beginning September 1 after the recipient completes his course work for certification or after termination of the scholarship loan, whichever is earlier. The scholarship loan may be terminated by the recipient

withdrawing from school or by the recipient not meeting the standards set by the State Board.

(e) The State Board shall forgive the loan, if within four years after completing the course work the recipient teaches for two years in the subject area and the local school administrative unit agreed upon when the loan was made.

(f) All funds appropriated to or otherwise received by the Teacher Aide and Substitute Teacher Retraining Program, all funds received as repayment of scholarship loans, and all interest earned on these funds shall be placed in a revolving fund and may be used only for scholarship loans granted under the Teacher Aide and Substitute Teacher Retraining Program. (1985 (Reg. Sess., 1986), c. 1014, s. 63(a).)

§ 115C-363.21. Teacher Incentive Program.

(a) The Office of Teacher Recruitment shall administer a Teacher Incentive Program. The program shall be used to provide a one-time incentive of three thousand dollars (\$3,000) to former teachers who have achieved career status but have been out of the teaching field for at least three years or to provide actual moving costs of up to three thousand dollars (\$3,000) for teachers not currently employed by a local school administrative unit in North Carolina.

(b) An applicant for an incentive grant shall agree to teach for at least two years in a specific subject area, a specific geographic area, or both. Recipients shall be selected by the Superintendent of Public Instruction.

(c) All grants shall be evidenced by notes made payable to the State Board of Education. If the recipient fails to abide by the agreement, he shall repay the amount of the grant and ten percent (10%) interest, accruing from the time the agreement is breached.

(d) All funds appropriated to or otherwise received by the Teacher Incentive Program, all funds received as repayment of the grants, and all interest earned on these funds shall be placed in a revolving fund and may be used only for incentive grants under the Teacher Incentive Program. (1985 (Reg. Sess., 1986), c. 1014, s. 63(a).)

Part 2. North Carolina Teaching Fellows Commission.

§ 115C-363.22. North Carolina Teaching Fellows Commission established.

There is established the North Carolina Teaching Fellows Commission. This Commission shall exercise its powers and functions independently of the State Board of Education and the Department of Public Instruction. The Public School Forum of North Carolina, Inc., shall provide staff and office space to the Commission. Staff to the Commission are not State employees. (1985 (Reg. Sess., 1986), c. 1014, s. 63(a).)

§ 115C-363.23. Membership.

(a) The Commission shall consist of 11 nonlegislative members as follows:

- (1) The Chairman of the State Board of Education, or his designee;
- (2) The Lieutenant Governor, or his designee;
- (3) Three persons appointed by the Governor;
- (4) Three persons appointed by the General Assembly on the recommendation of the President of the Senate, as provided in G.S. 120-121; and
- (5) Three persons appointed by the General Assembly on the recommendation of the Speaker of the House of Representatives, as provided in G.S. 120-121.

(b) Each of the appointing entities shall seek to achieve a balanced membership representing, to the maximum extent possible, the State as a whole. The Commission members shall be chosen from among individuals who have demonstrated a commitment to education.

(c) Commission members shall be appointed for four-year terms, with the first appointments to expire July 1, 1990.

(d) In the event a vacancy occurs for any reason, the vacancy shall be filled by appointment by the entity that made the appointment, except that vacancies in appointments by the General Assembly shall be filled under G.S. 120-122. The new appointee shall serve for the remainder of the unexpired term.

(e) The Lieutenant Governor or his designee shall serve as chairman.

(f) Members of the Commission shall receive per diem and necessary travel and subsistence expenses in accordance with Chapter 138 of the General Statutes.

(g) The Commission shall meet regularly at times and places the chairman deems necessary. (1985 (Reg. Sess., 1986), c. 1014, s. 63(a).)

§ 115C-363.23A. Teaching Fellows Program established; administration.

(a) A Teaching Fellows Program shall be administered by the North Carolina Teaching Fellows Commission. The Teaching Fellows Program shall be used to provide a four-year scholarship loan of five thousand dollars (\$5,000) per year to North Carolina high school seniors interested in preparing to teach in the public schools of the State. The Commission shall adopt very stringent standards, including minimum grade point average and scholastic aptitude test scores, for awarding these scholarship loans to ensure that only the best high school seniors receive them.

(b) The Commission shall administer the program in cooperation with teacher training institutions selected by the Commission. Teaching Fellows should be exposed to a range of extra-curricular activities while in college. These activities should be geared to installing a strong motivation not only to remain in teaching but to provide leadership for tomorrow's schools.

(c) The Commission shall form regional review committees to assist it in identifying the best high school seniors for the program. The Commission and the review committees shall make an effort to identify and encourage minority students and students who may not otherwise consider a career in teaching to enter the program.

(d) All scholarship loans shall be evidenced by notes made payable to the Commission that shall bear interest at the rate of ten percent (10%) per year beginning September 1 after completion of the program, or immediately after

termination of the scholarship loan, whichever is earlier. The scholarship loan may be terminated by the recipient withdrawing from school or by the recipient not meeting the standards set by the Commission.

(e) The Commission shall forgive the loan if, within seven years after graduation, the recipient teaches for four years at a North Carolina public school or at a school operated by the United States government in North Carolina.

(f) All funds appropriated to or otherwise received by the Teaching Fellows Program for scholarships, all funds received as repayment of scholarship loans, and all interest earned on these funds, shall be placed in a revolving fund. This revolving fund may be used only for scholarship loans granted under the Teaching Fellows Program. (1985 (Reg. Sess., 1986), c. 1014, s. 63(a).)

§ 115C-363.24. Teaching Grant Program for College Juniors.

(a) A Teaching Grant Program for College Juniors shall be administered by the North Carolina Teaching Fellows Commission. The Teaching Grant Program for Prospective Teachers shall be used to provide a two-year scholarship loan of four thousand dollars (\$4,000) per year to 200 North Carolina residents who are college juniors or community college graduates and who are interested in preparing to teach in the public schools of the State. The Commission shall adopt standards to ensure that these scholarship loans are awarded only to students who meet scholastic standards set by the Commission and who are majoring in a subject area of high need and who agree to teach in a specified region or local school administrative unit of the State.

(b) All scholarship loans shall be evidenced by notes made payable to the Commission that bear interest at the rate of ten percent (10%) per year beginning September 1 after completion of the program, or immediately after termination of the scholarship loan, whichever is earlier. The scholarship loan may be terminated by the recipient withdrawing from school or by the recipient not meeting the standards set by the Commission.

(c) The Commission shall forgive the loan if, within five years after graduation, the recipient teaches for three years in the subject area and the geographical area agreed upon when the scholarship loan was made.

(d) All funds appropriated to or otherwise received by the Teaching Grant Program for College Juniors for scholarships, all funds received as repayment of scholarship loans, and all interest earned on these funds shall be placed in a revolving fund. This revolving fund may be used only for scholarship loans granted under the Teaching Grant Program for College Juniors. (1985 (Reg. Sess., 1986), c. 1014, s. 63 (a).)

SUBCHAPTER VI. STUDENTS.

ARTICLE 26.

Attendance.

Part 1. Compulsory Attendance.

§ 115C-378. Children between seven and 16 required to attend.

Legal Periodicals. —

For note, "The Squeal Rule: Statutory Resolution and Constitutional Implications — Bur-

dening the Minor's Right of Privacy," see 6 Duke L.J. 1325 (1984).

ARTICLE 27.

Discipline.

§ 115C-390. School personnel may use reasonable force.

Principals, teachers, substitute teachers, voluntary teachers, teacher aides and assistants and student teachers in the public schools of this State may use reasonable force in the exercise of lawful authority to restrain or correct pupils and maintain order. No local board of education shall promulgate or continue in effect a rule, regulation or bylaw which prohibits the use of such force as is specified in this section. (1955, c. 1372, art. 17, s. 4; 1959, c. 1016; 1969, c. 638, ss. 2, 3; 1971, c. 434; 1981, c. 423, s. 1; 1985 (Reg. Sess., 1986), c. 975, s. 21.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 975, s. 25 provides that the provisions of the act shall not be construed to abolish or in any manner affect any supplemental tax or any local taxing district.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 11, 1986, deleted "or district committee" following "local board of education" in the second sentence.

CASE NOTES

Prior to adoption of this section, rule was that teacher had right to administer corporal punishment to students so long as it was done without malice and to further an educational goal. If the teacher inflicted serious injury on the student, the teacher was liable although acting without malice and to further an educational goal if he should have reasonably foreseen that a serious or permanent injury of some kind would naturally or probably result from the act. *Gaspersohn ex rel. Gaspersohn v. Harnett County Bd. of Educ.*, 75 N.C. App. 23, 330 S.E.2d 489, cert. denied, 314 N.C. 539, 335 S.E.2d 315 (1985).

Common-law remedy for excessive cor-

poral punishment is applicable in this State, but there can be no recovery if the punishment is reasonable in light of its purpose. *Gaspersohn ex rel. Gaspersohn v. Harnett County Bd. of Educ.*, 75 N.C. App. 23, 330 S.E.2d 489, cert. denied, 314 N.C. 539, 335 S.E.2d 315 (1985).

Jury Instructions. — A proposed instruction that corporal punishment should never be employed as a first line of punishment except in cases in which the act of the student is so antisocial or disruptive in nature as to shock the conscience was contrary to this section. The court correctly charged the jury that if a school official failed to exercise ordinary care and

inflicted permanent or long lasting injury that was the natural and probable result he would be liable. *Gaspersohn ex rel. Gaspersohn v. Harnett County Bd. of Educ.*, 75 N.C. App. 23, 330 S.E.2d 489, cert. denied, 314 N.C. 539, 335 S.E.2d 315 (1985).

The court could correctly refuse to give an instruction that boys were given, in addition to corporal punishment, the alternative of raking leaves. When the student chose corporal punishment as an alternative to in-school suspension, the question was whether a reasonable amount of force was used, not whether some

other form of punishment should have been used. *Gaspersohn ex rel. Gaspersohn v. Harnett County Bd. of Educ.*, 75 N.C. App. 23, 330 S.E.2d 489, cert. denied, 314 N.C. 539, 335 S.E.2d 315 (1985).

International law, made applicable to North Carolina by the United States, does not proscribe corporal punishment. *Gaspersohn ex rel. Gaspersohn v. Harnett County Bd. of Educ.*, 75 N.C. App. 23, 330 S.E.2d 489, cert. denied, 314 N.C. 539, 335 S.E.2d 315 (1985).

§ 115C-391. Suspension or expulsion of pupils.

CASE NOTES

Ban on the use or possession of tobacco products by students at school is a valid exercise of the authority delegated to the various boards of education by the legislature, and does not violate the guarantee of equal protec-

tion contained in the Fourteenth Amendment to the U.S. Const. and N.C. Const., Art. 1, § 19. *Craig v. Buncombe County Bd. of Educ.* — N.C. App. —, 343 S.E.2d 222 (1986).

SUBCHAPTER VII. FISCAL AFFAIRS.

ARTICLE 31.

The School Budget and Fiscal Control Act.

Part 2. Budget.

§ 115C-430. Apportionment of county appropriations among local school administrative units.

If there is more than one local school administrative unit in a county, all appropriations by the county to the local current expense funds of the units, except appropriations funded by supplemental taxes levied less than county-wide pursuant to a local act of G.S. 115C-501 to 115C-511, must be apportioned according to the membership of each unit. County appropriations are properly apportioned when the dollar amount obtained by dividing the amount so appropriated to each unit by the total membership of the unit is the same for each unit. The total membership of the local school administrative unit is the unit's average daily membership for the budget year to be determined by and certified to the unit and the board of county commissioners by the State Board of Education. (1975, c. 437, s. 1; 1981, c. 423, s. 1; 1985 (Reg. Sess., 1986), c. 1014, s. 78.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 243, contains a severability clause.

Effect of Amendments. — The 1985 (Reg.

Sess., 1986) amendment, effective July 1, 1986, deleted "projected" preceding "average daily membership" in the last sentence.

Part 3. Fiscal Control.

§ 115C-437. Allocation of revenues to the local school administrative unit by the county.

CASE NOTES

Applicability of 1985 Amendment. — The 1985 amendment to this section, defining "clear proceeds," could only be effective as to monies collected because of traffic violations

occurring on and after July 17, 1985. *Cauble v. City of Asheville*, 314 N.C. 598, 336 S.E.2d 59 (1985).

ARTICLE 32.

Loans from State Literary Fund.

§ 115C-461. Loans by county board to school districts.

The county board of education, from any sum borrowed under the provisions of this Article, may make loans only to districts that shall have levied a local tax sufficient to repay the installments and interest on said loan for the purpose of building schoolhouses in the district, and the amount so loaned to any district shall be payable in 10 annual installments, with interest thereon at the same rate the county board of education is paying, payable annually. Any amount loaned under the provisions of this law shall be a lien upon the total local tax funds produced in the district. Whenever the local taxes may not be sufficient to pay the installments and the interest, the county board of education must supply the remainder out of the current expense fund, and shall make provision for the same when the county budget is made and presented to the commissioners. (1955, c. 1372, art. 11, s. 4; 1981, c. 423, s. 1; 1985 (Reg. Sess., 1986), c. 975, s. 24.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 975, s. 25 provides that the provisions of the act shall not be construed to abolish or in any manner affect any supplemental tax or any local taxing district.

Effect of Amendments. — The 1985 (Reg.

Sess., 1986) amendment, effective July 11, 1986, deleted a former second paragraph of this section, relating to written petition of a majority of the school committee asking for a loan, and a lien upon local taxes for repayment of the same.

ARTICLE 32A.

Scholarship Loan Fund for Prospective Teachers.

§§ 115C-468 to 115C-472: Repealed by Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 63(b), effective July 1, 1987.

For these sections as in effect until July 1, 1987, see the 1985 Cumulative Supplement.

Cross References. — As to the Teacher Enhancement Program, see § 115C-363.15 et seq.

Editor's Note. — Section 63(b) of Session Laws 1985 (Reg. Sess., 1986), c. 1014, provides:

"Effective July 1, 1987, Article 32A of Chapter 115C of the General Statutes and Section 10 of Chapter 1034 of the 1983 Session Laws are repealed; provided, however, this subsection does not apply to individuals who have received commitments for scholarship loans

under these statutes prior to July 1, 1987, and who have not completed the program or to individuals who have not fulfilled their obligations to teach or to repay their notes by July 1, 1987.

Effective July 1, 1987, all funds not needed in the Scholarship Loan Fund for Prospective Teachers for individuals who received commit-

ments for scholarship loans under Article 32A of Chapter 115C of the General Statutes or Section 10 of Chapter 1034 of the 1983 Session Laws are transferred to the Teaching Fellows Program."

Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 243, contains a severability clause.

SUBCHAPTER VIII. LOCAL TAX ELECTIONS.

ARTICLE 36.

Voted Tax Supplements for School Purposes.

§ 115C-503. Who may petition for election.

Local boards of education may petition the board of county commissioners for an election in their respective local school administrative units or for any school areas therein.

A majority of the qualified voters who have resided for the preceding 12 months in an area which is adjacent to a city administrative unit may petition the county board of education for an election on the question of annexing such area to the city administrative unit. For any of the other purposes enumerated in G.S. 115C-501, twenty-five percent (25%) of the qualified voters who reside in a local school administrative unit may petition the local board of education for an election. (1955, c. 1372, art. 14, s. 3; 1961, c. 1019, s. 2; 1981, c. 423, s. 1; 1985 (Reg. Sess., 1986), c. 975, s. 7.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 975, s. 25 provides that the provisions of the act shall not be construed to abolish or in any manner affect any supplemental tax or any local taxing district.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 11, 1986, substituted the present second paragraph for the former second and third paragraphs.

§ 115C-505. Boards of education must consider petitions.

The board of education to whom the petition requesting an election is addressed shall receive the petition and give it due consideration. If, in the discretion of the board or education, the petition for an election shall be approved, it shall be endorsed by the chairman and the secretary of the board and a record of the endorsement shall be made in the minutes of the board. Petitions for an election to enlarge a city administrative unit shall be subject to the approval and endorsement of both county and city boards of education which are therein affected.

Local boards of education shall have no discretion in granting an election to abolish a special school tax in any local school administrative unit, or district, or other school area, which has previously voted a supplemental tax, whenever a majority of the qualified voters residing in said local school administrative unit, district or school area shall petition for an election. When such a petition, showing the proper number of names of qualified voters, is presented to a board of education, it is hereby made mandatory that such petition shall be granted and the election held. If at the election a majority of those in the district who have voted thereon have voted "against local tax," the tax shall be deemed revoked and shall not be levied: Provided, that in Alexander,

Anson, Beaufort, Buncombe, Carteret, Catawba, Chatham, Chowan, Cleveland, Craven, Currituck, Davidson, Duplin, Franklin, Gates, Greene, Henderson, Hoke, Hyde, Iredell, Jackson, Johnston, Lenoir, Martin, Mecklenburg, Moore, Nash, Onslow, Pamlico, Pitt, Randolph, Richmond, Robeson, Rockingham, Transylvania, Vance, Wake, Warren and Wilkes Counties, petition of twenty-five percent (25%) of the number of voters in the election creating said special tax district, said petition to be signed by qualified voters residing in such special tax district, shall be sufficient.

The provisions of this section as to abolishing local tax districts shall not be applied when such local tax district is in debt in any sum whatever, or has obligated or committed its resources in any contractual manner: Provided, that no election for revoking a local tax in any local tax district shall be ordered and held in the district within less than one year from the date of the election at which the tax was voted and the district established, nor at any time within less than one year after the date of the last election on the question of revoking the tax in the district; and no petition seeking to revoke a school tax shall be approved by a board of education more often than once a year. (1955, c. 1372, art. 14, s. 5; 1957, c. 1100; 1981, c. 423, s. 1; 1985 (Reg. Sess., 1986), c. 975, s. 24.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 975, s. 25 provides that the provisions of the act shall not be construed to abolish or in any manner affect any supplemental tax or any local taxing district.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 11, 1986, deleted a former last paragraph of this

section, which read "If the petition for an election in an area containing a number of districts is signed by the school committeeman of at least a majority of the school districts within a proposed special school taxing area, the board of education in such administrative units shall endorse such petition and the election shall be held."

§ 115C-510. Elections in districts created from portions of contiguous counties.

Districts already created and those that may be created from portions of two or more contiguous counties may hold elections under this Article to be incorporated or to vote a special local tax therein for the purposes enumerated in G.S. 115C-501.

Elections for either purpose must be initiated by petitions from the portion of each county included in the district, or the proposed district. In districts already created or proposed to be created, the petition must be signed by fifteen percent (15%) of the registered voters who reside in the area. When the petitions shall have been approved by each of the boards of education of such contiguous counties, they shall then be presented by each of said boards of education to their respective boards of county commissioners.

The boards of commissioners of each of the contiguous counties, in compliance with the provisions of this Article relating to the conduct of local tax elections, then shall call upon the county board of elections to hold an election in that portion of the proposed district lying in its county. Election returns shall be made from each portion of the proposed district to the board of commissioners ordering the election in that portion, and the returns shall be canvassed and recorded as required in this Article for local tax districts.

If a majority of the voters who vote thereon in each of the counties shall vote in favor of the tax, or for incorporation, the election shall be determined to have carried in the whole district, and shall be so recorded in the records of the board of county commissioners in each county in which the district is located.

If the proposition submitted to the voters in the election is a question of incorporating the district, the ballots for this election shall have printed thereon the words "For Incorporation" and "Against Incorporation." If the election for incorporation is carried, the district is thereby incorporated and shall possess all the authority of incorporated districts.

In case the election carried in each portion of the proposed district, the several county boards of education concerned shall each pass a formal order consolidating the territory into one joint local tax district, which shall be and become a body corporate by the name and style of "..... Joint Local Tax School District of Counties." The county board of education having the largest school census and the largest area in the part of the joint local tax district lying in its county shall determine the location of the schoolhouse; but if the largest census and largest area do not both lie in the same county, then the county boards shall jointly select the site for the building; and in case of a disagreement they shall submit the question to a board of arbitration consisting of three members, one member to be named by each board of education if three counties are concerned, or if there are but two counties, then each board shall choose one member and the two so named shall select the third member. The decision of this board of arbitration shall be binding on all county boards of education concerned.

The building of all schoolhouses in such joint local tax districts shall be effected by the county board of education of the county in which the building is to be located under authority of law governing the erection of school buildings by county boards of education. It shall be lawful for the boards of education in the other county or counties to contribute to the cost of the building in proportion to the number of children shown by the official census to be resident within that part of the joint district lying within each county respectively. If the building is to be erected from moneys borrowed from the State Literary Fund or from county taxation, then each county board of education shall contribute to its construction in the proportion set out above and pay over its contribution to the treasurer of the county board having control of the erection of the building: Provided, it shall be lawful for the county board that controls the erection of the building to borrow from the State and lend to the district the full amount of the cost of the building in cases where the entire amount, or part of the amount, is to be repaid by the district from district funds.

All district funds of a joint local tax district shall be kept distinct from all other funds, placed to the credit of the district, and expended as other local tax or district bond funds are lawfully disbursed.

The county board of education and county superintendent of schools of the county in which the schoolhouse is located shall have as full and ample control over the joint school and the district as it has in the case of other local tax districts, subject only to the limitations of this section.

All districts formed from portions of contiguous counties before the ratification of this Article are hereby authorized and empowered to exercise all the powers and privileges conferred by this Article. (1955, c. 1372, art. 14, s. 8; 1981, c. 423, s. 1; 1985 (Reg. Sess., 1986), c. 975, ss. 8, 24.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 975, s. 25 provides that the provisions of the act shall not be construed to abolish or in any manner affect any supplemental tax or any local taxing district.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 11,

1986, substituted the present second sentence of the second paragraph for the former second and third sentences, which read "In districts already created, the majority of the committeemen must sign the petition. In proposed districts, the petition must be signed by fifteen percent (15%) of the registered voters who re-

side in the area," and deleted the former seventh, eighth, and next-to-last paragraphs of this section, relating to school committees.

SUBCHAPTER IX. PROPERTY.

ARTICLE 37.

School Sites and Property.

§ 115C-518. Disposition of school property; easements and rights-of-way.

(a) When in the opinion of any local board of education the use of any building site or other real property or personal property owned or held by the board is unnecessary or undesirable for public school purposes, the local board of education may dispose of such according to the procedures prescribed in General Statutes, Chapter 160A, Article 12, or any successor provisions thereto. Provided, when any real property to which the board holds title is no longer suitable or necessary for public school purposes, the board of county commissioners for the county in which the property is located shall be afforded the first opportunity to obtain the property. The board of education shall offer the property to the board of commissioners at a fair market price or at a price negotiated between the two boards. If the board of commissioners does not choose to obtain the property as offered, the board of education may dispose of such property according to the procedure as herein provided. Provided that no State or federal regulations would prohibit such action. For the purposes of this section references in Chapter 160A, Article 12, to the "city," the "council," or a specific city official are deemed to refer, respectively, to the school administrative unit, the board of education, and the school administrative official who most nearly performs the same duties performed by the specified city official. A local board of education may also sell any property other than real property through the facilities of the North Carolina Department of Administration. The proceeds of any sale of real property or from any lease for a term of over one year shall be applied to reduce the county's bonded indebtedness for the school administrative unit disposing of such real property or for capital outlay purposes.

(1955, c. 1372, art. 15, s. 2; 1959, c. 324; c. 573, s. 11; 1961, c. 395; 1975, c. 264; c. 879, s. 46; 1977, c. 803; 1981, c. 423, s. 1; 1981 (Reg. Sess., 1982), c. 1216; 1983, c. 731; 1985 (Reg. Sess., 1986), c. 975, s. 22.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Local Modification. — New Hanover County Board of Education: 1985 (Reg. Sess., 1986), c. 917.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 975, s. 25 provides that the pro-

visions of the act shall not be construed to abolish or in any manner affect any supplemental tax or any local taxing district.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 11, 1986, deleted "district or" preceding "administrative unit" in the sixth sentence of subsection (a).

§ 115C-524. Repair of school property; use of buildings for other than school purposes.

(b) It shall be the duty of local boards of education and tax-levying authorities, in order to safeguard the investment made in public schools, to keep all school buildings in good repair to the end that all public school property shall be taken care of and be at all times in proper condition for use. It shall be the duty of all principals, teachers, and janitors to report to their respective boards of education immediately any unsanitary condition, damage to school property, or needed repair. All principals, teachers, and janitors shall be held responsible for the safekeeping of the buildings during the school session and all breakage and damage shall be repaired by those responsible for same, and where any principal or teacher shall permit damage to the public school buildings by lack of proper discipline of pupils, such principal or teacher shall be held responsible for such damage: Provided, principals and teachers shall not be held responsible for damage that they could not have prevented by reasonable supervision in the performance of their duties.

Notwithstanding the provisions of G.S. 115C-263 and 115C-264, local boards of education shall have the authority to adopt rules and regulations by which school buildings, including cafeterias and lunchrooms, may be used for other than school purposes so long as such use is consistent with the proper preservation and care of the public school property. No liability shall attach to any board of education, individually or collectively, for personal injury suffered by reason of the use of such school property. (1955, c. 1372, art. 15, s. 9; 1957, c. 684; 1963, c. 253; 1981, c. 423, s. 1; 1985 (Reg. Sess., 1986), c. 975, s. 23.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 975, s. 25 provides that the provisions of the act shall not be construed to abolish or in any manner affect any supplemental tax or any local taxing district.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 11, 1986, deleted "committeemen" following "It shall be the duty of all" at the beginning of the second sentence of the first paragraph of subsection (b).

Chapter 115D.

Community Colleges and Technical Institutes.

Article 1.

General Provisions for State Administration.

Sec.

115D-3. Department of Community Colleges;
staff; advisory council.

115D-4. Establishment and transfer of institu-
tions; capital improvements.

115D-5. Administration of institutions by

State Board of Community Col-
leges; personnel exempt from
State Personnel Act; extension
courses; tuition waiver; in-plant
training; contracting, etc., for es-
tablishment and operation of ex-
tension units of the community
college system; use of existing
public school facilities.

ARTICLE 1.

General Provisions for State Administration.

§ 115D-3. Department of Community Colleges; staff; advisory council.

The Department of Community Colleges shall be a principal administrative department of State government under the direction of the State Board of Community Colleges, and shall be separate from the free public school system of the State and the Department of Public Education. The State Board shall have authority to adopt and administer all policies, regulations, and standards which it may deem necessary for the operation of the Department.

The State Board shall elect a State President of the Department of Community Colleges. He shall be the chief administrative officer of the Department. The compensation of this position shall be fixed by the General Assembly in the Current Operations Appropriations Act.

The State President shall be assisted by such professional staff members as may be deemed necessary to carry out the provisions of this Chapter, who shall be elected by the State Board on nomination of the State President. The compensation of the staff members elected by the Board shall be fixed by the Governor and State Board of Community Colleges. These staff members shall include such officers as may be deemed desirable by the State President and State Board. Provision shall be made for persons of high competence and strong professional experience in such areas as academic affairs, public service programs, business and financial affairs, institutional studies and long-range planning, student affairs, research, legal affairs, health affairs and institutional development, and for State and federal programs administered by the State Board. In addition, the State President shall be assisted by such other employees as may be needed to carry out the provisions of this Chapter, who shall be subject to the provisions of Chapter 126 of the General Statutes. The staff complement shall be established by the State Board on recommendation of the State President to insure that there are persons on the staff who have the professional competence and experience to carry out the duties assigned and to insure that there are persons on the staff who are familiar with the problems and capabilities of all of the principal types of institutions represented in the system. The State Board of Community Colleges shall have all other powers, duties, and responsibilities delegated to the State Board of Education affecting the Department of Community Colleges not otherwise stated in this Chapter. Prior to taking any action under this section where joint

approval is required, the Governor and State Board of Community Colleges may consult with the Advisory Budget Commission. (1963, c. 448, s. 23; 1971, c. 1244, s. 14; 1975, c. 699, s. 5; 1979, c. 462, s. 2; c. 896, s. 3; 1979, 2nd Sess., c. 1130, ss. 1, 2; 1981, c. 859, s. 35.2; 1983, c. 479, s. 4; c. 717, s. 26; 1983 (Reg. Sess., 1984), c. 1034, s. 164; 1985 (Reg. Sess., 1986), c. 955, ss. 19, 20.)

Editor's Note. — Section 1 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "This act may be cited as the Separation of Powers Act of 1986."

Section 127 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "If any part of this act shall be declared invalid by any court, this shall not affect any other part of this act."

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 1, 1986, deleted "after consultation with the Advisory Budget Commission" at the end of the second sentence of the third paragraph and added the last sentence of the last paragraph.

§ 115D-4. Establishment and transfer of institutions; capital improvements.

The establishment of all community colleges and technical institutes or the conversion of any such existing institution into a new type of institution shall be subject to the approval of the General Assembly upon recommendation of the State Board of Community Colleges. In no case, however, shall favorable recommendation be made by the State Board for the establishment of an institution until it has been demonstrated to the satisfaction of the State Board that a genuine educational need exists within a proposed administrative area, that existing public and private post-high school institutions in the area will not meet the need, that adequate local financial support for the institution will be provided, that public schools in the area will not be affected adversely by the local financial support required for the institution, and that funds sufficient to provide State financial support of the institution are available.

The expenditures of any State funds for any capital improvements of existing institutions shall be subject to the prior approval of the State Board of Community Colleges and the Governor, provided that the Governor may consult with the Advisory Budget Commission before giving approval. The expenditure of State funds at any institution herein authorized to be approved by the State Board shall be subject to the terms of the Executive Budget Act unless specifically otherwise provided in this Chapter. (1963, c. 448, s. 23; 1965, c. 1028; 1971, c. 1244, s. 14; 1977, c. 154, s. 1; 1979, c. 462, s. 2; c. 896, s. 4; 1979, 2nd Sess., c. 1130, s. 1; 1983, c. 717, ss. 27-27.2; 1985 (Reg. Sess., 1986), c. 955, s. 21.)

Editor's Note. — Section 1 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "This act may be cited as the Separation of Powers Act of 1986."

Section 127 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "If any part of this act

shall be declared invalid by any court, this shall not affect any other part of this act."

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 1, 1986, substituted "may consult" for "shall consult" in the first sentence of the second paragraph.

§ 115D-5. Administration of institutions by State Board of Community Colleges; personnel exempt from State Personnel Act; extension courses; tuition waiver; in-plant training; contracting, etc., for establishment and operation of extension units of the community college system; use of existing public school facilities.

(e) The State Board of Community Colleges is authorized to enter into agreements with local boards of education, upon approval by the Governor, for the establishment and operation of extension units of the community college system, provided that the Governor shall consult [may consult] with the Advisory Budget Commission before giving approval. The State Board is further authorized to provide the financial support for matching capital outlay and for operating and equipping extension units as provided in this Chapter for other institutions, subject to available funds.

On petition of a board of education of the school administrative unit in which an extension unit is proposed to be established, the State Board of Community Colleges may approve the use by the proposed institution of existing public school facilities, if the State Board finds:

- (1) That an adequate portion of these facilities can be devoted to the exclusive use of the institution, and
- (2) That use of these facilities will be consistent with sound educational considerations.

(1963, c. 488, s. 23; 1967, c. 652; 1969, c. 1294; 1973, c. 768; 1975, c. 882; 1977, c. 1065; 1979, c. 462, s. 2; c. 896, ss. 5-7; 1979, 2nd Sess., c. 1130, s. 1; 1981, c. 609; c. 859, s. 35.1; c. 897; c. 1127, s. 43; 1983, c. 717, s. 28; 1983 (Reg. Sess., 1984), c. 1034, ss. 45, 46; 1985, c. 479, s. 67; 1985 (Reg. Sess., 1986), c. 955, s. 22.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Section 1 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "This act may be cited as the Separation of Powers Act of 1986."

Section 127 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "If any part of this act shall be declared invalid by any court, this shall not affect any other part of this act."

Effect of Amendments. — Session Laws

1985 (Reg. Sess., 1986), c. 955, s. 22 effective July 1, 1986, directed that the words "may consult" be substituted for "shall consult" in the last paragraph of subsection (e). The words "shall consult" do not occur in the last paragraph of subsection (e), but may be found in the first sentence of the first paragraph of that subsection. At the direction of the Revisor of Statutes, the words "may consult" have been inserted in brackets following "shall consult" in that sentence.

Chapter 115E.

Higher Educational Facilities Finance Act.

(This Chapter is effective upon certification of approval of a constitutional amendment.)

Sec.	Sec.
115E-1. (Effective upon certification of approval of a constitutional amendment) Short title.	ment) Trust agreement or resolution.
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115E-11. (Effective upon certification of approval of a constitutional amendment) Bonds and notes.	115E-22. (Effective upon certification of approval of a constitutional amendment) Conflict of interest.
115E-12. (Effective upon certification of approval of a constitutional amendment)	115E-23. (Effective upon certification of approval of a constitutional amendment) Additional method.

§ 115E-1. (Effective upon certification of approval of a constitutional amendment) Short title.

This Chapter shall be known, and may be cited, as the "Higher Educational Facilities Finance Act." (1985 (Reg. Sess., 1986), c. 794, s. 1.)

Cross References. — For proposed constitutional amendment relating to enactment of general laws dealing with transactions of the type contemplated by this Chapter, see the note under N.C. Const., Art. V, § 11 concern-

ing Session Laws 1985 (Reg. Sess., 1986), c. 814.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 794, s. 27 makes this Chapter effective upon certification by the State Board

of Elections that an amendment to the North Carolina Constitution authorizing the enactment of general laws dealing with transactions of the type contemplated by the act has been approved by the people of the State.

Sections 24 through 26 of Session Laws 1985 (Reg. Sess., 1986), c. 794, provide:

"Sec. 24. Liberal Construction. This act, being necessary for the health and welfare of the people of the State, shall be liberally construed to effect the purposes thereof.

"Sec. 25. Inconsistent Laws Inapplicable. Insofar as the provisions of this act are inconsistent with the provisions of any general or special laws, or parts thereof, the provisions of this act shall be controlling.

"Sec. 26. The provisions of this act are severable, and if any of its provisions shall be held unconstitutional by any court of competent jurisdiction, the decision of such court shall not affect or impair any of the remaining provisions."

§ 115E-2. (Effective upon certification of approval of a constitutional amendment) Legislative findings.

It is hereby declared that for the benefit of the people of the State of North Carolina, the increase of their commerce, welfare and prosperity and the improvement of their health and living conditions it is essential that they be given the fullest opportunity to learn and to develop their intellectual capacities; that it is essential for institutions of higher education within the State to be able to construct and renovate facilities to assist its citizens in achieving the fullest development of their intellectual capacities; and that it is the purpose of this Chapter to provide a measure of assistance and an alternative method to enable private institutions of higher education in the State to provide the facilities and the structures which are needed to accomplish the purposes of this Chapter, all to the public benefit and good, to the extent and in the manner provided herein. (1985 (Reg. Sess., 1986), c. 794, s. 2.)

Editor's Note. — As to the effective date of this section, see the Editor's note under § 115E-1.

§ 115E-3. (Effective upon certification of approval of a constitutional amendment) Definitions.

As used or referred to in this Chapter, the following words and terms shall have the following meanings, unless the context clearly indicates otherwise:

- (1) "Agency" means the North Carolina Educational Facilities Finance Agency created by this Chapter, or, should said agency be abolished or otherwise divested of its functions under this Chapter, the public body succeeding it in its principal functions, or upon which are conferred by law the rights, powers and duties given by this Chapter to the agency.
- (2) "Cost", as applied to any project or any portion thereof financed under the provisions of this Chapter, means all or any part of the cost of construction, acquisition, alteration, enlargement, reconstruction and remodeling of a project, including all lands, structures, real or personal property, rights, rights-of-way, franchises, easements and interests acquired or used for or in connection with a project, the cost of demolishing or removing any buildings or structures on land so acquired, including the cost of acquiring any lands to which such buildings or structures may be moved, the cost of all machinery and equipment, financing charges, interest prior to and during construction and, if deemed advisable by the agency, for a period not exceeding two years after the estimated date of completion of construction,

the cost of engineering and architectural surveys, plans and specifications, the cost of consulting and legal services and other expenses necessary or incident to determining the feasibility or practicability of constructing or equipping a project, the cost of administrative and other expenses necessary or incident to the construction or acquisition of a project and the financing of the construction or acquisition thereof, including reasonable provision for working capital and a reserve for debt service, and the cost of reimbursing any participating institution for higher education for any payments made for any cost described above or the refinancing of any cost described above, including any evidence of indebtedness incurred to finance such cost; provided, however, that no payment shall be reimbursed or any cost or indebtedness be refinanced if such payment was made or such cost or indebtedness was incurred earlier than five years prior to the effective date of this Chapter.

- (3) "Project" means any one or more buildings, structures, improvements, additions, extensions, enlargements or other facilities for use primarily as a dormitory or other housing facility, including housing facilities for student nurses, a dining hall and other food preparation and food service facilities, student union, administration building, academic building, library, laboratory, research facility, classroom, athletic facility, health care facility, laundry facility, and maintenance, storage or utility facility and other structures or facilities related thereto or required or useful for the instruction of students or the conducting of research or the operation of an institution for higher education, including parking and other facilities or structures essential or convenient for the orderly conduct of such institution for higher education, or any combination of the foregoing, and shall also include landscaping, site preparation, furniture, equipment and machinery and other similar items necessary or convenient for the operation of an institution for higher education or a particular facility, building or structure thereof in the manner for which its use is intended but shall not include such items as books, fuel, supplies or other items the costs of which are customarily deemed to result in a current operating charge, and shall not include any facility used or to be used for sectarian instruction or as a place of religious worship nor any facility which is used or to be used primarily in connection with any part of the program of a school or department of divinity for any religious denomination.
- (4) "Bonds" or "notes" means the revenue bonds or bond anticipation notes, respectively, authorized to be issued by the agency under this Chapter, including revenue refunding bonds, notwithstanding that the same may be secured by a deed of trust or the full faith and credit of a participating institution for higher education or any other lawfully pledged security of a participating institution for higher education.
- (5) "Institution for higher education" means a nonprofit private educational institution within the State of North Carolina authorized by law to provide a program of education beyond the high school level.
- (6) "Participating institution for higher education" means an institution for higher education which, pursuant to the provisions of this Chapter, undertakes the financing, refinancing, acquiring, constructing, equipping, providing, owning, repairing, maintaining, extending, improving, rehabilitating, renovating or furnishing of a project or undertakes the refunding or refinancing of obligations or of a deed of trust or a mortgage or of advances as provided in this Chapter.

- (7) "State" means the State of North Carolina. (1985 (Reg. Sess., 1986), c. 794, s. 3.)

Editor's Note. — As to the effective date of this section, see the Editor's note under § 115E-1.

§ 115E-4. (Effective upon certification of approval of a constitutional amendment) Educational facilities finance agency.

(a) There is hereby created a body politic and corporate to be known as "North Carolina Educational Facilities Finance Agency" which shall be constituted a public agency and an instrumentality of the State for the performance of essential public functions. The agency shall be governed by a board of directors composed of seven members. Two of the members of said board shall be the State Treasurer and the State Auditor, both of whom shall serve ex officio. The remaining directors of the agency shall be residents of the State and shall not hold other public office. The President of the Senate shall appoint one director, the Speaker of the House shall appoint one director, and the Governor shall appoint three of the directors of the agency. The five appointive directors of the agency shall be appointed for staggered four-year terms, two being appointed initially for one year by the President of the Senate and the Speaker of the House, respectively, and one for two years, one for three years and one for four years, respectively, as designated by the Governor, and each director shall continue in office until his successor shall be duly appointed and qualified, except that any person appointed to fill a vacancy shall serve only for the unexpired term. Any vacancy in a position held by an appointive member shall be filled by a new appointment made by the officer who originally made such appointment. Any member of the board of directors shall be eligible for reappointment. Each appointive member of the board of directors may be removed by the Governor for misfeasance, malfeasance or neglect of duty after reasonable notice and a public hearing, unless the same are in writing expressly waived. Each appointive member of the board of directors before entering upon his duties shall take an oath of office to administer the duties of his office faithfully and impartially and a record of such oath shall be filed in the office of the Secretary of State. The Governor shall designate from among the members of the board of directors a chairman and a vice-chairman. The terms of the chairman and vice-chairman shall extend to the earlier or either two years or the date of expiration of their then current terms as members of the board of directors of the agency. The board of directors shall elect and appoint and prescribe the duties of a secretary-treasurer and such other officers as it shall deem necessary or advisable, which officers need not be members of the board of directors.

(b) No part of the revenues or assets of the agency shall inure to the benefit of or be distributable to its members or officers or other private persons. The members of the agency shall receive no compensation for their services but shall be entitled to receive, for attendance at meetings of the agency or any committee thereof and for other services for the agency, reimbursement for such actual expenses as may be incurred for travel and subsistence in the performance of official duties and such per diem as is allowed by law for members of other State boards, commissions and committees.

(c) The secretary-treasurer of the agency shall keep a record of the proceedings of the agency and shall be custodian of all books, documents and papers filed with the agency, the minute book or journal of the agency and its official

seal. He shall have authority to cause copies to be made of all minutes and other records and documents of the agency and to give certificates under the official seal of the agency to the effect that such copies are true copies, and all persons dealing with the agency may rely upon such certificates.

(d) Four members of the board of directors of the agency shall constitute a quorum and the affirmative vote of a majority of the members present at a meeting of the board of directors duly called and held shall be necessary for any action taken by the board of directors of the agency; provided, however, that the board of directors may appoint an executive committee to act on behalf of said board during the period between regular meetings of said board, and said committee shall have full power to act upon the vote of a majority of its members. No vacancy in the membership of the agency shall impair the rights of a quorum to exercise all the rights and to perform all the duties of the agency.

(e) The North Carolina Educational Facilities Finance Agency shall be contained within the Department of State Treasurer as if it had been transferred to that department by a Type II transfer as defined in G.S. 143A-6(b). (1985 (Reg. Sess., 1986), c. 794, s. 4.)

Editor's Note. — As to the effective date of this section, see the Editor's note under § 115E-1.

§ 115E-5. (Effective upon certification of approval of a constitutional amendment) General powers.

The agency shall have all of the powers necessary or convenient to carry out and effectuate the purposes and provisions of this Chapter, including, but without limiting the generality of the foregoing, the power:

- (1) To make and execute contracts and agreements necessary or incidental to the exercise of its powers and duties under this Chapter, including loan agreements and agreements of sale or leases with, mortgages and deeds of trust and conveyances to participating institutions of higher education, persons, firms, corporations, governmental agencies and others and including credit enhancement agreements;
- (2) To acquire by purchase, lease, gift or otherwise, or to obtain options for the acquisition of any property, real or personal, improved or unimproved, including interests in land in fee or less than fee for any project, upon such terms and at such cost as shall be agreed upon by the owner and the agency;
- (3) To arrange or contract with any county, city, town or other political subdivision or instrumentality of the State for the opening or closing of streets or for the furnishing of utility or other services to any project;
- (4) To sell, convey, lease as lessor, mortgage, exchange, transfer, grant a deed of trust in, or otherwise dispose of, or to grant options for any such purposes with respect to, any real or personal property or interest therein;
- (5) To pledge or assign any money, purchase price payments, rents, loan repayments, charges, fees or other revenues, including any federally guaranteed securities and moneys received therefrom whether such securities are initially acquired by the agency or a participating institution for higher education, and any proceeds derived by the agency from sales of property, insurance, condemnation awards or other sources;

- (6) To pledge or assign the revenues and receipts from any project and any loan agreement, agreement of sale or lease of the loan repayments, purchase price payments, rent and income received thereunder;
- (7) To borrow money as herein provided to carry out and effectuate its corporate purposes and to issue in evidence thereof bonds and notes for the purpose of providing funds to pay all or any part of the cost of any project, to lend money to any participating institution for higher education for the acquisition of any federally guaranteed securities and to issue revenue refunding bonds;
- (8) To finance, refinance, acquire, construct, equip, provide, operate, own, repair, maintain, extend, improve, rehabilitate, renovate and furnish any project and to pay all or any part of the cost thereof from the proceeds of bonds or notes or from any contribution, gift or donation or other funds available to the agency for such purpose;
- (9) To fix, revise, charge and collect or cause to be fixed, revised, charged and collected purchase price payments, rents, loan repayments, fees, rates and charges for the use of, or services rendered by, any project;
- (10) To employ fiscal consultants, consulting engineers, architects, attorneys, feasibility consultants, appraisers and such other consultants and employees as may be required in the judgment of the agency and to fix and pay their compensation from funds available to the agency therefor;
- (11) To conduct studies and surveys respecting the need for projects and their location, financing and construction;
- (12) To apply for, accept, receive and agree to and comply with the terms and conditions governing grants, loans, advances, contributions, interest subsidies and other aid with respect to any project from federal and State agencies or instrumentalities;
- (13) To sue and be sued in its own name, plead and be impleaded;
- (14) To acquire and enter into commitments to acquire any federally guaranteed security or federally insured mortgage note and to pledge or otherwise use any such federally guaranteed security or federally insured mortgage note in such manner as the agency deems in its best interest to secure or otherwise provide a source of repayment on any of its bonds or notes issued on behalf of any participating institution for higher education to finance or refinance the cost of any project;
- (15) To make loans to any participating institution for higher education for the cost of a project in accordance with an agreement between the agency and the participating institution for higher education;
- (16) To make loans to a participating institution for higher education to refund outstanding loans, obligations, deeds of trust or advances issued, made or given by such participating institutions for higher education for the cost of a project;
- (17) To charge and to apportion among participating institutions for higher education its administrative costs and expenses incurred in the exercise of its powers and duties conferred by this Chapter;
- (18) To adopt an official seal and alter the same at pleasure; and
- (19) To do all other things necessary or convenient to carry out the purposes of this chapter. (1985 (Reg. Sess., 1986), c. 794, s. 5.)

Editor's Note. — As to the effective date of this section, see the Editor's note under § 115E-1.

§ 115E-6. (Effective upon certification of approval of a constitutional amendment) Criteria and requirements.

In undertaking any project pursuant to this Chapter, the agency shall be guided by and shall observe the following criteria and requirements; provided that the determination of the agency as to its compliance with such criteria and requirements shall be final and conclusive:

- (1) No project shall be sold or leased nor any loan made to any institution for higher education which is not financially responsible and capable of fulfilling its obligations, including its obligations under an agreement of sale or lease or a loan agreement to make purchase price payments, to pay rent, to make loan repayments, to operate, repair and maintain at its own expense the project and to discharge such other responsibilities as may be imposed under the agreement of sale or lease or loan agreement;
- (2) Adequate provision shall be made for the payment of the principal of and the interest on the bonds and any necessary reserves therefor and for the operation, repair and maintenance of the project at the expense of the participating institution for higher education;
- (3) The public facilities, including utilities, and public services necessary for the project will be made available; and
- (4) The projects shall be operated to serve and benefit the public and there shall be no discrimination against any person based on race, creed, color or national origin. (1985 (Reg. Sess., 1986), c. 794, s. 6.)

Editor's Note. — As to the effective date of this section, see the Editor's note under § 115E-1.

§ 115E-7. (Effective upon certification of approval of a constitutional amendment) Procedural requirements.

Any institution for higher education may submit to the agency, and the agency may consider, a proposal for financing a project using such forms and following such instructions as may be prescribed by the agency. Such proposal shall set forth the type and location of the project and may include other information and data available to the institution for higher education respecting the project and the extent to which such project conforms to the criteria and requirements set forth in this Chapter. The agency may request the institution for higher education to provide additional information and data respecting the project. The agency is authorized to make or cause to be made such investigation, surveys, studies, reports and reviews as in its judgment are necessary and desirable to determine the feasibility and desirability of the project, the extent to which the project will contribute to the health and welfare of the area in which it will be located, the powers, experience, background, financial condition, record of service and capability of the management of the institution for higher education, the extent to which the project

otherwise conforms to the criteria and requirements of this Chapter, and such other factors as may be deemed relevant or convenient in carrying out the purposes of this Chapter. (1985 (Reg. Sess., 1986), c. 794, s. 7.)

Editor's Note. — As to the effective date of this section, see the Editor's note under § 115E-1.

§ 115E-8. (Effective upon certification of approval of a constitutional amendment) Operations of projects; agreements of sale on leases; conveyance of interest in projects.

The agency may sell or lease any project to a participating institution for higher education for operation and maintenance or lend money to any participating institution for higher education in such manner as shall effectuate the purposes of this Chapter, under a loan agreement or an agreement of sale or lease in form and substance not inconsistent herewith. Any such loan agreement or agreement of sale or lease may include provisions that:

- (1) The participating institution for higher education shall, at its own expense, operate, repair and maintain the project covered by such agreement;
- (2) The purchase price payments to be made under the agreement of sale, the rent payable under the agreement of lease or the loan repayments under the loan agreement shall in the aggregate be not less than an amount sufficient to pay all of the interest, principal and any redemption premium on the bonds or notes issued by the agency to pay the cost of the project sold or leased thereunder or with respect to which the loan was made;
- (3) The participating institution for higher education shall pay all other costs incurred by the agency in connection with the providing of the project covered by any such agreement, except such costs as may be paid out of the proceeds of bonds or notes or otherwise, including, but without limitation, insurance costs, the cost of administering the resolution authorizing the issuance of, or any trust agreement securing, such bonds or notes and the fees and expenses of trustees, paying agents, attorneys, consultants and others;
- (4) The loan agreement or the agreement of sale or lease shall terminate not earlier than the date on which all such bonds and all other obligations incurred by the agency in connection with the project covered by any such agreement shall be retired or provision for such retirement shall be made; and
- (5) The obligation of the participating institution for higher education to make loan repayments or purchase price payments or to pay rent shall not be subject to cancellation, termination or abatement by the participating institution for higher education until the bonds have been retired or provision has been made for such retirement.

Where the agency has acquired a possessory or ownership interest in any project which it has undertaken on behalf of a participating institution for higher education it shall promptly convey, without the payment of any consideration, all its right, title and interest in such project to such participating institution for higher education upon the retirement or provision for the retirement of all bonds or notes issued and obligations incurred by the agency in connection with such project. (1985 (Reg. Sess., 1986), c. 794, s. 8.)

Editor's Note. — As to the effective date of this section, see the Editor's note under § 115E-1.

§ 115E-9. (Effective upon certification of approval of a constitutional amendment) Construction contracts.

If the agency shall determine that the purposes of this chapter will be more effectively served, the agency in its discretion may award or cause to be awarded contracts for the construction of any project on behalf of a participating institution for higher education upon a negotiated basis as determined by the agency. The agency shall prescribe such bid security requirements and other procedures in connection with the award of such contracts as in its judgment shall protect the public interest. The agency may by written contract engage the services of the participating institution for higher education in the construction of such project and may provide in any such contract that such participating institution for higher education, subject to such conditions and requirements consistent with the provisions of this Chapter as shall be prescribed in such contract, may act as an agent of, or an independent contractor for, the agency for the performance of the functions described therein, including the acquisition of the site and other real property for such project, the preparation of plans, specifications and contract documents, the award of construction and other contracts upon a competitive or negotiated basis, the construction of such project directly by such participating institution for higher education, the inspection and supervision of construction, the employment of engineers, architects, builders and other contractors and the provision of money to pay the cost thereof pending reimbursement by the agency. Any such contract may provide that the agency may, out of proceeds of bonds or notes, make advances to or reimburse the participating institution for higher education for its costs incurred in the performance of such functions, and shall set forth the supporting documents required to be submitted to the agency and the reviews, examinations and audits that shall be required in connection therewith to assure compliance with the provisions of this Chapter and such contract. (1985 (Reg. Sess., 1986), c. 794, s. 9.)

Editor's Note. — As to the effective date of this section, see the Editor's note under § 115E-1.

§ 115E-10. (Effective upon certification of approval of a constitutional amendment) Credit of State not pledged.

Bonds or notes issued under the provisions of this Chapter shall not be secured by a pledge of the faith and credit of the State or of any political subdivision thereof or be deemed to create an indebtedness of the State, or of any such political subdivision thereof, requiring any voter approval, but shall be payable solely from the revenues and other funds provided therefor. Each bond or note issued under this Chapter shall contain on the face thereof a statement to the effect that the agency shall not be obligated to pay the same nor the interest thereon except from the revenues and other funds pledged therefor and that neither the faith and credit nor the taxing power of the State

or of any political subdivision thereof is pledged as security for the payment of the principal of or the interest on such bond or note.

Expenses incurred by the agency in carrying out the provisions of this Chapter may be made payable from funds provided pursuant to, or made available for use under, this Chapter and no liability shall be incurred by the agency hereunder beyond the extent to which moneys shall have been so provided. (1985 (Reg. Sess., 1986), c. 794, s. 10.)

Editor's Note. — As to the effective date of this section, see the Editor's note under § 115E-1.

§ 115E-11. (Effective upon certification of approval of a constitutional amendment) Bonds and notes.

(a) The agency is hereby authorized to provide for the issuance, at one time or from time to time, of bonds, or notes in anticipation of the issuance of bonds, of the agency to carry out and effectuate its corporate purposes. The principal of and the interest on such bonds or notes shall be payable solely from funds provided under this Chapter for such payment. Any such notes may be made payable from the proceeds of bonds or renewal notes or, in the event bond or renewal note proceeds are not available, such notes may be paid from any available revenues or other funds provided therefor. The bonds or notes of each issue shall be dated and may be made redeemable before maturity at the option of the agency at such price or prices and upon such terms and conditions as may be determined by the agency. The bonds may also be made payable from time to time on demand or tender for purchase by the owner upon such terms and conditions as may be determined by the agency. Any such bonds or notes shall bear interest at such rate or rates (including variable rates) as may be determined by the Local Government Commission of North Carolina with the approval of the agency. Notes shall mature at such time or times not exceeding 10 years from their date or dates and bonds shall mature at such time or times not exceeding 40 years from their date or dates, as may be determined by the agency. The agency shall determine the form and manner of execution of the bonds or notes, including any interest coupons to be attached thereto, and shall fix the denomination or denominations and the place or places of payment of principal and interest, which may be any bank or trust company within or without the State. In case any officer whose signature or a facsimile of whose signature shall appear on any bonds or notes or coupons attached thereto shall cease to be such officer before the delivery thereof, such signature or such facsimile shall nevertheless be valid and sufficient for all purposes the same as if he had remained in office until such delivery. The agency may also provide for the authentication of the bonds or notes by a trustee or fiscal agent. The bonds or notes may be issued in coupon or in registered form, or both, as the agency may determine, and provision may be made for the registration of any coupon bonds or notes as to principal alone and also as to both principal and interest, and for the reconversion into coupon bonds or notes of any bonds or notes registered as to both principal and interest, and for the interchange of registered and coupon bonds or notes. No bonds or notes may be issued by the agency under this Chapter unless the issuance thereof is approved by the Local Government Commission of North Carolina.

(b) The agency shall file with the Secretary of the Local Government Commission an application requesting approval of the issuance of such bonds or notes which shall contain such information and have attached to it such docu-

ments concerning the proposed financing and prospective borrower, vendee or lessee as the Secretary may require.

In determining whether a proposed bond or note issue should be approved, the Local Government Commission may consider, in addition to the criteria and requirements mentioned in this Chapter, the effect of the proposed financing upon any scheduled or proposed sale of tax-exempt obligations by the State or any of its agencies or departments or by any unit of local government in the State.

The Local Government Commission shall approve the issuance of such bonds or notes if, upon the information and evidence it receives, it finds and determines that the proposed financing will effectuate the purposes of this Chapter.

Upon the filing with the Local Government Commission of a resolution of the agency requesting that its bonds or notes be sold, such bonds or notes may be sold in such manner, either at public or private sale, and for such price as the Local Government Commission shall determine to be for the best interests of the agency and effectuate best the purposes of this Chapter, provided that such sale shall be approved by the agency.

(c) The proceeds of any bonds or notes shall be used solely for the purposes for which issued and shall be disbursed in such manner and under such restrictions, if any, as the agency may provide in the resolution authorizing the issuance of, or any trust agreement securing, such bonds or notes.

(d) Prior to the preparation of definitive bonds, the agency may, under like restrictions, issue interim receipts or temporary bonds, with or without coupons, exchangeable for definitive bonds, when such bonds shall have been executed and are available for delivery. The agency may also provide for the replacement of any bonds or notes which shall become mutilated or shall be destroyed or lost.

(e) Bonds or notes may be issued under the provisions of this Chapter without obtaining, except as otherwise expressly provided in this Chapter, the consent of any department, division, commission, board, body, bureau or agency of the State, and without any other proceedings or the happening of any conditions or things other than those proceedings, conditions or things which are specifically required by this Chapter and the provisions of the resolution authorizing the issuance of, or any trust agreement securing, such bonds or notes. (1985 (Reg. Sess., 1986), c. 794, s. 11.)

Editor's Note. — As to the effective date of this section, see the Editor's note under § 115E-1.

§ 115E-12. (Effective upon certification of approval of a constitutional amendment) Trust agreement or resolution.

In the discretion of the agency any bonds or notes issued under the provisions of this Chapter may be secured by a trust agreement by and between the agency and a corporate trustee, which may be any trust company or bank having the powers of a trust company within or without the State. Such trust agreement or the resolution authorizing the issuance of such bonds or notes may pledge or assign all or any part of the revenues of the agency received pursuant to this Chapter, including, without limitation, fees, loan repayments, purchase price payments, rents, charges, insurance proceeds, condem-

nation awards and any other revenues and funds received in connection with any project and may grant a deed of trust or a mortgage on any project. Such trust agreement or resolution may contain such provisions for protecting and enforcing the rights and remedies of the holders of any such bonds or notes as may be reasonable and proper and not in violation of law, including covenants setting forth the duties of the agency in relation to the purposes to which bond or note proceeds may be applied, the disposition or pledging of the revenues of the agency, including any payments in respect of any federally guaranteed security or any federally insured mortgage note, the duties of the agency with respect to the acquisition, construction, maintenance, repair and operation of any project, the fees, loan repayments, purchase price payments, rents and charges to be fixed and collected in connection therewith, the terms and conditions for the issuance of additional bonds or notes, and the custody, safeguarding and application of all moneys. All bonds issued under this Chapter shall be equally and ratably secured by a pledge, charge, and lien upon revenues provided for in such trust agreement or resolution, without priority by reason of number, or of dates of bonds, execution, or delivery, in accordance with the provisions of this Chapter and of such trust agreement or resolution; except that the agency may provide in such trust agreement or resolution that bonds issued pursuant thereto shall to the extent and in the manner prescribed in such trust agreement or resolution be subordinated and junior in standing, with respect to the payment of principal and interest and the security thereof, to any other bonds. It shall be lawful for any bank or trust company incorporated under the laws of the State which may act as depository of the proceeds of bonds or notes, revenues or other money hereunder to furnish such indemnifying bonds or to pledge such securities as may be required by the agency. Any such trust agreement or resolution may set off the rights and remedies, including foreclosure of any deed of trust or mortgage, of the holders of any bonds or notes and of the trustee, and may restrict the individual right of action by any such holders. In addition to the foregoing, any such trust agreement or resolution may contain such other provisions as the agency may deem reasonable and proper for the security of the holders of any bonds or notes. Expenses incurred in carrying out the provisions of such trust agreement or resolution may be treated as a part of the cost of any project or paid from the revenues pledged or assigned to the payment of the principal of and the interest on bonds or notes or from any other funds available to the agency. (1985 (Reg. Sess., 1986), c. 794, s. 12.)

Editor's Note. — As to the effective date of this section, see the Editor's note under § 115E-1.

§ 115E-13. (Effective upon certification of approval of a constitutional amendment) Revenues; pledges of revenues.

(a) The agency is hereby authorized to fix and to collect fees, loan repayments, purchase price payments, rents and charges for the use of any project, and any part or section thereof, and to contract with any participating institution for higher education for the use thereof. The agency may require that the participating institution for higher education shall operate, repair or maintain such project and shall bear the cost thereof and other costs of the agency in connection therewith, all as may be provided in the agreement of sale or

lease, loan agreement or other contract with the agency, in addition to other obligations imposed under such agreement or contract.

(b) The fees, loan repayments, purchase price payments, rents and charges shall be fixed so as to provide a fund sufficient, with such other funds as may be made available therefor, (i) to pay the costs of operating, repairing and maintaining the project to the extent that adequate provision for the payment of such costs has not otherwise been provided for, (ii) to pay the principal of and the interest on all bonds or notes as the same shall become due and payable and (iii) to create and maintain any reserves provided for in the resolution authorizing the issuance of, or any trust agreement securing, such bonds; and such fees, loan repayments, purchase price payments, rents and charges may be applied or pledged to the payment of debt service on the bonds prior to the payment of the costs of operating, repairing and maintaining the project.

(c) All pledges of fees, loan repayments, purchase price payments, rents, charges and other revenues under the provisions of this Chapter shall be valid and binding from the time when such pledges are made. All such revenues so pledged and thereafter received by the agency shall immediately be subject to the lien of such pledge without any physical delivery thereof or further act, and the lien of any such pledge shall be valid and binding as against all parties having claims of any kind in tort, contract or otherwise against the agency, irrespective of whether such parties have notice thereof. The resolution or any trust agreement by which a pledge is created or any loan agreement, agreement of sale or lease need not be filed or recorded except in the records of the agency.

(d) The State of North Carolina does pledge to and agree with the holders of any bonds or notes issued by the agency that so long as any of such bonds or notes are outstanding and unpaid the State will not limit or alter the rights vested in the agency at the time of issuance of the bonds or notes to fix, revise, charge, and collect or cause to be fixed, revised, charged and collected loan repayments, purchase price payments, rents, fees and charges for the use of or services rendered by any project in connection with which the bonds or notes were issued, so as to provide a fund sufficient, with such other funds as may be made available therefor, to pay the costs of operating, repairing and maintaining the project, to pay the principal of and the interest on all bonds and notes as the same shall become due and payable and to create and maintain any reserves provided therefor and to fulfill the terms of any agreements made with the bondholders or noteholders, nor will the State in any way impair the rights and remedies of the bondholders or noteholders until the bonds or notes and all costs and expenses in connection with any action or proceedings by or on behalf of the bondholders or noteholders, are fully paid, met and discharged. (1985 (Reg. Sess., 1986), c. 794, s. 13.)

Editor's Note. — As to the effective date of this section, see the Editor's note under § 115E-1.

§ 115E-14. (Effective upon certification of approval of a constitutional amendment) Trust funds.

Notwithstanding any other provisions of law to the contrary, all moneys received pursuant to the authority of this Chapter, including, without limitation, fees, loan repayments, purchase price payments, rents, charges, insurance proceeds, condemnation awards and any other revenues and funds received in connection with any project, shall be deemed to be trust funds to be held and applied solely as provided in this Chapter. The resolution authorizing the issuance of, or any trust agreement securing, any bonds or notes may provide that any of such moneys may be temporarily invested pending the disbursement thereof and shall provide that any officer with whom, or any bank or trust company with which, such moneys shall be deposited shall act as trustee of such moneys and shall hold and apply the same for the purposes of this Chapter, subject to such limitations as this Chapter and such resolution or trust agreement may provide. Any such moneys may be invested as provided in G.S. 159-30, as it may from time to time be amended. (1985 (Reg. Sess., 1986), c. 794, s. 14.)

Editor's Note. — As to the effective date of this section, see the Editor's note under § 115E-1.

§ 115E-15. (Effective upon certification of approval of a constitutional amendment) Remedies.

Any holder of bonds or notes issued under the provisions of this Chapter or any coupons appertaining thereto, and the trustee under any trust agreement or resolution authorizing the issuance of such bonds or notes, except to the extent the rights herein given may be restricted by such trust agreement or resolution, may, either at law or in equity, by suit, action, mandamus or other proceeding, protect and enforce any and all rights under the laws of the State or granted hereunder or under such trust agreement or resolution, or under any other contract executed by the agency pursuant to this Chapter, and may enforce and compel the performance of all duties required by this Chapter or by such trust agreement or resolution to be performed by the agency or by any officer thereof. (1985 (Reg. Sess., 1986), c. 794, s. 15.)

Editor's Note. — As to the effective date of this section, see the Editor's note under § 115E-1.

§ 115E-16. (Effective upon certification of approval of a constitutional amendment) Investment securities.

All bonds, notes and interest coupons appertaining thereto issued under this Chapter are hereby made investment securities within the meaning of and for all the purposes of Article 8 of the Uniform Commercial Code as enacted in this State, whether or not they are of such form and character as to be investment securities under said Article 8, subject only to the provisions of the bonds and notes pertaining to registration. (1985 (Reg. Sess., 1986), c. 794, s. 16.)

Editor's Note. — As to the effective date of this section, see the Editor's note under § 115E-1.

§ 115E-17. (Effective upon certification of approval of a constitutional amendment) Bonds or notes eligible for investment.

Bonds or notes issued under the provisions of this Chapter are hereby made securities in which all public officers and public bodies of the State and its political subdivisions, all insurance companies, trust companies, banking associations, investment companies, executors, administrators, trustees and other fiduciaries may properly and legally invest funds, including capital in their control or belonging to them. Such bonds or notes are hereby made securities which may properly and legally be deposited with and received by any State or municipal officer or any agency or political subdivision of the State for any purpose for which the deposit of bonds, notes or obligations of this State is now or may hereafter be authorized by law. (1985 (Reg. Sess., 1986), c. 794, s. 17.)

Editor's Note. — As to the effective date of this section, see the Editor's note under § 115E-1.

§ 115E-18. (Effective upon certification of approval of a constitutional amendment) Refunding bonds or notes.

The agency is hereby authorized to provide for the issuance of refunding bonds or notes for the purpose of refunding any bonds or notes then outstanding which shall have been issued under the provisions of this Chapter, including the payment of any redemption premium thereon and any interest accrued or to accrue to the date of redemption of such bonds or notes and, if deemed advisable by the agency, for any corporate purpose of the agency, including, without limitation:

- (1) Constructing improvements, additions, extensions or enlargements of the project in connection with which the bonds or notes to be refunded shall have been issued, and
- (2) Paying all or any part of the cost of any additional project.

The issuance of such bonds or notes, the maturities and other details thereof, the rights of the holders thereof, and the rights, duties and obligations of the agency in respect of the same shall be governed by the provisions of this Chapter which relate to the issuance of bonds or notes, insofar as such provisions may be appropriate therefor.

Refunding bonds or notes may be sold or exchanged for outstanding bonds or notes issued under this Chapter and, if sold, the proceeds thereof may be applied, in addition to any other authorized purposes, to the purchase, redemption or payment of such bonds or notes, with any other available funds, to the payment of the principal, accrued interest and any redemption premium on the bonds or notes being refunded, and, if so provided or permitted in the resolution authorizing the issuance of, or in the trust agreement securing, such bonds or notes, to the payment of any interest on such refunding bonds or notes and any expenses in connection with such refunding. Such proceeds may

be invested in direct obligations of, or obligations the principal of and the interest on which are unconditionally guaranteed by, the United States of America which shall mature or which shall be subject to redemption by the holders thereof, at the option of such holders, not later than the respective dates when the proceeds, together with the interest accrued thereon, will be required for the purposes intended. (1985 (Reg. Sess., 1986), c. 794, s. 18.)

Editor's Note. — As to the effective date of this section, see the Editor's note under § 115E-1.

§ 115E-19. (Effective upon certification of approval of a constitutional amendment) Annual report.

The agency shall, promptly following the close of each fiscal year, submit an annual report of its activities under this Chapter for the preceding year to the Governor, the State Auditor, the General Assembly, the Advisory Budget Commission and the Local Government Commission. The agency shall cause an audit of its books and accounts relating to its activities under this Chapter to be made at least once in each year by an independent certified public accountant and the cost thereof may be paid from any available moneys of the agency. (1985 (Reg. Sess., 1986), c. 794, s. 19.)

Editor's Note. — As to the effective date of this section, see the Editor's note under § 115E-1.

§ 115E-20. (Effective upon certification of approval of a constitutional amendment) Officers not liable.

No member or officer of the agency shall be subject to any personal liability or accountability by reason of his execution of any bonds or notes or the issuance thereof. (1985 (Reg. Sess., 1986), c. 794, s. 20.)

Editor's Note. — As to the effective date of this section, see the Editor's note under § 115E-1.

§ 115E-21. (Effective upon certification of approval of a constitutional amendment) Tax exemption.

The exercise of the powers granted by this Chapter will be in all respects for the benefit of the people of the State and will promote their health and welfare, and no tax or assessment shall be levied upon any project undertaken by the agency prior to the retirement or provision for the retirement of all bonds or notes issued and obligations incurred by the agency in connection with such project.

Any bonds or notes issued by the agency under the provisions of this Chapter, their transfer and the income therefrom (including any profit made on the sale thereof) shall at all times be free from taxation by the State or any local unit or political subdivision or other instrumentality of the State, excepting inheritance or gift taxes. (1985 (Reg. Sess., 1986), c. 794, s. 21.)

Editor's Note. — As to the effective date of this section, see the Editor's note under § 115E-1.

§ 115E-22. (Effective upon certification of approval of a constitutional amendment) Conflict of interest.

If any member, officer or employee of the agency shall be interested either directly or indirectly, or shall be an officer or employee of or have an ownership interest in any firm or corporation interested directly or indirectly, in any contract with the agency, such interest shall be disclosed to the agency and shall be set forth in the minutes of the agency, and the member, officer or employee having such interest therein shall not participate on behalf of the agency in the authorization of any such contract. (1985 (Reg. Sess., 1986), c. 794, s. 22.)

Editor's Note. — As to the effective date of this section, see the Editor's note under § 115E-1.

§ 115E-23. (Effective upon certification of approval of a constitutional amendment) Additional method.

The foregoing sections of this Chapter shall be deemed to provide an additional and alternative method for the doing of the things authorized thereby and shall be regarded as supplemental and additional to powers conferred by other laws, and shall not be regarded as in derogation of any powers now existing; provided, however, that the issuance of bonds or notes under the provisions of this Chapter need not comply with the requirements of any other law applicable to the issuance of bonds or notes. (1985 (Reg. Sess., 1986), c. 794, s. 23.)

Editor's Note. — As to the effective date of this section, see the Editor's note under § 115E-1.

Chapter 116.

Higher Education.

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ARTICLE 1.

The University of North Carolina.

Part 1. General Provisions.

§ 116-4. Constituent institutions of the University of North Carolina.

CASE NOTES

Editor's Note. — The case of *Mayberry v. Dees*, 638 F.2d 690 (4th Cir. 1981), which is annotated under this section in the main volume, originally appeared in the advance sheets as 638 F.2d 690. However, that opinion was withdrawn and the case was reheard and re-

considered by a reconstituted panel, which issued a new opinion at 663 F.2d 502 (4th Cir. 1981).

Legal Periodicals. — For 1984 survey, "The Rights of University Faculty to Their Inventive Ideas," see 63 N.C.L. Rev. 1248 (1985).

Part 2. Organization, Governance and Property of the University.

§ 116-11. Powers and duties generally.

The powers and duties of the Board of Governors shall include the following:

- (9) a. The Board of Governors shall develop, prepare and present to the Governor, the Advisory Budget Commission and the General Assembly a single, unified recommended budget for all of public senior higher education. The recommendations shall consist of requests in three general categories: (i) funds for the continuing operation of each constituent institution, (ii) funds for salary increases for employees exempt from the State Personnel Act and (iii) funds requested without reference to constituent institutions, itemized as to priority and covering such areas as new programs and activities, expansions of programs and activities, increases in enrollments, increases to accommodate internal shifts and categories of persons served, capital improvements, improvements in levels of operation and increases to remedy deficiencies, as well as other areas. The function of the Advisory Budget Commission under this section applies only if the Director of the Budget consults with the Commission in preparation of the budget.
- b. Funds for the continuing operation of each constituent institution shall be appropriated directly to the institution. Funds for salary increases for employees exempt from the State Personnel Act shall be appropriated to the board in a lump sum for allocation to the institutions. Funds for the third category in paragraph a of this subdivision shall be appropriated to the Board in a lump sum. The Board shall allocate to the institutions any funds appropriated, said allocation to be made in accordance with the Board's schedule of priorities and in accordance with any specifications in the Budget Appropriation Act; provided, however, that when both the Board and the Director of the Budget deem it to be in the best interest of the State, funds in the third category may be allocated, in whole or in part, for other items within the list of priorities or for items not included in the list. Provided, nothing herein shall be construed to allow the General Assembly, except as to capital improvements, to refer to particular constituent institutions in any specifications as to priorities in the third category. Prior to taking any action under this paragraph, the Director of the Budget may consult with the Advisory Budget Commission.
- c. The Director of the Budget may, on recommendation of the Board, authorize transfer of appropriated funds from one institution to another to provide adjustments for over or under enrollment or may make any other adjustments among institutions that would provide for the orderly and efficient operation of the institutions. Prior to taking any action under this paragraph, the Director of the Budget may consult with the Advisory Budget Commission.
- d. Notwithstanding any other provision of law, any unencumbered or unexpended funds remaining in capital improvement codes credited to The University of North Carolina Board of Governors or the 16 constituent institutions for projects not enumerated by the General Assembly may be used for advance planning within the University system.

(1971, c. 1244, s. 1; 1979, c. 862, s. 8; c. 896, s. 13; 1979, 2nd Sess., c. 1130, s. 1; 1983, c. 163; c. 717, ss. 29, 30; c. 761, s. 113; 1983 (Reg. Sess., 1984), c. 1019, s. 2; 1985, c. 757, s. 152; 1985 (Reg. Sess., 1986), c. 955, ss. 23-27.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Section 1 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "This act may be cited as the Separation of Powers Act of 1986."

Section 127 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "If any part of this act shall be declared invalid by any court, this shall not affect any other part of this act."

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 1, 1986, added the last sentence of subdivision (9)a, de-

leted "(after the Director of the Budget consults with the Advisory Budget Commission)" following "Director of the Budget" in the fourth sentence of subdivision (9)b, added the last sentence of (9)b, deleted "after consultation with the Advisory Budget Commission" following "The Director of the Budget" in the first sentence of subdivision (9)c, and added the second sentence of subdivision (9)c.

Legal Periodicals. —

For 1984 survey, "The Rights of University Faculty to Their Inventive Ideas," see 63 N.C.L. Rev. 1248 (1985).

§ 116-19. Contracts with private institutions to aid North Carolina students.

Editor's Note. — Section 92 of Session Laws 1985 (Reg. Sess., 1986), c. 1014, effective July 1, 1986, substituted "one thousand dollars (\$1,000)" for "nine hundred fifty dollars (\$950.00)" in the first paragraph of s. 80 of Ses-

sion Laws 1985, c. 479. Section 80 of Session Laws 1985, c. 479 is noted in the Editor's note under this section in the 1985 Cumulative Supplement.

§ 116-22. Definitions applicable to §§ 116-19 to 116-22.

Editor's Note. — Section 92 of Session Laws 1985 (Reg. Sess., 1986), c. 1014, effective July 1, 1986, substituted "one thousand dollars (\$1,000)" for "nine hundred fifty dollars (\$950.00)" in the first paragraph of s. 80 of Ses-

sion Laws 1985, c. 479. Section 80 of Session Laws 1985, c. 479 is noted in the Editor's note under this section in the 1985 Cumulative Supplement.

Part 3. Constituent Institutions.

§ 116-36. Endowment fund.

(g) The trustees of the endowment fund shall have the power to buy, sell, lend, exchange, lease, transfer, or otherwise dispose of or to acquire (except by pledging their credit or violating a lawful condition of receipt of the corpus into the endowment fund) any property, real or personal, with respect to the fund, in either public or private transaction, and in doing so they shall not be subject to the provisions of Chapters 143 and 146 of the General Statutes; provided that, any expense or financial obligation of the State of North Carolina created by any acquisition or disposition, by whatever means, of any real or personal property of the endowment fund shall be borne by the endowment fund unless authorization to satisfy the expense or financial obligation from some other source shall first have been obtained from the Director of the Budget. Prior to taking any action under this subsection, the Director of the Budget may consult with the Advisory Budget Commission.

(1971, c. 1244, s. 1; 1977, c. 506; 1979, c. 649, ss. 2, 3; 1983, c. 717, s. 31; 1985 (Reg. Sess., 1986), c. 955, ss. 28, 29.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Section 1 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "This act may be cited as the Separation of Powers Act of 1986."

Section 127 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "If any part of this act

shall be declared invalid by any court, this shall not affect any other part of this act."

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 1, 1986, deleted "after the Director of the Budget consults with the Advisory Budget Commission" at the end of the first sentence of subsection (g) and added the second sentence of subsection (g).

§ 116-37. North Carolina Memorial Hospital board of directors; administration of hospital.

(e) Hospital Finances. — The hospital shall be subject to the provision of the Executive Budget Act. There shall be established a hospital business and budget office to administer the budget and financial affairs of the hospital, independent of the central business and financial office of the University of North Carolina at Chapel Hill, except for cooperative reporting requirements. The director of the hospital, subject to the board of directors, shall be responsible for all aspects of budget preparation, budget execution, and expenditure reporting. Subject to the approval of the Director of the Budget: All hospital operating funds may be budgeted and disbursed through a special fund code, all hospital receipts may be deposited directly to the special fund code; and general fund appropriations for hospital support may be budgeted in a general fund code under a single purpose, "Contribution to Hospital Operations" and be transferable to the special fund operating code as receipts. Prior to taking any action under this subsection, the Director of the Budget may consult with the Advisory Budget Commission.

(1971, c. 762, s. 1; c. 1244, s. 6; 1981, c. 859, s. 41.5; 1983, c. 717, s. 32; 1985 (Reg. Sess., 1986), c. 955, ss. 30, 31.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Section 1 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "This act may be cited as the Separation of Powers Act of 1986."

Section 127 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "If any part of this act

shall be declared invalid by any court, this shall not affect any other part of this act."

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 1, 1986, deleted "after consultation with the Advisory Budget Commission" following "Director of the Budget" in the fourth sentence of subsection (e) and added the last sentence of subsection (e).

Part 4. Revenue Bonds for Service and Auxiliary Facilities.

§ 116-41.1. Definitions.

Local Modification. — (As to Part 4) University of North Carolina at Chapel Hill: 1985 (Reg. Sess., 1986), c. 865, s. 4.

§ 116-41.4. Bonds authorized; amount limited; form, execution and sale; terms and conditions; use of proceeds; additional bonds; interim receipts or temporary bonds; replacement of lost, etc., bonds; approval or consent for issuance; bonds not debt of State; bond anticipation notes.

The Board is hereby authorized to issue, subject to the approval of the Director of the Budget, at one time or from time to time, revenue bonds of the University for the purpose of undertaking and carrying out any project or projects hereunder; provided, however, that the aggregate principal amount of revenue bonds which the Board is authorized to issue under this section during the biennium ending June 30, 1969, shall not exceed three million five hundred thousand dollars (\$3,500,000); provided, further, the Board shall have authority to issue revenue bonds under this section in an additional aggregate principal amount not to exceed three million five hundred thousand dollars (\$3,500,000) during the biennium ending June 30, 1971; provided, however, that the aggregate principal amount of revenue bonds which the Board is authorized to issue under this section during the biennium ending June 30, 1973, shall not exceed thirteen million dollars (\$13,000,000); provided, further, that the aggregate principal amount of revenue bonds which the Board is authorized to issue under this section during the biennium ending June 30, 1975, shall not exceed thirteen million dollars (\$13,000,000). The bonds shall be dated, shall mature at such time or times not exceeding 30 years from their date or dates, and shall bear interest at such rate or rates as may be determined by the Board, and may be made redeemable before maturity at the option of the Board at such price or prices and under such terms and conditions as may be fixed by the Board prior to the issuance of the bonds. The Board shall determine the form and manner of execution of the bonds, and any interest coupons to be attached thereto, and shall fix the denomination or denominations of the bonds and the place or places of payment of principal and interest, which may be at any bank or trust company within or without the State. In case any officer whose signature or a facsimile of whose signature appears on any bonds or coupons shall cease to be such officer before the delivery of such bonds, such signature or such facsimile shall nevertheless be valid and sufficient for all purposes the same as if he had remained in office until such delivery. Notwithstanding any of the other provisions of this Part or any recitals in any bonds issued under the provisions of this Part, all such bonds shall be deemed to be negotiable instruments under the laws of this State. The bonds may be issued in coupon or registered form or both, as the Board may determine, and provision may be made for the registration of any coupon bonds as to principal alone and also as to both principal and interest, and for the reconversion into coupon bonds of any bonds registered as to both principal and interest. The Board may sell such bonds in such manner, at public or private sale, and for such price, as it may determine to be for the best interests of the University.

The proceeds of the bonds of each issue shall be used solely for the purpose for which such bonds shall have been authorized and shall be disbursed in such manner and under such restrictions, if any, as the Board may provide in the resolution authorizing the issuance of such bonds. Unless otherwise provided in the authorizing resolution, if the proceeds of such bonds, by error of estimates or otherwise, shall be less than such costs, additional bonds may in like manner be issued to provide the amount of such deficit and shall be deemed to be of the same issue and shall be entitled to payment from the same

fund without preference or priority of the bonds first issued for the same purpose.

The resolution providing for the issuance of revenue bonds may also contain such limitations upon the issuance of additional revenue bonds as the Board may deem proper, and such additional bonds shall be issued under such restrictions and limitations as may be prescribed by such resolution.

Prior to the preparation of definitive bonds, the Board may, under like restrictions, issue interim receipts or temporary bonds, with or without coupons, exchangeable for definitive bonds when such bonds shall have been executed and are available for delivery. The Board may also provide for the replacement of any bonds which shall become mutilated or be destroyed or lost.

Bonds may be issued by the Board under the provisions of this Part, subject to the approval of the Director of the Budget, but without obtaining the consent of any other commission, board, bureau or agency of the State, and without any other proceedings or the happening of any other conditions or things than those consents, proceedings, conditions or things which are specifically required by this Part.

Revenue bonds issued under the provisions of this Part shall not be deemed to constitute a debt of the State of North Carolina or a pledge of the faith and credit of the State, but such bonds shall be payable solely from the funds herein provided therefor and a statement to that effect shall be recited on the face of the bonds.

The Board is hereby authorized to issue, subject to the approval of the Director of the Budget, at one time or from time to time, revenue bond anticipation notes of the Board in anticipation of the issuance of bonds authorized pursuant to the provisions of this Part. The principal of and the interest on such notes shall be payable solely from the proceeds of bonds or renewal notes or, in the event bond or renewal note proceeds are not available, any available revenues of the project or projects for which such bonds shall have been authorized. The notes of each issue shall be dated, shall mature at such time or times not exceeding two years from their date or dates, shall bear interest at such rate or rates as may be determined by the Board, and may be made redeemable before maturity, at the option of the Board, at such price or prices and under such terms and conditions as may be fixed by the Board, and may be made redeemable before maturity, at the option of the Board, at such price or prices and under such terms and conditions as may be fixed by the Board prior to the issuance of the notes. The Board shall determine the form and manner of execution of the notes, including any interest coupons to be attached thereto, and shall fix the denomination or denominations of the notes and the place or places of payment of principal and interest, which may be at any bank or trust company within or without the State. In case any officer, whose signature or a facsimile of whose signature shall appear on any notes or coupons, shall cease to be such officer before the delivery of such notes, such signature or such facsimile shall nevertheless be valid and sufficient for all purposes the same as if he had remained in office until such delivery. Notwithstanding any of the other provisions of this Part or any recitals in any notes issued under the provisions of this Part, all such notes shall be deemed to be negotiable instruments under the laws of this State. The notes may be issued in coupon or registered form or both, as the Board may determine, and provision may be made for the registration of any coupon notes as to principal alone and also as to both principal and interest, and for the reconversion into coupon notes of any notes registered as to both principal and interest. The Board may sell such notes in such manner, at public or private sale, and for such price, as it may determine to be for the best interests of the University.

The proceeds of the notes of each issue shall be used solely for the purpose for which the bonds in anticipation of which such notes are being issued shall have been authorized, and such note proceeds shall be disbursed in such manner and under such restrictions, if any, as the Board may provide in the resolution authorizing the issuance of such notes or bonds.

The resolution providing for the issuance of notes or bonds may also contain such limitations upon the issuance of additional notes as the Board may deem proper, and such additional notes shall be issued under such restrictions and limitations as may be prescribed by such resolution.

Notes may be issued by the Board under the provisions of this Part, subject to the approval of the Director of the Budget, but without obtaining the consent of any other commission, board, bureau or agency of the State, and without any other proceedings or the happening of any other conditions or things than those consents, proceedings, conditions or things which are specifically required by this Part.

Revenue bond anticipation notes issued under the provisions of this Part shall not be deemed to constitute a debt of the State of North Carolina or a pledge of the faith and credit of the State, but such notes shall be payable solely from the funds herein provided therefor and a statement to that effect shall be recited on the face of the notes.

Unless the context shall otherwise indicate, the word "bonds," wherever used in this Part, shall be deemed and construed to include the words "bond anticipation notes."

Prior to taking any action under this section, the Director of the Budget may consult with the Advisory Budget Commission. (1961, c. 1078, s. 4; 1963, c. 944, s. 2; 1965, c. 1033, s. 2; 1967, c. 724; 1969, c. 1236; 1971, c. 636; c. 1244, s. 15; 1973, c. 663; 1983, c. 577, s. 3; 1985 (Reg. Sess., 1986), c. 955, ss. 32, 33.)

Editor's Note. — Section 1 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "This act may be cited as the Separation of Powers Act of 1986."

Section 127 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "If any part of this act shall be declared invalid by any court, this shall not affect any other part of this act."

Effect of Amendments. — The 1985 (Reg.

Sess., 1986) amendment, effective July 1, 1986, deleted "after the Director of the Budget consults with the Advisory Budget Commission" following "Director of the Budget" in the first sentence of the first paragraph, in the fifth paragraph, in the first sentence of the seventh paragraph, and in the tenth paragraph, and added the last paragraph.

§ 116-41.9. Refunding revenue bonds.

The University is hereby authorized, subject to the approval of the Director of the Budget, to issue from time to time refunding revenue bonds for the purpose of refunding any revenue bonds issued by the University under this Part in connection with any project or projects, including the payment of any redemption premium thereon and any interest accrued or to accrue to the date of redemption of such bonds. The University is further authorized, subject to the approval of the Director of the Budget, to issue from time to time refunding revenue bonds for the combined purpose of

- (1) Refunding any revenue bonds or refunding revenue bonds issued by the University in connection with any project or projects including the payment of any redemption premium thereon and any interest accrued or to accrue to the date of redemption of such bonds, and
- (2) Paying all or any part of the cost of any project or projects.

The issuance of such refunding revenue bonds, the maturities and other details thereof, the rights and remedies of the holders thereof, and the rights,

powers, privileges, duties and obligations of the University with respect to the same, shall be governed by the foregoing provisions of this Part insofar as the same may be applicable.

Prior to taking any action under this section, the Director of the Budget may consult with the Advisory Budget Commission. (1961, c. 1078, s. 9; 1983, c. 577, s. 4; 1985 (Reg. Sess., 1986), c. 955, ss. 34, 35.)

Editor's Note. — Section 1 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "This act may be cited as the Separation of Powers Act of 1986."

Section 127 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "If any part of this act shall be declared invalid by any court, this shall not affect any other part of this act."

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 1, 1986, deleted "after consultation with the Advisory Budget Commission" following "Director of the Budget" in the first and second sentences of the first paragraph, and added the last paragraph.

ARTICLE 19.

Revenue Bonds for Student Housing.

§ 116-175.1. Consultation with Advisory Budget Commission.

Whenever this Article requires the approval of the Director of the Budget of an action, the Director of the Budget may consult with the Advisory Budget Commission before giving approval. (1983, c. 577, s. 5; 1985 (Reg. Sess., 1986), c. 955, s. 36.)

Editor's Note. — Section 1 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "This act may be cited as the Separation of Powers Act of 1986."

Section 127 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "If any part of this act

shall be declared invalid by any court, this shall not affect any other part of this act."

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 1, 1986, substituted "may consult" for "shall consult."

ARTICLE 21.

Revenue Bonds for Student Housing, Student Activities, Physical Education and Recreation.

§ 116-187.1. Consultation with Advisory Budget Commission.

Whenever this Article requires the approval of the Director of the Budget of an action, the Director of the Budget may consult with the Advisory Budget Commission before giving approval. (1983, ch. 577, s. 7; 1985 (Reg. Sess., 1986), c. 955, s. 37.)

Editor's Note. — Section 1 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "This act may be cited as the Separation of Powers Act of 1986."

Section 127 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "If any part of this act shall be declared invalid by any court, this shall not affect any other part of this act."

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 1, 1986, substituted "may consult" for "shall consult."

ARTICLE 23.

State Education Assistance Authority.

§ 116-209.19. Grants to students.

The Authority is authorized to make grants to students enrolled or to be enrolled in eligible institutions in North Carolina out of such money as from time to time may be appropriated by the State or as may otherwise be available to the Authority for such grants. The Authority, subject to the provisions of this Article and any applicable appropriation act, shall adopt rules, regulations and procedures for determining the needs of the respective students for grants and for the purpose of making such grants. The amount of any grant made by the Authority to any student, whether enrolled or to be enrolled in any private institution or any tax-supported public institution, shall be determined by the Authority upon the basis of substantially similar standards and guides that shall be set forth in the Authority's rules, regulations and procedures; provided, however, that grants made in any fiscal year to students enrolled or to be enrolled in private institutions may be increased to compensate, in whole or in part, for the average annual State appropriated tuition subsidy for such fiscal year, determined as provided herein. The average annual State appropriated subsidy for each fiscal year shall be determined by the Secretary of Administration, after consultation with the Board of Governors of the University of North Carolina and the Authority, for each of the two categories of tax-supported institutions, being (i) institutions, presently 16, that provide education of the collegiate grade and grant baccalaureate degrees and (ii) institutions, such as community colleges and technical institutes created and existing under Chapter 115A of the General Statutes. The average annual State appropriated subsidy for each of such two categories of institutions shall mean the amount of the total appropriations of the State for the respective fiscal years under the current operations budgets, pursuant to the Executive Budget Act reasonably allocable to undergraduate students enrolled in such institutions exclusive of the Division of Health Affairs of the University of North Carolina and the North Carolina School of the Arts for all institutions in such category, all as shall be determined by the Secretary of Administration after consultation as above provided, divided by the budgeted number of North Carolina undergraduate students to be enrolled in such fiscal year.

The Authority, in determining the needs of students for grants, may among other factors, give consideration to the amount of other financial assistance that may be available to the students, such as nonrepayable awards under the Basic Educational Opportunity Grant Program, the Health Professions Education Assistance Act or other student assistance programs created by federal law.

Prior to taking any action under this subsection, the Secretary of Administration may consult with the Advisory Budget Commission. (1971, c. 392, s. 11; c. 1244, s. 14; 1975, c. 879, s. 46; 1979, c. 165, s. 9; 1983, c. 717, s. 35; 1985 (Reg. Sess., 1986), c. 955, ss. 38, 39.)

Editor's Note. — Section 1 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "This act may be cited as the Separation of Powers Act of 1986."

Section 127 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "If any part of this act shall be declared invalid by any court, this shall not affect any other part of this act."

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 1, 1986, deleted "Advisory Budget Commission" following "after consultation with the" in the fourth sentence of the first paragraph, and added the last paragraph.

ARTICLE 30.

Western North Carolina Arboretum.

§ 116-240. Establishment of Arboretum.

The Western North Carolina Arboretum is established on land being provided by the United States Forest Service from property presently designated as the Bent Creek Experimental Forest.

The United States Forest Service has committed itself to continuing its work of the land provided to the Arboretum as many of its studies will be compatible with the work of the Arboretum. (1985 (Reg. Sess., 1986), c. 1014, s. 98.)

Editor's Note. — Section 244 of Session Laws 1985 (Reg. Sess., 1986), c. 1014, makes this Article effective July 1, 1986. Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 243, contains a severability clause.

§ 116-241. Purpose and scope of Arboretum.

The Arboretum shall be prepared for viewing and maintaining the necessary plantings that will be added to the present vegetation of the site in order to make the Arboretum fully representative of Western North Carolina. Extensive clearing of underbrush and other debris needed to prepare the area for demonstrations, installation of fencing for security purposes, land modifications and improvement, and plant acquisitions shall be carried out to make the Arboretum both representative and accessible to the public. Roads and pathways shall be constructed as necessary throughout the Arboretum to enable visitors to ride and walk through the area in order to observe and study the various kinds of vegetation. An extensive program of identification of trees, shrubs, and other living material shall be ongoing at the Arboretum. Necessary visitor and educational buildings, greenhouses, and a small lecture hall, with restrooms and other associated requirements, shall be constructed on the property. Machine sheds and service buildings shall also be constructed on the property to house equipment and to provide working space for the personnel employed in developing and operating the Arboretum. (1985 (Reg. Sess., 1986), c. 1014, s. 98.)

§ 116-242. Administration of Arboretum; acceptance of gifts and grants.

The Arboretum shall be administered by The University of North Carolina through the Board of Directors established in G.S. 116-243. State funds for the administration of the Arboretum shall be appropriated to The University of North Carolina for the University of North Carolina at Asheville. The University of North Carolina may receive gifts and grants to be used for development or operation of the Arboretum. (1985 (Reg. Sess., 1986), c. 1014, s. 98.)

§ 116-243. Board of directors established; appointments.

A board of directors to govern the operation of the Arboretum is established, to be appointed as follows:

- (1) Two by the Governor, initially, one for a two-year term, and one for a four-year term. Successors shall be appointed for four-year terms;
- (2) Two by the General Assembly, in accordance with G.S. 120-121, upon the recommendation of the President of the Senate, initially, one for a two-year term, and one for a four-year term. Successors shall be appointed for four-year terms;
- (3) Two by the General Assembly, in accordance with G.S. 120-121, upon the recommendation of the Speaker of the House of Representatives, initially, one for a two-year term, and one for a four-year term. Successors shall be appointed for four-year terms;
- (4) The President of The University of North Carolina or his designee to serve *ex officio*;
- (5) The chancellors, chief executive officers, or their designees of the following institutions of higher education: North Carolina State University, Western Carolina University, The University of North Carolina at Asheville, Mars Hill College, and Warren Wilson College, to serve *ex officio*;
- (6) The President of Western North Carolina Arboretum, Inc., to serve *ex officio*;
- (7) Six by the Board of Governors of The University of North Carolina, initially, three for one-year terms, and three for three-year terms. Successors shall be appointed for four-year terms. One shall be an active grower of nursery stock, and one other shall represent the State's garden clubs;
- (8) The executive director of the Arboretum and the Executive Vice President of Western North Carolina Development Association shall serve *ex officio* as nonvoting members of the board of directors.

All appointed members may serve two full four-year terms following the initial appointment and then may not be reappointed until they have been absent for at least four years. Members serve until their successors have been appointed. Appointees to fill vacancies serve for the remainder of the unexpired term. Vacancies in appointments made by the General Assembly shall be filled in accordance with G.S. 120-122. Initial terms begin July 1, 1986.

The chairman of the board of directors shall be elected biennially by majority vote of the directors.

The executive director of the Arboretum shall report to the board of directors. (1985 (Reg. Sess., 1986), c. 1014, s. 98.)

§ 116-244. Duties of board of directors.

The board of directors of the Arboretum has the following duties and responsibilities:

- (1) Development of the policies and procedures concerning the use of the land and facilities being developed as part of the Western North Carolina Arboretum, Inc.;
- (2) Approval of plans for any buildings to be constructed on the facility;
- (3) Maintenance and upkeep of buildings and all properties;
- (4) Approval of permanent appointments to the staff of the Arboretum;
- (5) Recommendations to the General Administration of candidates for executive director of the Arboretum;
- (6) Recommendations to the General Administration for necessary termination of the executive director or other personnel of the Arboretum;
- (7) Ensurance of appropriate liaison between the Arboretum and the U. S. Forest Service, the Western North Carolina Arboretum, Inc., and other agencies and organizations of interest to and involved in the work at the Arboretum;
- (8) Development of various policies and directives, including the duties of the executive director, to be prepared jointly by the members of the board of directors and the executive director;
- (9) Approval of annual expenditures and budget requests to be submitted to the Board of Governors.

The board of directors shall meet at least twice a year, and more frequently on the call of the chairman or at the request of at least 10 members of the board. Meetings shall be held at the Arboretum, the University of North Carolina at Asheville, or Western Carolina University. (1985 (Reg. Sess., 1986), c. 1014, s. 98.)

Chapter 117.**Electrification.****ARTICLE 2.***Electric Membership Corporations.***§ 117-6. Title of Article.**

Legal Periodicals. — For 1984 survey of Electric Service: The Municipalities' Power commercial law, "Utilities — Extension of Play," see 63 N.C.L. Rev. 1095 (1985).

Chapter 118.

Firemen’s Relief Fund.

Article 1.

Fund Derived from Fire Insurance Companies.

Article 4.

North Carolina Firemen’s and Rescue Squad Workers’ Pension Fund.

Sec.
118-5. Disbursement of funds by Insurance Commissioner.

Sec.
118-41.1. Additional retroactive membership.
118-42. Monthly pensions upon retirement.

ARTICLE 1.

Fund Derived from Fire Insurance Companies.

§ 118-1. Fire insurance companies to report premiums collected.

Local Modification. — (As to this Chapter)
City of Concord: 1985 (Reg. Sess., 1986), c. 861, s. 1.
Local Supplemental Firemen’s Retire-

ment Fund. — City of Whiteville: 1985 (Reg. Sess., 1986), c. 980; City of Kinston: 1985 (Reg. Sess., 1986), c. 945.

§ 118-5. Disbursement of funds by Insurance Commissioner.

The Insurance Commissioner shall deduct the sum of three percent (3%) from the money so collected from the insurance companies, corporations, or associations, as aforesaid, and pay the same over to the treasurer of the State Firemen’s Association for general purposes. The Insurance Commissioner shall deduct the sum of two percent (2%) from the money so collected from the insurance companies, corporations, or associations, as aforesaid, and retain the same in the budget of the Department of Insurance for the purpose of administering the disbursement of funds by the board of trustees in accordance with the provisions of G.S. 118-7. The remainder of the money so collected from the insurance companies, corporations, or associations, as aforesaid, doing business in the several towns and cities in the State having or that may hereafter have organized fire departments as provided in this Article, said Insurance Commissioner shall pay to the treasurer of each town or city to be held by him as a separate and distinct fund, and he shall immediately pay the same to the treasurer of the local board of trustees upon his election and qualification, for the use of the board of trustees of the foremen’s local relief fund in each town or city, which board shall be composed of five members, residents of said city or town as hereinafter provided for, to be used by them for the purposes as named in G.S. 118-7. (1907, c. 831, s. 5; C.S., s. 6067; 1925, c. 41; 1985 (Reg. Sess., 1986), c. 1014, s. 168.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 243, contains a severability clause.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 1, 1986, rewrote the section catchline, which formerly read "Insurance Commissioner to pay fund to

treasurer," substituted "three percent (3%)" for "five percent (5%)" near the beginning of the section, divided the former single sentence of this section into the present first and third sentences by deleting "and" at the beginning of the present third sentence, and added the present second sentence.

§ 118-7. Disbursement of funds by trustees.

Local Modification. — City of Kinston: 1985 (Reg. Sess., 1986), c. 944.

ARTICLE 4.

North Carolina Firemen's and Rescue Squad Workers' Pension Fund.

§ 118-41.1. Additional retroactive membership.

(a) Any fireman or rescue squad worker who is now eligible and is a member of a fire department or rescue squad chartered by the State of North Carolina and who has not previously elected to become a member may make application through the board of trustees for membership in the fund on or before March 31, 1987. The person shall make a lump sum payment of five dollars (\$5.00) per month retroactively to the time he first became eligible to become a member, plus interest at an annual rate of eight percent (8%), for each year of his retroactive payments. Upon making the lump sum payment, the person shall be given credit for all prior service in the same manner as if he had made application for membership at the time he first became eligible. Any member who made application for membership subsequent to the time he was first eligible and did not receive credit for prior service may receive credit for this prior service upon lump sum payment of five dollars (\$5.00) per month retroactively to the time he first became eligible, plus interest at an annual rate of eight percent (8%), for each year of his retroactive payments. Upon making this lump sum payment, the date of membership shall be the same as if he had made application for membership at the time he was first eligible.

(b) Effective April 1, 1987, any fireman or rescue squad worker who has not reached his thirty-fifth birthday who is eligible and who has not previously elected to become a member may make application through the board of trustees for membership in the fund at any time. The person shall make a lump sum payment of five dollars (\$5.00) per month retroactively to the time he first became eligible to become a member, plus interest at an annual rate to be set by the board of trustees, for each year of his retroactive payments. Upon making this lump sum payment, the person shall be given credit for all prior service in the same manner as if he had made application for membership at the time he first became eligible. Any member who has not reached his thirty-fifth birthday who made application for membership subsequent to the time he was first eligible and did not receive credit for prior service may receive credit for such prior service upon lump sum payment of five dollars (\$5.00) per month retroactively to the time he first became eligible, plus interest at an annual rate to be set by the board of trustees, for each year of his retroactive payments. Upon making this lump sum payment, the date of membership shall be the same as if he had made application for membership at the time he was first eligible. (1985 (Reg. Sess., 1986), c. 1014, s. 49.1(a).)

Editor's Note. — Section 49.1 of Session Laws 1985 (Reg. Sess., 1986), c. 1014 makes this section effective October 1, 1986. Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 243, contains a severability clause.

§ 118-42. Monthly pensions upon retirement.

Any member who has served 20 years as an "eligible fireman" or "eligible rescue squad worker" in the State of North Carolina, as provided in G.S. 118-38 and G.S. 118-39, and who has attained the age of 55 years is entitled to be paid a monthly pension from this fund. The monthly pension shall be in the amount of one hundred dollars (\$100.00) per month. Any retired fireman receiving a pension of fifty dollars (\$50.00) per month shall, effective July 1, 1981, receive a pension of one hundred dollars (\$100.00) per month.

Members shall pay five dollars (\$5.00) per month as required by G.S. 118-40 and G.S. 118-41 for a period of no longer than 20 years. No "eligible rescue squad member" shall receive a pension prior to July 1, 1983. No person shall be entitled to a pension hereunder until his official duties as a fireman or rescue squad worker shall have been terminated and he shall have retired as such according to standards or rules fixed by the board of trustees.

Any member who is totally and permanently disabled while in the discharge of his official duties as a result of bodily injuries sustained or as a result of extreme exercise or extreme activity experienced in the course and scope of his official duties and who leaves the fire or rescue squad service because of this disability shall be entitled to be paid from the fund a monthly benefit in an amount of one hundred dollars (\$100.00) per month beginning the first month after his fifty-fifth birthday. All applications for disability are subject to the approval of the board who may appoint physicians to examine and evaluate the disabled member prior to approval of his application, and annually thereafter. Any disabled member shall not be required to make the monthly payment of five dollars (\$5.00) as required by G.S. 118-40 and G.S. 118-41.

Any member who is totally and permanently disabled for any cause, other than line of duty, who leaves the fire or rescue squad service because of this disability and who has at least 10 years of service with the pension fund, may be permitted to continue making a monthly contribution of five dollars (\$5.00) to the fund until he has paid into the fund the sum of one thousand two hundred dollars (\$1,200). The member shall upon attaining the age of 55 years be entitled to receive a pension as provided by this section. All applications for disability are subject to the approval of the board who may appoint physicians to examine and evaluate the disabled member prior to approval of his application annually thereafter.

Any member who, because his residence is annexed by a city under Part 2 or Part 3 of Article 4 of Chapter 160A of the General Statutes, or whose department is closed because of an annexation by a city under Part 2 or Part 3 of Article 4 of Chapter 160A of the General Statutes, and because of such annexation is unable to perform as a fireman of any status, and if the member has at least 10 years of service with the pension fund, may be permitted to continue making a monthly contribution of five dollars (\$5.00) to the fund until he has paid into the fund the sum of one thousand two hundred dollars (\$1,200). The member upon attaining the age of 55 years and completion of such contributions shall be entitled to receive a pension as provided by this section. Any application to make monthly contributions under this section shall be subject to a finding of eligibility by the Board of Trustees upon application of the member.

The pensions provided shall be in addition to all other pensions or benefits under any other statutes of the State of North Carolina or the United States,

notwithstanding any exclusionary provisions of other pensions or retirement systems provided by law. (1957, c. 1420, s. 1; 1959, c. 1212, s. 1; 1961, c. 980; 1971, c. 336; 1977, c. 926, s. 1; 1981, c. 1029, s. 1; 1983, c. 500, s. 2; c. 636, s. 24; 1985 (Reg. Sess., 1986), c. 1014, s. 49.1(b).)

Editor's Note. —

Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 243, contains a severability clause.

ffective July 1, 1986, substituted "one hundred dollars (\$100.00)" for "seventy-five dollars (\$75.00)" in the first and third paragraphs.

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, ef-

Chapter 120.

General Assembly.

Article 1.

Apportionment of Members; Compensation and Allowances.

- Sec.
120-3. (Effective upon the convening of the 1987 Regular Session) Pay of members and officers of the General Assembly.
120-3.1. (Effective upon the convening of the 1987 Regular Session) Subsistence and travel allowances for members of the General Assembly.
120-4. [Repealed.]

Article 1A.

Legislative Retirement System.

- 120-4.22A. Post-retirement increases in allowances.

Article 6A.1.

Submission of Acts.

- 120-30.9H. Decision letters of U. S. Attorney General published in North Carolina Register.

Article 7.

Legislative Services Commission.

- 120-32. (Effective upon the convening of the 1987 Regular Session) Commission duties.

Article 8.

Elected Officers.

- 120-37. Elected officers; salaries; staff.

Article 16.

Legislative Appointments to Boards and Commissions.

- 120-123. Service by members of the General

Sec.

Assembly on certain boards and commissions.

Article 18.

Review of Proposals to License New Occupations and Professions.

120-140 to 120-149. [Expired.]

Article 19.

Commission on Agriculture, Forestry, and Seafood Awareness.

120-155 to 120-157. [Reserved.]

Article 20.

Joint Legislative Commission on Municipal Incorporations.

Part 1. Organization.

- 120-158. Creation of Commission.
120-159. Terms.
120-160. Compensation.
120-161. Facilities and staff.
120-162. [Reserved.]

Part 2. Procedure for Incorporation Review.

- 120-163. Petition.
120-164. Notification.
120-165. Initial inquiry.
120-166. Additional criteria; nearness to another municipality.
120-167. Additional criteria; population.
120-168. Additional criteria; development.
120-169. Additional criteria; area unincorporated.
120-170. Findings as to services.
120-171. Procedures if findings made.
120-172. Referendum.
120-173. Modification of petition.
120-174. Deadline for recommendations.

ARTICLE 1.

*Apportionment of Members; Compensation and Allowances.***§ 120-3. (Effective upon the convening of the 1987 Regular Session) Pay of members and officers of the General Assembly.**

(a) The Speaker of the House shall be paid an annual salary of twenty-eight thousand four hundred fifty-two dollars (\$28,452) payable monthly and an expense allowance of nine hundred twenty-nine dollars (\$929.00) per month. The President Pro Tempore of the Senate shall be paid an annual salary of seventeen thousand four hundred dollars (\$17,400) payable monthly and an expense allowance of six hundred three dollars (\$603.00) per month. The Speaker Pro Tempore of the House shall be paid an annual salary of fourteen thousand six hundred fifty-two dollars (\$14,652) payable monthly and an expense allowance of three hundred thirty-seven dollars (\$337.00) per month. The minority leader in the House and the majority and minority leader in the Senate shall each be paid an annual salary of twelve thousand four hundred fifty-six dollars (\$12,456) payable monthly, and an expense allowance of three hundred thirty-seven dollars (\$337.00) per month.

(b) Every other member of the General Assembly shall receive increases in annual salary and expense allowances only to the extent of and in the amounts equal to the average increases received by employees of the State, effective upon convening of the next regular session of the General Assembly after enactment of these increased amounts. Accordingly, upon convening of the 1987 Regular Session of the General Assembly, every other member of the General Assembly shall be paid an annual salary of ten thousand one hundred forty dollars (\$10,140) payable monthly, and an expense allowance of two hundred fifty-two dollars (\$252.00) per month.

(c) The salary and expense allowances provided in this section are in addition to any per diem compensation and any subsistence and travel allowance authorized by any other law with respect to any regular or extra session of the General Assembly, and service on any State board, agency, commission, standing committee and study commission. (1929, c. 2, s. 1; 1951, c. 23, s. 1; 1965, c. 917; c. 1157, s. 1; 1967, c. 1120; 1969, c. 1278, s. 1; 1971, c. 1200, s. 5; 1973, c. 1482, s. 1; 1977, 2nd Sess., c. 1249, ss. 1, 2; 1979, 2nd Sess., c. 1137, s. 9.1; 1983, c. 761, s. 203; 1983 (Reg. Sess., 1984), c. 1034, s. 209; 1985, c. 479, s. 208; 1985 (Reg. Sess., 1986), c. 1014, s. 29.)

For this section as in effect until the convening of the 1987 Regular Session of the General Assembly, see the 1985 Cumulative Supplement.

Editor's Note. —

Session Laws 1985 (Reg. Sess., 1986), c. 994 provided that the 1987 Regular Session of the General Assembly shall be held beginning on February 9, 1987.

Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 243, contains a severability clause.

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective upon the convening of the 1987 Regular Session of the General Assembly, rewrote subsections (a) and (b).

§ 120-3.1. (Effective upon the convening of the 1987 Regular Session) Subsistence and travel allowances for members of the General Assembly.

(a) In addition to compensation for their services, members of the General Assembly shall be paid the following allowances:

- (1) A weekly travel allowance for each week or fraction thereof that the General Assembly is in regular or extra session. The amount of the weekly travel allowance shall be calculated for each member by multiplying the actual round-trip mileage from that member's home to the City of Raleigh by the rate per mile allowed to State employees for official travel.
- (2) A travel allowance at the rate allowed by statute for State employees whenever the member travels, whether in or out of session, as a representative of the General Assembly or of its committees or commissions, with the approval of the Legislative Services Commission.
- (3) A subsistence allowance for meals and lodging at a daily rate equal to the maximum per diem rate for federal employees traveling to Raleigh, North Carolina, as set out at 51 Federal Register 19683 (May 30, 1986), while the General Assembly is in session and, except as otherwise provided in this subdivision, while the General Assembly is not in session when, with the approval of the Speaker of the House in the case of Representatives or the President Pro Tempore of the Senate in case of Senators, the member is:
 - a. Traveling as a representative of the General Assembly or of its committees or commissions, or
 - b. Otherwise in the service of the State.

A member who is authorized to travel, whether in or out of session, within the United States outside North Carolina, may elect to receive, in lieu of the amount provided in the preceding paragraph, a subsistence allowance of twenty dollars (\$20.00) a day for meals, plus actual expenses for lodging when evidenced by a receipt satisfactory to the Legislative Administrative Officer, the latter not to exceed the maximum per diem rate for federal employees traveling to the same place, as set out at 51 Federal Register 19677-19686 (May 30, 1986) and at 51 Federal Register 16885-16886 (May 7, 1986).

- (4) A member may be reimbursed for registration fees as permitted by the Legislative Services Commission.

(b) Payment of travel and subsistence allowances shall be made to members of the General Assembly only after certification by the claimant as to the correctness thereof on forms prescribed by the Legislative Services Commission. Claims for travel and subsistence payments shall be paid at such times as may be prescribed by the Legislative Services Commission.

(c) When the General Assembly by joint action of the two houses adjourns to a day certain, which day is more than three days after the date of adjournment, the period between the date of adjournment and the date of reconvening shall for the purposes of this section be deemed to be a period when the General Assembly is not in session, and no member shall be entitled to subsistence and travel allowance during that period, except under circumstances which would entitle him to subsistence and travel allowance when the General Assembly is not in session. (1957, c. 8; 1959, c. 939; 1961, c. 889; 1965, c. 86, s. 1; 1969, c. 1257, s. 1; 1971, c. 1200, ss. 1-4; 1973, c. 1482, s. 2; 1977, 2nd Sess., c. 1249, ss. 3, 4; 1979, 2nd Sess., c. 1137, s. 30; 1983, c. 761, ss. 25, 26; 1983 (Reg. Sess., 1984), c. 1034, ss. 184, 186; 1985, c. 479, s. 206; 1985 (Reg. Sess., 1986), c. 1014, s. 40(a).)

For this section as in effect until the convening of the 1987 General Assembly, see the 1985 Cumulative Supplement.

Editor's Note. —

Session Laws 1985 (Reg. Sess., 1986), c. 994 provided that the 1987 Regular Session of the General Assembly shall be held beginning on February 9, 1987.

Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 243, contains a severability clause.

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective upon the convening of the 1987 General Assembly, rewrote subdivision (a)(3).

§ 120-4: Repealed by Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 40(b), effective upon the convening of the 1987 Regular Session of the General Assembly.

For this section as in effect until the convening of the 1987 General Assembly, see the main volume.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 994 provided that the 1987 Reg-

ular Session of the General Assembly shall be held beginning on February 9, 1987.

Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 243, contains a severability clause.

ARTICLE 1A.

Legislative Retirement System.

§ 120-4.22A. Post-retirement increases in allowances.

(a) Retired members and beneficiaries of the Retirement System shall receive post-retirement increases in allowances on the same basis as post-retirement increases in allowances are provided to retired members and beneficiaries of the Teachers' and State Employees' Retirement System.

(b) In accordance with subsection (a) of this section, from and after July 1, 1986, the retirement allowance to or on account of beneficiaries whose retirement commenced on or before January 1, 1986, shall be increased by the same amount as provided to retired members and beneficiaries of the Teachers' and State Employees' Retirement System pursuant to the provisions of G.S. 135-5(ii) and (jj). (1985 (Reg. Sess., 1986), c. 1014, s. 49(c).)

Editor's Note. — Section 244 of Session Laws 1985 (Reg. Sess., 1986), c. 1014 makes this section effective July 1, 1986.

Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 243, contains a severability clause.

ARTICLE 3A.

Sessions; Electronic Voting.

§ 120-11.1. Time of meeting.

Editor's Note. —

Sections 1 and 2 of Acts 1985 (Reg. Sess., 1986), c. 994, provide: "Section 1. The 1987 regular session of the Senate and House of Representatives shall be held beginning on the sec-

ond Monday in February [February 9, 1987] of 1987 at 1:00 p.m.

"Sec. 2. G.S. 120-11.1 shall not apply to the 1987 regular session."

ARTICLE 6A.1.

*Submission of Acts.***§ 120-30.9A. Purpose.****Editor's Note. —**

Section 2 of Session Laws 1985 (Reg. Sess., 1986), c. 957, which in s. 1 amends § 163-106(d), effective July 9, 1986, provides: "Notwithstanding the provisions of Article 6A.1 of

Chapter 120 of the General Statutes, the Administrative Officer of the Courts shall immediately submit this act to the Attorney General of the United States under Section 5 of the Voting Rights Act of 1965."

§ 120-30.9H. Decision letters of U. S. Attorney General published in North Carolina Register.

All letters and other documents received by the authorities required by this Article to submit any "changes effecting voting" from the Attorney General of the United States in which a final decision is made concerning a submitted "change affecting voting" shall be filed with the Director of the Office of Administrative Hearings. The Director shall publish the letters and other documents in the North Carolina Register. (1985 (Reg. Sess., 1986), c. 1032, s. 11.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1032, s. 13 makes this section effective upon ratification. The act was ratified July 16, 1986.

ARTICLE 7.

*Legislative Services Commission.***§ 120-32. (Effective upon the convening of the 1987 Regular Session) Commission duties.**

The Legislative Services Commission is hereby authorized to:

- (1) Determine the number, titles, classification, functions, compensation, and other conditions of employment of the joint legislative service employees of the General Assembly, including but not limited to the following departments:
 - a. Legislative Services Officer and personnel,
 - b. Electronic document writing system,
 - c. Proofreaders,
 - d. Legislative printing,
 - e. Enrolling clerk and personnel,
 - f. Library,
 - g. Research and bill drafting,
 - h. Printed bills,
 - i. Disbursing and supply;
- (2) Determine the classification and compensation of employees of the respective houses other than staff elected officers; however, the hiring of employees of each house and their duties shall be prescribed by the rules and administrative regulations of the respective house;

- (3) Acquire and dispose of furnishings, furniture, equipment, and supplies required by the General Assembly, its agencies and commissions and maintain custody of same between sessions. It shall be a misdemeanor for any person(s) to remove any state-owned furniture, fixtures, or equipment from the State Legislative Building for any purpose whatsoever, except as approved by the Legislative Services Commission;
- (4) Contract for services required for the operation of the General Assembly, its agencies, and commissions; however, any departure from established operating procedures, requiring a substantial expenditure of funds, shall be approved by appropriate resolution of the General Assembly;
- (5) a. Provide for engrossing and enrolling of bills,
b. Appoint an enrolling clerk to act under its supervision in the enrollment and ratification of acts;
- (6) a. Provide for the duplication and limited distribution of copies of ratified laws and joint resolutions of the General Assembly and forward such copies to the persons authorized to receive same,
b. Maintain such records of legislative activities and publish such documents as it may deem appropriate for the operation of the General Assembly;
- (7) a. Provide for the indexing and printing of the session laws of each regular, extra or special session of the General Assembly and provide for the printing of the journal of each house of the General Assembly,
b. Provide and supply to the Secretary of State such bound volumes of the journals and session laws as may be required by him to be distributed under the provisions of G.S. 147-45, 147-46.1 and 147-48.
- (8) Repealed by Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 40(c), effective upon the convening of the 1987 Regular Session.
- (9) To establish a bill drafting division to draft bills at the request of members or committees of the General Assembly.
- (10) To select the locations for buildings occupied by the General Assembly, and to name any building occupied by the General Assembly.
- (11) To specify the uses within the General Assembly budget of funds appropriated to the General Assembly which remain available for expenditure after the end of the biennial fiscal period, and to revert funds under G.S. 143-18.
- (12) (For effective date see note) Provide insurance to provide excess indemnity for any occurrence which results in a claim against any member of the General Assembly, as provided in G.S. 143-300.2 through G.S. 143-300.6. That insurance may not provide for any indemnity to be payable for any claim not covered by the above cited statutes, nor for any criminal act by a member, nor for any act committed by a member or former member prior to the inception of insurance.
- (13) Provide insurance to provide excess indemnity for any occurrence that results in a claim against any employee, officer, or committee, subcommittee, or commission member in the legislative branch other than a member of the General Assembly, as provided in G.S. 143-300.2 through G.S. 143-300.6. That insurance may not provide for any indemnity to be payable for any claim not covered by the above cited statutes, nor for any criminal act, nor for any act committed prior to the inception of insurance. (1969, c. 1184, s. 2; 1971, c. 685, s. 2; c. 1200, s. 8; 1977, c. 802, s. 50.60; 1981 (Reg. Sess., 1982), c.

1191, s. 67; 1983 (Reg. Sess., 1984), c. 1034, s. 182; 1985, c. 479, s. 176(a), (b); 1985 (Reg. Sess., 1986), c. 1014, s. 40(c).)

For this section as in effect until the convening of the 1987 General Assembly, see the main volume and the 1985 Cumulative Supplement.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 944, provided that the 1987 Regular Session of the General Assembly shall be held beginning on February 9, 1987.

Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 243, contains a severability clause.

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective upon the convening of the 1987 General Assembly, deleted subdivision (8), relating to authority to approve or disapprove authorization for travel for members of the General Assembly.

ARTICLE 8.

Elected Officers.

§ 120-37. Elected officers; salaries; staff.

(b) The sergeant-at-arms and the reading clerk in each house shall be paid a salary of one hundred sixty-eight dollars (\$168.00) per week, plus subsistence at the same daily rate provided for members of the General Assembly, plus mileage at the rate provided for members of the General Assembly for one round trip only from their homes to Raleigh and return. The sergeants-at-arms shall serve during sessions of the General Assembly and at such time prior to the convening of, and subsequent to adjournment or recess of, sessions as may be authorized by the Legislative Services Commission. The reading clerks shall serve during sessions only.

(c) The principal clerks shall be full-time officers. Each principal clerk shall be paid an annual salary of thirty-seven thousand four hundred forty dollars (\$37,440), payable monthly. The Legislative Services Commission shall review the salary of the principal clerks prior to submission of the proposed operating budget of the General Assembly to the Governor and Advisory Budget Commission and shall make appropriate recommendations for changes in those salaries. Any changes enacted by the General Assembly shall be by amendment to this paragraph.

(1969, c. 1184, s. 7; 1977, 2nd Sess., c. 1278; 1979, c. 838, s. 82; 1979, 2nd Sess., c. 1137, s. 8; 1981, c. 1127, s. 9; 1983, c. 761, s. 197; 1983 (Reg. Sess., 1984), c. 1034, s. 208; c. 1116, s. 110; 1985, c. 479, ss. 205, 207; c. 757, s. 189; 1985 (Reg. Sess., 1986), c. 1014, ss. 30, 31.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. —

Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 243, contains a severability clause.

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, ef-

fective July 1, 1986, substituted "one hundred sixty-eight dollars (\$168.00)" for "one hundred sixty dollars (\$160.00)" in the first sentence of subsection (b) and substituted "thirty-seven thousand four hundred forty dollars (\$37,440)" for "thirty-five thousand six hundred fifty-two dollars (\$35,652)" in the second sentence of subsection (c).

ARTICLE 16.

*Legislative Appointments to Boards and Commissions.***§ 120-123. Service by members of the General Assembly on certain boards and commissions.**

No member of the General Assembly may serve on any of the following boards or commissions:

- (1a) Not effectuated.
- (1b) The Administrative Rules Review Commission as established by G.S. 143B-30.1.
- (41) Repealed by Session Laws 1985 (Reg. Sess., 1986), c. 1011, s. 2.1(c), effective July 15, 1986.
- (45a) The North Carolina Teaching Fellows Commission, as established by G.S. 115C-363.22.
- (46) The Board of Directors of the Western North Carolina Arboretum, as established in G.S. 116-240.
- (47) The North Carolina Agricultural Finance Authority, as established by G.S. 122D-4.
- (48) Reserved for future codification purposes.
- (49) The Northeastern North Carolina Farmers Market Commission as established by G.S. 106-720.
- (50) The Southeastern North Carolina Farmers Market Commission as established by G.S. 106-727. (1981 (Reg. Sess., 1982), c. 1191, s. 2; 1983, c. 328, s. 1.1; c. 558, s. 5; c. 559, s. 4; c. 717, ss. 2, 3, 43.2, 99, 105, 110; c. 761, s. 179; c. 778, s. 2; c. 786, s. 9; c. 789, s. 2; c. 832, s. 2; c. 871, s. 3; c. 899, s. 3; 1983 (Reg. Sess., 1984), c. 995, ss. 4, 19; 1985, c. 202, s. 5; c. 479, s. 153(b); c. 589, s. 37; c. 666, s. 80; c. 746, s. 6; c. 757, ss. 155(b), 167(h), 179(e), 206(f), 208(c); 1985 (Reg. Sess., 1986), c. 1011, ss. 2, 2.1(c); c. 1014, ss. 63(h), 99; c. 1028, s. 33; c. 1029, s. 14.3.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Cross References. — As to the Administrative Rules Review Commission, see §§ 143B-30 to 143B-30.4.

Editor's Note. —

By letter of October 28, 1985, addressed to the President of the Senate and the Speaker of the House, the Supreme Court declined to issue an advisory opinion as contemplated by Session Laws 1985, c. 746, ss. 18.2 and 19, and referred to in the 1985 Cumulative Supplement, on the grounds that to issue such an opinion would be to place the court directly in the stream of the legislative process, and in view of the prerogative of the General Assembly to first address and determine the constitutionality of its own legislation. See *In re Advisory Opinion*, — N.C. —, 335 S.E.2d 890 (1985).

Session Laws 1985 (Reg. Sess., 1986), c.

1022, s. 7 deleted the word "advisory" preceding "opinion" in the third sentence of Session Laws 1985, c. 746, s. 19, as referred to in the 1985 Cumulative Supplement.

At the direction of the Revisor of Statutes, subdivision (1a), as enacted by Session Laws 1985, c. 746, s. 6, has been shown as not effectuated.

Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 243 and Session Laws 1985 (Reg. Sess., 1986), c. 1028, s. 38 are severability clauses.

Effect of Amendments. —

Session Laws 1985 (Reg. Sess., 1986), c. 1011, s. 2, effective July 15, 1986, added subdivision (47).

Session Laws 1985 (Reg. Sess., 1986), c. 1011, s. 2.1(c), effective July 15, 1986, deleted subdivision (41), which read "Board of Directors of the North Carolina Agricultural Facilities Finance Agency as established by G.S. 122B-5."

Session Laws 1985 (Reg. Sess., 1986), c.

1014, s. 63(h), effective July 15, 1986, added subdivision (45a).

Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 99, effective July 1, 1986, added subdivision (46).

Session Laws 1985 (Reg. Sess., 1986), c.

1028, s. 33, effective July 16, 1986, added subdivision (1b).

Session Laws 1985 (Reg. Sess., 1986), c. 1029, s. 14.3, effective July 16, 1986, added subdivisions (49) and (50).

ARTICLE 18.

Review of Proposals to License New Occupations and Professions.

§§ 120-140 to 120-149: Expired.

Editor's Note. — This Article was enacted by Session Laws 1983 (Reg. Sess., 1984), c. 1089, s. 1, effective August 1, 1984, and expired pursuant to s. 2 of that act on January

1, 1987. Sections 120-140 through 120-145 were amended by Session Laws 1985, c. 173, ss. 1-4. Sections 120-146 through 120-149 had been reserved for future codification purposes.

ARTICLE 19.

Commission on Agriculture, Forestry, and Seafood Awareness.

§§ 120-155 to 120-157: Reserved for future codification purposes.

ARTICLE 20.

Joint Legislative Commission on Municipal Incorporations.

Part 1. Organization.

§ 120-158. Creation of Commission.

- (a) There is created the Joint Legislative Commission on Municipal Incorporations, referred to in this Article as "Commission".
- (b) The Commission shall consist of six members, appointed as follows:
 - (1) Two Senators appointed by the President of the Senate;
 - (2) Two House members appointed by the Speaker;
 - (3) One city manager or elected city official, appointed by the President of the Senate from a list of three eligible persons nominated by the North Carolina League of Municipalities; and
 - (4) One county commissioner or county manager, appointed by the Speaker from a list of three eligible persons nominated by the North Carolina Association of County Commissioners. (1985 (Reg. Sess., 1986), c. 1003, s. 1.)

Editor's Note. — Section 3 of Session Laws 1985 (Reg. Sess., 1986), c. 1003, provides: "Funds to implement Article 20 of Chapter 120 of the General Statutes may be provided by the Legislative Services Commission out of funds appropriated to the General Assembly."

Section 4 of Session Laws 1985 (Reg. Sess., 1986), c. 1003, makes this part effective July 14, 1986.

§ 120-159. Terms.

Members shall be appointed for terms ending June 30, 1987, and subsequently for two-year terms beginning July 1, 1987, and biennially thereafter. A member eligible when appointed may continue for the remainder of the term regardless of the member's continued eligibility for the category. The Commission shall elect a chairman from its membership for a one-year term. (1985 (Reg. Sess., 1986), c. 1003, s. 1.)

§ 120-160. Compensation.

Members of the Commission who are members of the General Assembly shall receive subsistence and travel allowances as provided by G.S. 120-3.1. Members who are State officers or employees shall receive subsistence and travel allowances as provided by G.S. 138-6. All other members shall receive per diem, subsistence, and travel allowances as provided by G.S. 138-5. (1985 (Reg. Sess., 1986), c. 1003, s. 1.)

§ 120-161. Facilities and staff.

The Commission may meet in the Legislative Building or the Legislative Office Building. Staff for the Commission shall be provided by the Legislative Services Commission. The Commission may contract with the Institute of Government, the Local Government Commission, the Department of Natural Resources and Community Development, or other agencies as may be necessary in completing any required studies, within the funds appropriated to the Commission. (1985 (Reg. Sess., 1986), c. 1003, s. 1.)

§ 120-162: Reserved for future codification purposes.

Part 2. Procedure for Incorporation Review.

§ 120-163. Petition.

(a) The process of seeking the recommendation of the Commission is commenced by filing with the Commission a petition signed by fifteen percent (15%) of the registered voters of the area proposed to be incorporated, but by not less than 25 registered voters of that area, asking for incorporation.

(b) The petition must be verified by the county board of elections of the county where the voter is alleged to be registered. The board of elections shall cause to be examined the signature, shall place a check mark beside the name of each signer who is qualified and registered to vote in that county in the area proposed to be incorporated, and shall attach to the petition a certificate stating the number of voters registered in that county in the area proposed to be incorporated, and the total number of registered voters who have been verified. The county board of elections shall return the petition to the person who presented it within 15 working days of receipt.

(c) The petition must include a proposed name for the city, a map of the city, a list of proposed services to be provided by the proposed municipality, the names of three persons to serve as interim governing board, a proposed charter, a statement of the estimated population, assessed valuation, degree of development, population density, and recommendations as to the form of government and manner of election. The proposed municipality may not contain any noncontiguous areas.

(d) The petitioners must present to the Commission the verified petition from the county board of elections.

(e) A petition must be submitted to the Commission at least 60 days prior to convening of the next regular session of the General Assembly in order for the Commission to make a recommendation to that session. (1985 (Reg. Sess., 1986), c. 1003, s. 1.)

Editor's Note. — Section 4 of Session Laws 1985 (Reg. Sess., 1986), c. 1003, makes this Part effective July 14, 1986.

§ 120-164. Notification.

(a) Not later than five days before submitting the petition to the Commission, the petitioners shall notify:

- (1) The board or boards of county commissioners of the county or counties where the proposed municipality is located;
- (2) All cities within that county or counties; and
- (3) All cities in any other county that are within five miles of the proposed municipality of the intent to present the petition to the Commission.

(b) The petitioners shall also publish, one per week for two consecutive weeks, with the second publication no later than seven days before submitting the petition to the Commission, notice in a newspaper of general circulation in the area proposed to be incorporated of the intent to present the petition to the Commission. (1985 (Reg. Sess., 1986), c. 1003, s. 1.)

§ 120-165. Initial inquiry.

(a) The Commission shall, upon receipt of the petition, determine if the requirements of G.S. 120-163 and G.S. 120-164 have been met. If it determines that those requirements have not been met, it shall return the petition to the petitioners. The Commission shall also publish in the North Carolina Register notice that it has received the petition.

(b) If it determines that those requirements have been met, it shall conduct further inquiry as provided by this Part. (1985 (Reg. Sess., 1986), c. 1003, s. 1.)

§ 120-166. Additional criteria; nearness to another municipality.

(a) The Commission may not make a positive recommendation if the proposed municipality is located within one mile of a municipality of 5,000 to 9,999, within three miles of a municipality of 10,000 to 24,999, within four miles of a municipality of 25,000 to 49,999, or within five miles of a municipality of 50,000 or over, according to the most recent decennial federal census, or according to the most recent annual estimate of the Office of State Budget

and Management if the municipality was incorporated since the return of that census.

(b) Subsection (a) of this section does not apply in the case of proximity to a specific municipality if:

- (1) The proposed municipality is entirely on an island that the nearby city is not on;
- (2) The proposed municipality is separated by a major river or other natural barrier from the nearby city, such that provision of municipal services by the nearby city to the proposed municipality is infeasible or the cost is prohibitive, and the Commission shall adopt policies to implement this subdivision;
- (3) The nearby municipality by resolution expresses its approval of the incorporation; or
- (4) An area of at least fifty percent (50%) of the proposed municipality has petitioned for annexation to the nearby city under G.S. 160-31 within the previous 12 months before the incorporation petition is submitted to the Commission but the annexation petition was not approved. (1985 (Reg. Sess., 1986), c. 1003, s. 1.)

Editor's Note. — The reference in subdivision (b)(4) of this section to § 160-31 was apparently intended to refer to § 160A-31.

§ 120-167. Additional criteria; population.

The Commission may not make a positive recommendation unless the proposed municipality has a permanent population of at least 100. (1985 (Reg. Sess., 1986), c. 1003, s. 1.)

§ 120-168. Additional criteria; development.

Except when the entire proposed municipality is within two miles of the Atlantic Ocean, Albemarle Sound, or Pamlico Sound, the Commission may not make a positive recommendation unless forty percent (40%) of the area is developed for residential, commercial, industrial, institutional, or governmental uses, or is dedicated as open space under the provisions of a zoning ordinance, subdivision ordinance, conditional or special use permit, or recorded restrictive covenants. (1985 (Reg. Sess., 1986), c. 1003, s. 1.)

§ 120-169. Additional criteria; area unincorporated.

The Commission may not make a positive recommendation if any of the proposed municipality is included within the boundary of another incorporated municipality, as defined by G.S. 153A-1(1). (1985 (Reg., Sess., 1986), c. 1003, s. 1.)

§ 120-170. Findings as to services.

The Commission may not make a positive recommendation unless it finds that the proposed municipality can provide at a reasonable tax rate the services requested by the petition, and finds that the proposed municipality can provide at a reasonable tax rate the types of services usually provided by similar municipalities. In making findings under this section, the Commission shall take into account municipal services already being provided. (1985 (Reg. Sess., 1986), c. 1003, s. 1.)

§ 120-171. Procedures if findings made.

(a) If the Commission finds that it may not make a positive recommendation because of the provisions of G.S. 120-166 through G.S. 120-170, it shall make a negative recommendation to the General Assembly. The report to the General Assembly shall list the grounds on which a negative recommendation is made, along with specific findings. If a negative recommendation is made, the Commission shall notify the petitioners of the need for a legally sufficient description of the proposed municipality if the proposal is to be considered by the General Assembly. At the request of a majority of the members of the interim board named in the petition, the Commission may conduct a public hearing and forward any comments or findings made as a result of that hearing along with the negative recommendation.

(b) If the Commission determines that it will not be barred from making a positive recommendation by G.S. 120-166 through G.S. 120-170, it shall require that petitioners have a legally sufficient description of the proposed municipality prepared at their expense as a condition of a positive recommendation.

(c) If the Commission determines that it is not barred from making a positive recommendation, it shall make a positive recommendation to the General Assembly for incorporation.

(d) The report of the Commission on a petition shall be in a form determined by the Commission to be useful to the General Assembly. (1985 (Reg. Sess., 1986), c. 1003, S. 1.)

§ 120-172. Referendum.

Based on information received at the public hearing, the Commission may recommend that any incorporation act passed by the General Assembly shall be submitted to a referendum, except if the petition contained the signatures of fifty percent (50%) of registered voters the Commission shall not recommend a referendum. (1985 (Reg. Sess., 1986), c. 1003, s. 1.)

§ 120-173. Modification of petition.

With the agreement of the majority of the persons designated by the petition as an interim governing board, the Commission may submit to the General Assembly recommendations based on deletion of areas from the petition, as long as there are no noncontiguous areas. (1985 (Reg. Sess., 1986), c. 1003, s. 1.)

§ 120-174. Deadline for recommendations.

If the petition is timely received under G.S. 120-163(e), the Commission shall make its recommendation to the General Assembly no later than 60 days after convening of the next regular session after submission of the petition. (1985 (Reg. Sess., 1986), c. 1003, s. 1.)

Chapter 121.
Archives and History.

Article 1.
General Provisions.

Sec.
121-11. Procedures where assistance extended to cities, counties, and other agencies or individuals.

Sec.
121-12. North Carolina Historical Commission.
121-12.1. Grants-in-aid.
121-12.2. Procedures for preparing budget requests and expending appropriations for grants-in-aid.

ARTICLE 1.
General Provisions.

§ 121-2. Definitions.

CASE NOTES

Cited in *State v. Wilson*, — N.C. —, 327 S.E.2d 470 (1985).

§ 121-11. Procedures where assistance extended to cities, counties, and other agencies or individuals.

In consideration of the public purpose thereby achieved, the Department of Cultural Resources may assist any county, city, or other political subdivision, corporation or organization, or private individual in the acquisition, maintenance, preservation, restoration, or development of historic or archaeological property by providing a portion of the cost therefor: Provided, that the Department of Cultural Resources may not make any acquisition, maintenance, preservation, restoration, or development of any property, not any assistance for any property, nor any contribution for these purposes, until:

- (1) The property or properties shall have been approved for these purposes by the Department of Cultural Resources according to criteria adopted by the North Carolina Historical Commission,
- (2) The report and recommendations of the Commission have been received and considered by the Department of Cultural Resources, and
- (3) The Department has found that there is a feasible and practical method of providing funds for the acquisition, restoration, preservation, maintenance, and operation of such property.

In all cases where assistance is extended by the Department of Cultural Resources to nonstate owners of property, whether from State funds or otherwise, it shall be a condition of assistance that

- (1) The property assisted shall, upon its acquisition or restoration, be made accessible to the public at such times and upon such terms as the Department of Cultural Resources shall by rule prescribe;
- (2) That the plans for preservation, restoration, and development be reviewed and approved by the Department of Cultural Resources;
- (3) That the expenditures of such funds be supervised by the Department of Cultural Resources; and
- (4) That such expenditures be accounted to the Department in a manner and at such times as are satisfactory to it.

In further consideration of the public purpose thereby achieved, the Department of Cultural Resources may assist any county, city, or other political subdivision, or corporation nonprofit history museum in the development of interpretive, security or climate control programs or projects. Provided, that the Department of Cultural Resources may not make any assistance or contribution from State funds for a program or project until:

- (1) The program or project shall have been approved for these purposes by the Department of Cultural Resources according to criteria adopted by the North Carolina Historical Commission;
- (2) The report and recommendations of the Commission have been received and considered by the Department of Cultural Resources; and
- (3) The Department has found that there is a feasible and practical method of providing funds for the maintenance and operation of such history museum.

In all cases where assistance is extended by the Department of Cultural Resources to nonstate owners of history museums, whether from State funds or otherwise, it shall be a condition of assistance that:

- (1) The museum assisted shall be accessible to the public at such times and upon such terms as the Department of Cultural Resources shall by rule prescribe;
- (2) Plans for the development of museum programs or projects be reviewed and approved by the Department of Cultural Resources;
- (3) The expenditure of such funds be supervised by the Department of Cultural Resources; and
- (4) Such expenditures be accounted to the Department in a manner and at such times as are satisfactory to it. (1973, c. 476, s. 48; 1979, c. 861, s. 2; 1985 (Reg. Sess., 1986), c. 1014, s. 171(a).)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 171(g) provides: "Notwithstanding any other provision of law, the following statutes do not apply to appropriations which the General Assembly has directed the Department of Cultural Resources to allocate to specific units of local government or private nonprofit agencies: G.S. 121-11; 121-12(c), (cl), and (d); 121-12.1; 121-12.2; 143-31.2; and 143B-62(2) (f) and (f1)."

Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 243, contains a severability clause.

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective July 1, 1986, rewrote the proviso at the end of the introductory language of the first and third paragraphs, and inserted "by the Department of Cultural Resources" following "extended" in the second and fourth paragraphs.

§ 121-12. North Carolina Historical Commission.

(c) **Criteria for State Aid to Historic Properties.** — The Commission shall also prepare and adopt criteria for the evaluation of all properties of historic or archaeological importance owned by, under option to, or being considered for acquisition by a county, city, historic properties commission, or other organization or individual for which State aid or assistance is requested. The Commission shall investigate, evaluate, and prepare a written report on all historic or archaeological property for which State aid or appropriations to be administered by the Department of Cultural Resources are proposed. This report, which shall be filed as a matter of record in the custody of the Department of Cultural Resources, shall set forth the following opinions or recommendations of the Commission:

- (1) Whether the property is historically authentic;
- (2) Whether it is of such educational, historical, or cultural significance as to be essential to the development of a balanced State program of historic and archaeological sites and properties;

- (3) The estimated total cost of the project under consideration and the apportionment of said cost among State and nonstate sources;
- (4) Whether practical plans have been or can be developed for the funding of the nonstate portion of the costs;
- (5) Whether practical plans have been developed for the continued staffing, maintenance and operation of the property without State assistance; and
- (6) Such further comments and recommendations that the Commission may make.

(c1) **Criteria for State Aid to Historical Museums.** — The Commission shall also prepare and adopt criteria for the evaluation of all interpretive, security or climate control programs or projects to be installed in nonprofit history museums for which State aid or assistance is requested. The Commission shall investigate, evaluate, and prepare a written report on all interpretive, security, or climate control programs or projects for which State appropriations to be administered by the Department of Cultural Resources are proposed. This report, which shall be filed as a matter of record in the custody of the Department of Cultural Resources, shall set forth the following opinions or recommendations of the Commission:

- (1) The statewide educational significance and the qualitative level of the program or project and whether the program or project is essential to the development of a State program of historical interpretation;
- (2) The local or regional need for such a program or project;
- (3) The estimated total cost of the program or project under consideration and the apportionment of said cost among State and nonstate sources;
- (4) Whether practical plans have been or can be developed for the funding of the nonstate portions of the costs;
- (5) Whether practical plans have been developed for the continued staffing, maintenance, and operating of the museum without State assistance; and
- (6) Such further comments and recommendations that the Commission may make.

(d) **Commission to Furnish Recommendations to Legislative Committees.** — The Commission through the Department of Cultural Resources shall furnish as soon as practicable to the chairman of each legislative committee to which is referred any bill seeking an appropriation of State funds to the Department of Cultural Resources for the purpose of acquiring, preserving, restoring, or operating, or otherwise assisting, any property having historic, archaeological, architectural, or other cultural value or significance, and to the chairman of each legislative committee to which is referred any bill seeking an appropriation of State funds to the Department of Cultural Resources for the purpose of assisting a history museum, at least five copies of a report on the findings and recommendations of the Commission relating to such property. (1973, c. 476, s. 48; 1975, c. 19, s. 40; 1979, c. 861, ss. 3-5; 1985 (Reg. Sess., 1986), c. 1014, s. 171(b).)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 171(g) provides: "Notwithstanding any other provision of law, the following statutes do not apply to appropriations which the General Assembly has directed the Department of Cultural Resources to allo-

cate to specific units of local government or private nonprofit agencies: G.S. 121-11; 121-12(c), (c1), and (d); 121-12.1; 121-12.2; 143-31.2; and 143B-62(2) (f) and (f1)."

Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 243, contains a severability clause.

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective July 1, 1986, added "from the Depart-

ment of Cultural Resources" at the end of the first sentence of subsection (c), inserted "to be administered by the Department of Cultural Resources" following "appropriations" in the second sentence of subsection (c), added "from the Department of Cultural Resources" at the end of the first sentence of subsection (c1), in-

serted "to be administered by the Department of Cultural Resources" following "appropriations" in the second sentence of subsection (c1), and inserted "to the Department of Cultural Resources" following "State funds" in two places in subsection (d).

§ 121-12.1. Grants-in-aid.

Under the concepts of reorganization of State government, responsibility for administering appropriations to the Department of Cultural Resources for grants-in-aid to private nonprofit organizations in the areas of history, art, and culture is hereby assigned to the Department of Cultural Resources. It shall be the responsibility of the Department of Cultural Resources to receive, analyze, and recommend to the Governor, the Advisory Budget Commission, and the General Assembly the disposition of any request for funding received by it from or for any of these organizations, and to disburse under provisions of law any appropriations made to the Department for them. Appropriations to the Department of Cultural Resources for grants-in-aid to assist in the restoration of historic sites owned by private nonprofit organizations shall in addition be expended only in accordance with G.S. 121-11, 121-12 and 143-31.2. The function of the Advisory Budget Commission under this section applies only if the Director of the Budget consults with the Commission in preparation of the budget. (1977, c. 802, s. 47; 1985 (Reg. Sess., 1986), c. 955, s. 40; c. 1014, s. 171(c).)

Editor's Note. —

Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 171(g) provides: "Notwithstanding any other provision of law, the following statutes do not apply to appropriations which the General Assembly has directed the Department of Cultural Resources to allocate to specific units of local government or private nonprofit agencies: G.S. 121-11; 121-12(c), (c1), and (d); 121-12.1; 121-12.2; 143-31.2; and 143B-62(2)(f) and (f1)."

Section 1 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "This act may be cited as the Separation of Powers Act of 1986."

Section 127 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "If any part of this act

shall be declared invalid by any court, this shall not affect any other part of this act."

Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 243, contains a severability clause.

Effect of Amendments. — Session Laws 1985 (Reg. Sess., 1986), c. 955, s. 40, effective July 1, 1986, added the last sentence.

Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 171(c), effective July 1, 1986, inserted "to the Department of Cultural Resources" and deleted "by the State" following "grants-in-aid" in the first sentence, substituted "received by it from" for "by" and inserted "the Department for" in the second sentence, and inserted "to the Department of Cultural Resources" in the third sentence.

§ 121-12.2. Procedures for preparing budget requests and expending appropriations for grants-in-aid.

Requests for funding may be submitted by these organizations to the Department of Cultural Resources. If received by any other department of State government except the General Assembly they shall be forwarded to the Department of Cultural Resources. All such requests shall be subjected to the process described in G.S. 121-12.1 and included in the Department's biennial budget request submitted in compliance with the Executive Budget Act.

The Department of Cultural Resources shall notify on a timely basis and in appropriate detail all those recipients of continuing appropriations as grants-in-aid of the requirements for submission of requests for appropriations for the ensuing fiscal period.

The Secretary of Cultural Resources is empowered and directed, in discharging the responsibilities herein assigned, to make regular and timely reviews, studies and recommendations concerning the operations and needs of these organizations for State funds, and to request from the applicants for grants and the recipients of grants through the Department, operating statements, audit reports and other information deemed appropriate. (1977, c. 802, s. 47; 1985 (Reg. Sess., 1986), c. 1014, s. 171(d).)

Editor's Note. —

Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 171(g) provides: "Notwithstanding any other provision of law, the following statutes do not apply to appropriations which the General Assembly has directed the Department of Cultural Resources to allocate to specific units of local government or private nonprofit agencies: G.S. 121-11; 121-12(c), (c1), and (d); 121-12.1; 121-12.2; 143-31.2; and 143B-62(2) (f) and (f1)."

Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 243, contains a severability clause.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 1, 1986, substituted "may" for "shall" in the first sentence of the first paragraph, inserted "except the General Assembly" in the second sentence of the first paragraph, and inserted "through the Department" in the third paragraph.

ARTICLE 4.

Conservation and Historic Preservation Agreements Act.

§ 121-40. Assessment of land or improvements subject to agreement.

CASE NOTES

To find the true value of property subject to conservation easements, the State Property Tax Commission must determine the market value prior to the granting of the easements and then reduce that value by applying a damage factor caused by the granting of the

conservation easements. Determining the highest and best use of the property prior to the granting of the easement is a critical part of the appraisal process. *Rainbow Springs Partnership v. County of Macon*, — N.C. App. —, 339 S.E.2d 681 (1986).

Chapter 122A.

North Carolina Housing Finance Agency.

Sec.

122A-8.1. Powers of the State Treasurer.

122A-11. Trust funds.

§ 122A-8.1. Powers of the State Treasurer.

Notwithstanding any other provisions of this act, the State Treasurer shall have the exclusive power to issue bonds and notes authorized under the act upon request of the Agency and with the approval of the Local Government Commission.

The State Treasurer in his sole discretion shall determine the interest rates, maturities, and other terms and conditions of the bonds and notes authorized by this act.

The North Carolina Housing Finance Agency shall determine when a bond issue is indicated. The Agency shall cooperate with the State Treasurer in structuring any bond issue in general, and also in soliciting proposals from financial consultants, underwriters, and bond attorneys.

The State Treasurer shall have the exclusive power to employ and designate the financial consultants, underwriters, and bond attorneys to be associated with the bond issue; provided, at least annually, the Treasurer shall seek the written recommendations of the Housing Finance Agency; and, subsequent to each bond issue, the Treasurer shall conduct a formal performance evaluation of the financial consultants, underwriters and bond attorneys which shall be open to public inspection.

The Director of the Budget shall provide to the State Treasurer the funds necessary to defray the costs incurred in performing the fiscal functions reserved to the Treasurer under this act from the funds allocated to the Agency pursuant to the 1975 Session Laws. Prior to taking any action under this paragraph, the Director of the Budget may consult with the Advisory Budget Commission.

Nothing in this act is intended to abrogate or diminish the inherent power of the State Treasurer to negotiate the terms and conditions of the bonds and notes, and to issue the bonds and notes authorized by General Statutes Chapter 122A. (1977, c. 673, s. 5; 1983, c. 717, s. 38; 1985, c. 723, s. 5; 1985 (Reg. Sess., 1986), c. 955, ss. 41, 42.)

Editor's Note. —

Section 1 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "This act may be cited as the Separation of Powers Act of 1986."

Section 127 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "If any part of this act shall be declared invalid by any court, this shall not affect any other part of this act."

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective July 1, 1986, deleted "after consultation with the Advisory Budget Commission" following "The Director of the Budget" in the first sentence of the next-to-last paragraph and added the second sentence of the next-to-last paragraph.

§ 122A-11. Trust funds.

Notwithstanding any other provisions of law to the contrary, all moneys received pursuant to the authority of this Chapter shall be deemed to be trust funds to be held and applied solely as provided in this Chapter. The resolution authorizing any obligations or the trust agreement securing the same may provide that any of such moneys may be temporarily invested pending the disbursement thereof and shall provide that any officer with whom, or any bank or trust company with which, such moneys shall be deposited shall act as trustee of such moneys and shall hold and apply the same for the purposes hereof, subject to such regulations as this Chapter and such resolution or trust agreement may provide.

Any moneys received pursuant to the authority of this Chapter and any other moneys available to the Agency for investment may be invested:

- (1) As provided in G.S. 159-30, except that for purposes of G.S. 159-30(b) the Agency may deposit moneys at interest in banks or trust companies outside as well as in this State, provided any such moneys at deposit outside this State are collateralized to the same extent and manner as if at deposit in this State;
- (2) In evidences of ownership of, or fractional undivided interests in, future interest and principal payments on either direct obligations of the United States government or obligations the principal of and the interest on which are guaranteed by the United States government, which obligations are held by a bank or trust company organized and existing under the laws of the United States of America or any state in the capacity of custodian;
- (3) In obligations which are collateralized by mortgage pass-through securities guaranteed by the Government National Mortgage Association, the Federal Home Loan Mortgage Corporation, or the Federal National Mortgage Association;
- (4) In a trust certificate or similar instrument evidencing an equity investment in a trust or other similar arrangement which is formed for the purpose of issuing obligations which are collateralized by mortgage pass-through or participation certificates guaranteed by the Government National Mortgage Association, the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association; and
- (5) In repurchase agreements with respect to either direct obligations of the United States government or obligations the principal of and interest on which are guaranteed by the United States government if entered into with a broker or dealer, as defined by the Securities Exchange Act of 1934, which is a dealer recognized as a primary dealer by a Federal Reserve Bank, or any commercial bank, trust company or national banking association, the deposits of which are insured by the Federal Deposit Insurance Corporation or any successor thereof if
 - a. such obligations that are subject to such repurchase agreement are delivered (in physical or in book entry form) to the Agency, or any financial institution serving either as trustee for obligations issued by the Agency or as fiscal agent for the Agency or the State Treasurer or are supported by a safekeeping receipt issued by a depository satisfactory to the Agency, provided that such repurchase agreement must provide that the value of the underlying obligations shall be maintained at a current market value, calculated at least daily, of not less than one hundred percent (100%) of the repurchase price;

- b. a valid and perfected first security interest in the obligations which are the subject of such repurchase agreement has been granted to the Agency or its assignee or book entry procedures, conforming, to the extent practicable, with federal regulations and satisfactory to the agency have been established for the benefit of the Agency or its assignee;
- c. such securities are free and clear of any adverse third party claims; and
- d. such repurchase agreement is in a form satisfactory to the Agency. (1969, c. 1235, s. 11; 1973, c. 1296, s. 51; 1985, c. 479, s. 149(b); 1985 (Reg. Sess., 1986), c. 1014, s. 185.)

Editor's Note. —

Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 243, contains a severability clause.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 15, 1986, deleted the former last sentence of the

first paragraph, which read "Any such moneys or any other moneys of the Agency may be invested as provided in G.S. 159-28.1," and added the second paragraph, with its subdivisions (1) to (5).

Chapter 122B.

North Carolina Agricultural Facilities Finance Act.

Sec.

122B-1 to 122B-29. [Repealed.]

§§ 122B-1 to 122B-29: Repealed by Session Laws 1985 (Reg. Sess., 1986), c. 1011, s. 2.1(a), effective July 15, 1986.

Cross References. — For present provisions as to agricultural finance, see Chapter 122D.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1011, s. 2.1(b) provides that

funds appropriated to the Department of Agriculture for administration of Chapter 122B may be used for the administration of Chapter 122D.

Chapter 122C.

Mental Health, Mental Retardation, and Substance Abuse Act of 1985.

Article 1. General Provisions.

Sec.

122C-3. Definitions.

Article 2.

Licensure of Facilities for the Mentally Ill, the Mentally Retarded, and Substance Abusers.

122C-23. Licensure.

122C-24. Adverse action on a license.

Article 3.

Clients' Rights.

122C-52. Right to confidentiality.

Article 5.

Procedures for Admission and Discharge of Clients.

Part 1. General Provisions.

122C-205. Return of clients to 24-hour facilities.

122C-206. Transfers of clients between 24-hour facilities.

Part 2. Voluntary Admissions and Discharges, Competent Adults, Facilities for the Mentally Ill and Substance Abusers.

122C-211. Admissions.

Part 7. Involuntary Commitment of the Mentally Ill and the Mentally Retarded with Behavior Disorders; Facilities for the Mentally Ill.

Sec.

122C-261. Affidavit and petition before clerk or magistrate; custody order.

122C-263. Duties of law-enforcement officer; first examination by physician or eligible psychologist.

122C-264. Duties of clerk of superior court.

122C-268. Inpatient commitment; district court hearing.

122C-271. Disposition.

122C-273. Duties for follow-up on commitment order.

Part 8. Involuntary Commitment of Substance Abusers, Facilities for Substance Abusers.

122C-284. Duties of clerk of superior court.

122C-285. Commitment; second examination and treatment pending hearing.

122C-286. Commitment; district court hearing.

122C-286.1. Venue of district court hearing when respondent held at a 24-hour facility pending hearing.

122C-290. Duties for follow-up on commitment order.

ARTICLE 1.

General Provisions.

§ 122C-3. Definitions.

As used in this Chapter, unless another meaning is specified or the context clearly requires otherwise the following terms have the meanings specified:

(20) "Legally responsible person" means: (i) when applied to an adult, who has been adjudicated incompetent, a guardian; or (ii) when applied to a minor, a parent, guardian, a person standing in loco parentis, or a legal custodian other than a parent who has been granted specific authority by law or in a custody order to consent for medical care, including psychiatric treatment.

(1899, c. 1, s. 28; Rev., s. 457.4; C.S., s. 6189; 1945, c. 952, s. 18; 1947, c. 537, s. 12; 1949, c. 71, s. 3; 1955, c. 887, s. 1; 1957, c. 1232, s. 13; 1959, c. 1028, s. 4; 1963, c. 1166, ss. 2, 10; c. 1184, s. 1; 1965, c. 933; 1973, c. 475, s. 2; c. 476, s.

133; c. 726, s. 1; c. 1408, ss. 1, 3; 1977, c. 400, ss. 2, 12; c. 568, s. 1; c. 679, s. 7; 1977, 2nd Sess., c. 1134, s. 2; 1979, c. 164, ss. 3, 4; c. 171, s. 2; c. 358, ss. 2, 26; c. 915, s. 1; c. 751, s. 28; 1981, c. 51, ss. 2-4; c. 539, s. 1; 1983, c. 280; c. 383, s. 2; c. 638, s. 2; c. 718, s. 1; c. 864, s. 4; 1983 (Reg. Sess., 1984), c. 1110, s. 4; 1985, c. 589, s. 2; c. 695, s. 1; c. 777, s. 2; 1985 (Reg. Sess., 1986), c. 863, s. 7.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective August 1, 1986, deleted "or an attorney-

in-fact acting under a valid durable power of attorney that authorizes him to provide or consent to medical care and hospitalization for the principal" following "a guardian" in clause (i) of subdivision (20).

ARTICLE 2.

Licensure of Facilities for the Mentally Ill, the Mentally Retarded, and Substance Abusers.

§ 122C-23. Licensure.

(f) Upon written application and in accordance with rules of the Commission, the Secretary may for good cause waive any of the rules implementing this Article, provided those rules do not affect the health, safety, or welfare of the individuals within the licensable facility. Decisions made pursuant to this subsection may be appealed to the Commission for a hearing in accordance with Chapter 150B of the General Statutes. (1899, c. 1, s. 60; Rev., s. 4600; C.S., s. 6219; 1945, c. 952, s. 41; 1957, c. 100, ss. 1, 4; 1963, c. 813, s. 1; c. 1166, s. 7; 1965, c. 1178, ss. 1-3; 1969, c. 954; 1973, c. 476, ss. 133, 152; 1977, c. 679, s. 7; 1981, c. 51, s. 3; 1983, c. 718, ss. 1, 4; 1985, c. 589, s. 2; 1985 (Reg. Sess., 1986), c. 863, s. 8.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective August 1, 1986, substituted "Chapter 150B" for "Chapter 150A" in the second sentence of subsection (f).

§ 122C-24. Adverse action on a license.

(a) The Secretary may deny, suspend, amend, or revoke a license in any case in which the Secretary finds that there has been a substantial failure to comply with any provision of this Article or any rule adopted pursuant to it. Actions under this section and appeals of those actions shall be in accordance with rules of the Commission and Chapter 150B of the General Statutes.

(b) When an appeal is filed concerning the denial, suspension, amendment, or revocation of a license, a copy of the proposal for decision shall be sent to the Chairman of the Commission in addition to the parties specified in G.S. 150B-34. The Chairman or members of the Commission designated by the Chairman may submit for the Secretary's consideration written or oral comments concerning the proposal prior to the issuance of a final agency decision in accordance with G.S. 150B-36. (1983, c. 718, s. 1; 1985, c. 589, s. 2; 1985 (Reg. Sess., 1986), c. 863, ss. 8-10.)

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective August 1, 1986, substituted "Chapter 150B" for "Chapter 150A" in the second sentence of subsection (a), substituted "G.S. 150B-34" for "G.S. 150A-34"

at the end of the first sentence of subsection (b), and substituted "G.S. 150B-36" for "G.S. 150A-36" at the end of the second sentence of subsection (b).

ARTICLE 3.

Clients' Rights.

§ 122C-52. Right to confidentiality.

(a) Except as provided in G.S. 132-5, confidential information acquired in attending or treating a client is not a public record under Chapter 132 of the General Statutes.

(1955, c. 887, s. 12; 1963, c. 1166, s. 10; 1965, c. 800, s. 4; 1973, c. 47, s. 2; c. 476, s. 133; c. 673, s. 5; c. 1408, s. 2; 1979, c. 147; 1983, c. 383, s. 10; c. 491; c. 638, s. 22; c. 864, s. 4; 1985, c. 589, s. 2; 1985 (Reg. Sess., 1986), c. 863, s. 11.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

1985 (Reg. Sess., 1986) amendment, effective August 1, 1986, inserted "Except as provided in G.S. 132-5" at the beginning of subsection (a).

Effect of Amendments. — The 1985 (Reg.

ARTICLE 4.

Organization and System for Delivery of Mental Health, Mental Retardation, and Substance Abuse Services.

Part 2. State, County and Area Authority.

§ 122C-112. Powers and duties of the Secretary.

CASE NOTES

The State, acting through the Secretary, was responsible for a young incompetent adult who, from birth, had been a ward of the State or of a guardian appointed by the State, and the Secretary at her election could provide

required treatment of this individual through local authorities. *Thomas v. Morrow*, 781 F.2d 367 (4th Cir. 1986), decided under former § 122-35.36.

ARTICLE 5.

Procedures for Admission and Discharge of Clients.

Part 1. General Provisions.

§ 122C-205. Return of clients to 24-hour facilities.

(a) When a client of a 24-hour facility who:

(1) Has been involuntarily committed;

- (2) Is being detained pending a judicial hearing;
- (3) Has been voluntarily admitted but is a minor or incompetent adult;
- (4) Has been placed on conditional release from the facility; or
- (5) Is a competent adult who has been voluntarily admitted and who, in the opinion of the responsible professional at the facility involved is currently dangerous to himself or others

escapes or breaches the condition of his release, if applicable, the responsible professional shall immediately notify the appropriate law-enforcement officer of the county of residence of the client, the appropriate law-enforcement officer of the county where the facility is located, and, if applicable, shall have recorded in the client's record the condition of release that has been breached. If there are reasonable grounds to believe that the client is in any county other than his county of residence, the responsible professional shall also notify the appropriate law-enforcement officer of that county. Upon receipt of notice, the law-enforcement officer shall take the client into custody and have the client returned to the facility from which the client has escaped or has been conditionally released. Transportation of the client back to the facility shall be provided in the same manner as described in G.S. 122C-251. Law-enforcement officers notified of a client's escape or breach of conditional release shall be notified of his return.

(b) The responsible professional shall also notify:

- (1) The next of kin or legally responsible person;
- (2) The clerk of superior court of the county of commitment of the client;
- (3) The area authority of the county of residence, if appropriate; and
- (4) The physician or eligible psychologist who performed the first examination for commitment, if appropriate,

of the escape or breach of condition of the client's release upon the occurrence of either action and of his subsequent return to the facility. (1899, c. 1, s. 27; Rev., s. 4563; C.S., s. 6175; 1927, c. 114; 1945, c. 952, s. 12; 1953, c. 256, s. 1; 1955, c. 887, s. 3; 1973, c. 673, s. 11; 1983, c. 548; 1985, c. 589, s. 2; c. 695, s. 2; 1985 (Reg. Sess., 1986), c. 863, ss. 12-14.)

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective August 1, 1986, recodified the language of the first sentence of subsection (a) beginning "escapes or breaches the condition of his release," as well as the second through fifth sentences thereafter, as the concluding part of subsection (a), rather than as part of subdivi-

sion (a)(5); in subdivision (b)(2) substituted "county of commitment" for "county of residence"; and recodified the language beginning "of the escape or breach of condition" at the end of subsection (b) as the concluding part of subsection (b) and not as a part of subdivision (b)(4).

§ 122C-206. Transfers of clients between 24-hour facilities.

(c1) If a client described in subsections (b) or (c) of this section is to be transferred from one 24-hour facility to another and transportation is needed,

the responsible professional at the original facility shall notify the clerk of court, and the clerk of court shall issue a custody order for transportation of the client as provided by G.S. 122C-251.

(1919, c. 330; C.S., s. 6163; 1925, c. 51, s. 1; 1945, c. 925, s. 5; 1947, c. 537, s. 9; c. 623, s. 1; 1953, c. 675, s. 15; 1955, c. 1274, s. 1; 1959, c. 1002, s. 11; 1963, c. 1166, ss. 10, 12; 1973, c. 475, s. 1; c. 476, s. 133; c. 673, ss. 7, 8; c. 1436, ss. 6, 7; 1977, c. 679, s. 7; 1981, c. 51, s. 3; c. 328, ss. 1, 2; 1985, c. 589, s. 2; 1985, (Reg. Sess., 1986), c. 863, s. 15.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective August 1, 1986, added subsection (c1).

Part 2. Voluntary Admissions and Discharges, Competent Adults, Facilities for the Mentally Ill and Substance Abusers.

§ 122C-211. Admissions.

(a) Except as provided in subsections (b) through (e) of this section, any individual in need of treatment for mental illness or substance abuse may seek voluntary admission at any facility by presenting himself for evaluation to the facility. No physician's statement is necessary, but a written application for evaluation or admission, signed by the individual seeking admission, is required. The application form shall be available at all times at all facilities. However, no one shall be denied admission because application forms are not available. An evaluation shall determine whether the individual is in need of care, treatment, habilitation or rehabilitation for mental illness or substance abuse or further evaluation by the facility. Information provided by family members regarding the individual's need for treatment shall be reviewed in the evaluation. An individual may not be accepted as a client if the facility determines that the individual does not need or cannot benefit from the care, treatment, habilitation, or rehabilitation available and that the individual is not in need of further evaluation by the facility. The facility shall give to an individual who is denied admission a referral to another facility or facilities that may be able to provide the treatment needed by the client.

(1945, c. 952, s. 47¹/₂; 1963, c. 1184, s. 22; 1973, c. 723, s. 1; c. 1084; 1983, c. 383, s. 4; 1985, c. 589, s. 2; 1985 (Reg. Sess., 1986), c. 863, s. 16.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective August 1,

1986, deleted "for the mentally ill or substance abusers" following "voluntary admission at any facility" in the first sentence of subsection (a).

Part 7. Involuntary Commitment of the Mentally Ill and the Mentally Retarded with Behavior Disorders; Facilities for the Mentally Ill.

§ 122C-261. Affidavit and petition before clerk or magistrate; custody order.

(d) If the affiant is a physician or eligible psychologist, he may execute the affidavit before any official authorized to administer oaths. He is not required to appear before the clerk or magistrate for this purpose. His examination shall comply with the requirements of the initial examination as provided in G.S. 122C-263(c). If the physician or eligible psychologist recommends outpatient commitment and the clerk or magistrate finds probable cause to believe that the respondent meets the criteria for outpatient commitment, he shall issue an order that a hearing before a district court judge be held to determine whether the respondent will be involuntarily committed. If a physician or eligible psychologist recommends outpatient commitment, he shall provide the respondent with written notice of any scheduled appointment and the name, address, and telephone number of the proposed outpatient treatment physician or center. If the physician or eligible psychologist recommends inpatient commitment and the clerk or magistrate finds probable cause to believe that the respondent meets the criteria for inpatient commitment, he shall issue an order for transportation to or custody at a 24-hour facility described in G.S. 122C-252. If a physician or eligible psychologist executes an affidavit for inpatient commitment of a respondent, a second physician shall be required to perform the examination required by G.S. 122C-266.

(1973, c. 726, s. 1; c. 1408, s. 1; 1977, c. 400, s. 3; 1979, c. 164, s. 2; c. 915, ss. 3, 18; 1983, c. 383, s. 5; c. 638, ss. 3-5; c. 864, s. 4; 1985, c. 589, s. 2; c. 695, ss. 2, 4; 1985 (Reg. Sess., 1986), c. 863, s. 17.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective August 1, 1986, inserted the present fourth and fifth sentences of subsection (d).

§ 122C-263. Duties of law-enforcement officer; first examination by physician or eligible psychologist.

(d) After the conclusion of the examination the physician or eligible psychologist shall make the following determinations:

(1) If the physician or eligible psychologist finds that:

- a. The respondent is mentally ill;
- b. The respondent is capable of surviving safely in the community with available supervision from family, friends, or others;
- c. Based on the respondent's treatment history, the respondent is in need of treatment in order to prevent further disability or deterioration which would predictably result in dangerousness as defined by G.S. 122C-3(11), and
- d. His current mental status or the nature of his illness limits or negates his ability to make an informed decision to seek voluntarily or comply with recommended treatment;

The physician or eligible psychologist shall so show on [the] his examination report and shall recommend outpatient commitment. In addition the examining physician or eligible psychologist shall show the name, address, and telephone number of the proposed outpatient treatment physician or center. The person designated in the order to provide transportation shall return the respondent to his regular residence or to the home of a consenting individual, and he shall be released from custody.

- (2) If the physician or eligible psychologist finds that the respondent is mentally ill and is dangerous to himself or others, or is mentally retarded, and because of an accompanying behavior disorder, is dangerous to others, he shall recommend inpatient commitment, and he shall so show on [the] his examination report. The law-enforcement officer or other designated person shall take the respondent to a 24-hour facility described in G.S. 122C-252 pending a district court hearing. If there is no area 24-hour facility and if the respondent is indigent and unable to pay for his care at a private 24-hour facility, the law-enforcement officer or other designated person shall take the respondent to a State facility for the mentally ill designated by the Commission in accordance with G.S. 143B-157(a)(1)a for custody, observation, and treatment and immediately notify the clerk of superior court of his actions.
- (3) If the physician or eligible psychologist finds that neither condition described in subdivisions (1) or (2) of this subsection exists, the respondent shall be released and the proceedings terminated.

(1973, c. 726, s. 1; c. 1408, s. 1; 1977, c. 400, s. 4; c. 679, s. 8; c. 739, s. 1; 1979, c. 358, s. 27; c. 915, s. 4; 1983, c. 380, ss. 4, 10; c. 638, ss. 6, 7, 25.1; c. 864, s. 4; 1985, c. 589, s. 2; c. 695, ss. 2, 5, 6; 1985 (Reg. Sess., 1986), c. 863, s. 18.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective August 1, 1986, inserted "in accordance with G.S. 143B-157(a)(1)a" in the last sentence of subdivision (d)(2).

§ 122C-264. Duties of clerk of superior court.

(c) Notice to the respondent, required by subsections (a) and (b) of this section, shall be given as provided in G.S. 1A-1, Rule 4(j) at least 72 hours before the hearing. Notice to other individuals shall be sent at least 72 hours before the hearing by first-class mail postage prepaid to the individual's last known address. G.S. 1A-1, Rule 6 shall not apply.

(1973, c. 1408, s. 1; 1977, c. 400, s. 5; c. 414, s. 1; 1979, c. 915, s. 5; 1983, c. 380, s. 9; c. 638, ss. 8, 16; c. 864, s. 4; 1985, c. 589, s. 2; c. 695, s. 7; 1985 (Reg. Sess., 1986), c. 863, s. 19.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective August 1, 1986, added the last sentence of subsection (c).

§ 122C-268. Inpatient commitment; district court hearing.

(b) The attorney, who is a member of the staff of the Attorney General assigned to one of the State's facilities for the mentally ill or the psychiatric service of North Carolina Memorial Hospital, shall represent the State's interest at commitment hearings, rehearings, and supplemental hearings held at the facility to which he is assigned under this Part.

In addition, the Attorney General may, in his discretion, designate an attorney who is a member of his staff to represent the State's interest at any commitment hearing, rehearing, or supplemental hearing held in a place other than at one of the State's facilities for the mentally ill or the psychiatric service of North Carolina Memorial Hospital.

(1985, c. 589, s. 2; c. 695, s. 8; 1985 (Reg. Sess., 1986), c. 1014, s. 195(b).)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 243, contains a severability clause.

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective July 1, 1986, added the second paragraph of subsection (b).

§ 122C-271. Disposition.

(a) If an examining physician or eligible psychologist has recommended outpatient commitment and the respondent has been released pending the district court hearing, the court may make one of the following dispositions:

- (1) If the court finds by clear, cogent, and convincing evidence that the respondent is mentally ill; that he is capable of surviving safely in the community with available supervision from family, friends, or others; that based on respondent's treatment history, the respondent is in need of treatment in order to prevent further disability or deterioration that would predictably result in dangerousness as defined in G.S. 122C-3(11); and that the respondent's current mental status or the nature of his illness limits or negates his ability to make an informed decision to seek voluntarily or comply with recommended treatment, it may order outpatient commitment for a period not in excess of 90 days.
- (2) If the court does not find that the respondent meets the criteria of commitment set out in subdivision (1) of this subsection, the respondent shall be discharged and the facility at which he was last a client so notified.

(b) If the respondent has been held in a 24-hour facility pending the district court hearing, the court may make one of the following dispositions:

- (1) If the court finds by clear, cogent, and convincing evidence that the respondent is mentally ill; that he is capable of surviving safely in the community with available supervision from family, friends, or others; that based on respondent's treatment history, the respondent is in need of treatment in order to prevent further disability or deterioration that would predictably result in dangerousness as defined by G.S. 122C-3(11); and that the respondent's current mental status or the nature of his illness limits or negates his ability to make an informed decision voluntarily to seek or comply with recommended treatment, it may order outpatient commitment for a period not in excess of 90 days. If the commitment proceedings were initiated as the result of the respondent's being charged with a violent crime, including a crime involving an assault with a deadly weapon, and the

respondent was found not guilty by reason of insanity or incapable of proceeding, the commitment order shall so show.

- (2) If the court finds by clear, cogent, and convincing evidence that the respondent is mentally ill and is dangerous to himself or others or is mentally retarded and, because of an accompanying behavior disorder, is dangerous to others, it may order inpatient commitment at a 24-hour facility described in G.S. 122C-252 for a period not in excess of 90 days. However, an individual who is mentally retarded and, because of an accompanying behavior disorder, is dangerous to others may not be committed to a State, area or private facility for the mentally retarded. An individual who is mentally ill and dangerous to himself or others may also be committed to a combination of inpatient and outpatient commitment at both a 24-hour facility and an outpatient treatment physician or center for a period not in excess of 90 days. If the commitment proceedings were initiated as the result of the respondent's being charged with a violent crime, including a crime involving an assault with a deadly weapon, and the respondent was found not guilty by reason of insanity or incapable of proceeding, the commitment order shall so show. If the court orders inpatient commitment for a respondent who is under an outpatient commitment order, the outpatient commitment is terminated; and the clerk of the superior court of the county where the district court hearing is held shall send a notice of the inpatient commitment to the clerk of superior court where the outpatient commitment was being supervised.
- (3) If the court does not find that the respondent meets either of the commitment criteria set out in subdivisions (1) and (2) of this subsection, the respondent shall be discharged, and the facility in which he was last a client so notified.
- (4) Before ordering any outpatient commitment, the court shall make findings of fact as to the availability of outpatient treatment. The court shall also show on the order the outpatient treatment physician or center who is to be responsible for the management and supervision of the respondent's outpatient commitment. When an outpatient commitment order is issued for a respondent held in a 24-hour facility, the court may order the respondent held at the facility for not more than 72 hours in order for the facility to notify the designated outpatient treatment physician or center of the treatment needs of the respondent. The clerk of court in the county where the facility is located shall send a copy of the outpatient commitment order to the designated outpatient treatment physician or center. If the outpatient commitment will be supervised in a county other than the county where the commitment originated, the court shall order venue for further court proceedings to be transferred to the county where the outpatient commitment will be supervised. Upon an order changing venue, the clerk of superior court in the county where the commitment originated shall transfer the file to the clerk of superior court in the county where the outpatient commitment is to be supervised. (1973, c. 726, s. 1; c. 1408, s. 1; 1977, c. 400, s. 8; c. 739, s. 2; 1979, c. 358, s. 26; c. 915, ss. 8, 15, 16; 1981, c. 537, s. 1; 1983, c. 380, s. 8; c. 638, s. 14; c. 864, s. 4; 1985, c. 589, s. 2; c. 695, s. 2; 1985 (Reg. Sess., 1986), c. 863, ss. 20-22.)

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective August 1, 1986, inserted "treatment history, the respondent is in need of" preceding "treatment in order to prevent further disability" in subdivision (a)(1), deleted "or a combination of inpatient and outpatient commitment

at both a 24-hour facility and an outpatient treatment physician or center" preceding "for a period not in excess of 90 days" at the end of the first sentence of subdivision (b)(2) and inserted the present third sentence of subdivision (b)(2).

§ 122C-273. Duties for follow-up on commitment order.

(a) Unless prohibited by Chapter 90 of the General Statutes, if the commitment order directs outpatient treatment, the outpatient treatment physician may prescribe or administer, or the center may administer, to the respondent reasonable and appropriate medication and treatment that are consistent with accepted medical standards.

- (1) If the respondent fails to comply or clearly refuses to comply with all or part of the prescribed treatment, the physician, the physician's designee, or the center shall make all reasonable effort to solicit the respondent's compliance. These efforts shall be documented and reported to the court with a request for a supplemental hearing.
- (2) If the respondent fails to comply, but does not clearly refuse to comply, with all or part of the prescribed treatment after reasonable effort to solicit the respondent's compliance, the physician, the physician's designee, or the center may request the court to order the respondent taken into custody for the purpose of examination. Upon receipt of this request, the clerk shall issue an order to a law-enforcement officer to take the respondent into custody and to take him immediately to the designated outpatient treatment physician or center for examination. The law-enforcement officer shall turn the respondent over to the custody of the physician or center who shall conduct the examination and then release the respondent. The law-enforcement officer may wait during the examination and return the respondent to his home after the examination. An examination conducted under this subsection in which a physician or eligible psychologist determines that the respondent meets the criteria for inpatient commitment may be substituted for the first examination required by G.S. 122C-263 if the clerk or magistrate issues a custody order within six hours after the examination was performed.
- (3) In no case may the respondent be physically forced to take medication or forcibly detained for treatment unless he poses an immediate danger to himself or others. In such cases inpatient commitment proceedings shall be initiated.
- (4) At any time that the outpatient treatment physician or center finds that the respondent no longer meets the criteria set out in G.S. 122C-263(d)(1), the physician or center shall so notify the court and the case shall be terminated; provided, however, if the respondent was initially committed as a result of conduct resulting in his being charged with a violent crime, including a crime involving an assault with a deadly weapon, and the respondent was found not guilty by reason of insanity or incapable of proceeding, the designated outpatient treatment physician or center shall notify the clerk that discharge is recommended. The clerk shall calendar a supplemental hearing as provided in G.S. 122C-274 to determine whether the respondent meets the criteria for outpatient commitment.
- (5) Any individual who has knowledge that a respondent on outpatient commitment has become dangerous to himself or others as defined by G.S. 122C-3(11) may initiate a new petition for inpatient commit-

ment as provided in this Part. If the respondent is committed as an inpatient, the outpatient commitment shall be terminated and notice sent by the clerk of court in the county where the respondent is committed as an inpatient to the clerk of court of the county where the outpatient commitment is being supervised.

(1983, c. 638, s. 16; c. 864, s. 4; 1985, c. 589, s. 2; 1985 (Reg. Sess., 1986), c. 863, ss. 23-26.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective August 1, 1986, inserted "Unless prohibited by Chapter 90 of the General Statutes" at the beginning of the introductory language of subsection (a), inserted "or the center may administer" following "physician may prescribe or administer" in the introductory language of subsection (a), in

subdivision (a)(1) substituted "physician, the physician's designee, or the center" for "physician or his designee" in the first sentence, and in subdivision (a)(2) substituted "physician, the physician's designee, or the center" for "physician or his designee" in the first sentence and substituted "physician or eligible psychologist" for "physician" preceding "determines that the respondent" in the last sentence.

§ 122C-277. Release and conditional release; judicial review.

CASE NOTES

Notice and Hearing. — The statutory provisions of former § 122-58.13(b) requiring notice and hearing prior to release from involuntary commitment were mandatory and not merely directive, applied in every case in which a respondent was initially committed af-

ter a judicial determination of not guilty by reason of insanity or incapacity to stand trial, and remained applicable throughout a respondent's commitment. In re Rogers, — N.C. App. —, 336 S.E.2d 682 (1985).

Part 8. Involuntary Commitment of Substance Abusers, Facilities for Substance Abusers.

§ 122C-284. Duties of clerk of superior court.

(b) Notice to the respondent required by subsection (a) of this section shall be given as provided in G.S. 1A-1, Rule 4(j) at least 72 hours before the hearing. Notice to other individuals shall be given by mailing at least 72 hours before the hearing a copy by first-class mail postage prepaid to the individual at his last known address. G.S. 1A-1, Rule 6 shall not apply.

(1973, c. 1408, s. 1; 1977, c. 400, s. 5; c. 414, s. 1; 1979, c. 915, s. 5; 1983, c. 380, s. 9; c. 638, s. 8; c. 864, s. 4; 1985, c. 589, s. 2; c. 695, s. 10; 1985 (Reg. Sess., 1986), c. 863, s. 27.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective August 1, 1986, added the last sentence of subsection (b).

§ 122C-285. Commitment; second examination and treatment pending hearing.

(a) Within 24 hours of arrival at a 24-hour facility described in G.S. 122C-252, the respondent shall be examined by a qualified professional. This professional shall be a physician if the initial commitment evaluation was conducted by an eligible psychologist. The examination shall include the assessment specified in G.S. 122C-283(c). If the qualified professional finds that the respondent is a substance abuser and is dangerous to himself or others, he shall hold and treat the respondent at the facility or designate other treatment pending the district court hearing. If the qualified professional finds that the respondent does not meet the criteria for commitment under G.S. 122C-283(d)(1), he shall release the respondent and the proceeding shall be terminated. In this case the reasons for the release shall be reported in writing to the clerk of superior court of the county in which the custody order originated. If the respondent is released, the law-enforcement officer or other person designated to provide transportation shall return the respondent to the originating county.

(b) If the 24-hour facility described in G.S. 122C-252 is the facility in which the first examination by a physician or eligible psychologist occurred and is the same facility in which the respondent is held, the second examination must occur not later than the following regular working day. (1973, c. 726, s. 1; c. 1408, s. 1; 1977, c. 400, s. 6; 1979, c. 915, s. 6; 1983, c. 380, s. 5; c. 638, ss. 9, 10; c. 864, s. 4; 1985, c. 589, s. 2; c. 695, s. 11; 1985 (Reg. Sess., 1986), c. 863, s. 28.)

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective August 1, 1986, designated the first

paragraph as subsection (a) and added subsection (b).

§ 122C-286. Commitment; district court hearing.

(e) Hearings may be held at a facility if it is located within the judge's judicial district or in the judge's chambers. A hearing may not be held in a regular courtroom, over objection of the respondent, if in the discretion of a judge a more suitable place is available.

(g) A copy of all documents admitted into evidence and a transcript of the proceedings shall be furnished to the respondent on request by the clerk upon the direction of a district court judge. If the respondent is indigent, the copies shall be provided at State expense.

(1985, c. 589, s. 2; c. 695, s. 8; 1985 (Reg. Sess., 1986), c. 863, ss. 29, 30.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective August 1, 1986, substituted "a facility"

for "an area facility or a private facility" in the first sentence of subsection (e) and rewrote the first sentence of subsection (g), which read "A copy of all documents admitted shall be furnished by the clerk to the respondent on request."

§ 122C-286.1. Venue of district court hearing when respondent held at a 24-hour facility pending hearing.

(a) In all cases where the respondent is held at a 24-hour facility pending the district court hearing as provided in G.S. 122C-286, unless the respondent through counsel objects to the venue, the hearing shall be held in the county in which the facility is located. Upon objection to venue, the hearing shall be held in the county where the petition was initiated.

(b) An official of the facility shall immediately notify the clerk of superior court of the county in which the facility is located of a determination to hold the respondent pending hearing. That clerk shall request transmittal of all documents pertinent to the proceedings from the clerk of superior court where the proceedings were initiated. The requesting clerk shall assume all duties set forth in G.S. 122C-284. The requesting clerk shall appoint as counsel for indigent respondents the counsel provided for in G.S. 122C-286(d). (1985 (Reg. Sess., 1986), c. 863, s. 31.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 863, s. 34 makes this section effective August 1, 1986.

§ 122C-290. Duties for follow-up on commitment order.

(b) If the respondent whose treatment is provided on an outpatient basis fails to comply with all or part of the prescribed treatment after reasonable effort to soliciting the respondent's compliance, the area authority or physician may have the respondent taken to a 24-hour facility described in G.S. 122C-252. Transportation shall be provided as specified in G.S. 122C-251 upon notice to the clerk of court by the area authority or physician that transportation is necessary. Prior to the placement in the 24-hour facility, a physician shall determine that treatment in the facility will benefit the respondent. If placement in a 24-hour facility is to exceed 45 consecutive days, the area authority or physician shall notify the clerk of court by the 30th day and request a supplemental hearing as specified in G.S. 122C-291.

(1983, c. 638, s. 16; c. 864, s. 4; 1985, c. 589, s. 2; 1985 (Reg. Sess., 1986), c. 863, s. 32.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective August 1,

1986, substituted "G.S. 122C-251 upon notice to the clerk of court by the area authority" for "G.S. 122C-251 upon notice by the area authority" in the second sentence of subsection (b).

Part 9. Public Intoxication.

§ 122C-301. Assistance to an individual who is intoxicated in public; procedure for commitment to shelter or facility.

CASE NOTES

Governmental Unit Not Assuming Responsibility for Payment of Medical Care.
— This section did not suggest that the governmental unit employing an officer who acted pursuant to the statute assumed responsibility

for payment for the medical care rendered to the intoxicated person. Craven County Hosp. Corp. v. Lenoir County, — N.C. App. —, 331 S.E.2d 690 (1985) (Decided under former § 122-65.11).

Chapter 22D.

North Carolina Agricultural Finance Act.

Sec.

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Sec.

- 122D-11. Statutory pledge.
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- 122D-18. Account and audits.
- 122D-19. Cooperation of State agencies.
- 122D-20. Construction of Chapter.
- 122D-21. Termination of the Authority.
- 122D-22. Severability.

§ 122D-1. Short title.

This Chapter shall be known and may be cited as the "North Carolina Agricultural Finance Act." (1983, c. 789, s. 1; 1985 (Reg. Sess., 1986), c. 1011, s. 1.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1011, repealed Chapter 122B and enacted Chapter 122D. Session Laws 1985 (Reg. Sess., 1986), c. 1011, s. 4 makes this Chapter effective July 15, 1986. Where appropriate, the historical citations to sections of repealed Chapter 122B have been added to corresponding sections in Chapter 122D.

Session Laws 1985 (Reg. Sess., 1986), c. 1011, s. 2.1, which repeals Chapter 122B, provides that funds appropriated to the Depart-

ment of Agriculture for administration of Chapter 122B may be used for the administration of this chapter.

Session Laws 1985 (Reg. Sess., 1986), c. 1011, s. 3 provides that funds appropriated in Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 2 to the Department of Agriculture, Reserve for Farm Loans shall be used for the purposes set out in c. 1011, other than administration of Chapter 122D.

§ 122D-2. Legislative findings and purposes.

(a) The General Assembly hereby finds and declares that there exists in the State of North Carolina a serious shortage of capital and credit available for investment in agriculture, for domestic and export purposes, at interest rates within the financial means of persons engaged in agricultural production and agricultural exports. This shortage of available capital and credit is severe throughout the State, has persisted for a number of years, and constitutes a grave threat to the agricultural industry and to the health, welfare, safety and prosperity of all residents of the State.

(b) The General Assembly hereby finds and declares further that private enterprise and existing federal and state governmental programs have not adequately alleviated the severe shortage of capital and credit available at affordable interest rates for investment in agriculture.

(c) The General Assembly hereby finds and declares that it is a matter of grave public necessity that the North Carolina Agricultural Finance Authority be created and empowered to alleviate the severe shortage of capital and credit available at affordable interest rates for investment in agriculture and

for the export of agricultural products, commodities and services by providing such capital and credit at interest rates within the financial means of persons and businesses engaged in agriculture and agricultural exports. (1983, c. 789, s. 1; 1985 (Reg. Sess., 1986), c. 1011, s. 1.)

§ 122D-3. Definitions.

As used in this Chapter, the following terms, unless the context clearly indicates a different meaning, shall have the following meanings:

- (1) "Agricultural loan" means a loan made by a lending institution or by the Authority to any person for the purpose of financing land acquisition or improvement; soil conservation; irrigation; construction, renovation or expansion of buildings and facilities; purchase of farm fixtures, livestock, poultry, and fish of any kind; seeds; fertilizers; pesticides; feeds; machinery; equipment; containers or supplies or any other products employed in the production, cultivation, harvesting, storage, marketing, distribution or export of agricultural products.
- (2) "Agriculture" means the commercial production, storage, processing, marketing, distribution or export of any agronomic, floricultural, horticultural, viticultural, silvicultural or aquacultural crop including, but not limited to, farm products, livestock and livestock products, poultry and poultry products, milk and dairy products, fruit and other horticultural products, and seafood and aquacultural products.
- (3) "Authority" means the North Carolina Agricultural Finance Authority created by this Chapter.
- (4) "Bonds" or "notes" mean the bonds, notes, renewal notes, refunding bonds, interim certificates, certificates of indebtedness, debentures, warrants, commercial paper, or other obligations or evidences of indebtedness authorized to be issued by the Authority pursuant to the provisions of this Chapter.
- (5) "Commissioner" means the North Carolina Commissioner of Agriculture.
- (6) "Department" means the North Carolina Department of Agriculture.
- (7) "Federal government" means the United States of America and any agency or instrumentality, corporate or otherwise, of the United States of America.
- (8) "Lending institution" means any bank, bank or trust company, federal land bank, production credit association, bank for cooperatives, building and loan association, homestead, insurance company, investment banker, mortgage banker or company, pension or retirement fund, savings bank or savings and loan association, small business investment company, credit union, the federal government or any other financial institution authorized to do business in North Carolina or operating under the supervision of any federal agency or any corporation organized or operating pursuant to Section 25 of the Federal Reserve Act.
- (9) "Persons" means any individual, partnership, firm, corporation, company, cooperative, association, society, trust or any other business unit or entity, including any state or federal agency.
- (10) "State" means the State of North Carolina or any agency or instrumentality thereof. (1983, c. 789, s. 1; 1985 (Reg. Sess., 1986), c. 1011, s. 1.)

§ 122D-4. North Carolina Agricultural Finance Authority.

(a) The North Carolina Agricultural Finance Authority, a body politic and corporate, is hereby created within the Department of Agriculture. The Authority shall be constituted a public agency and an instrumentality of the State for the performance of essential public functions.

(b) The Authority shall be composed of 10 members. The Commissioner shall serve ex officio, with the same rights and privileges, including voting rights, as other members. The other nine members shall be appointed in the following manner:

(1) Three members appointed by the General Assembly upon the recommendation of the Speaker of the House under G.S. 120-121;

(2) Three members appointed by the General Assembly upon the recommendation of the President of the Senate under G.S. 120-121; and

(3) Three members appointed by the Governor.

(c) Members shall serve for three-year terms. Initial terms shall commence July 1, 1986. Appointed members shall serve until their successors are appointed and qualify.

(d) Vacancies in the offices of any appointed members of the Authority shall be filled in accordance with G.S. 120-122 for the remainder of the unexpired term. No vacant office shall be included in the determination of a quorum. No vacancy in office shall impair the rights of the members to exercise all rights and to conduct official business of the Authority.

(e) The domicile of the Authority shall be the City of Raleigh.

(f) A majority of the members shall constitute a quorum for the transaction of official business. All official actions of the Authority shall require an affirmative vote of a majority of the members present and voting at any meeting.

(g) Members of the Authority shall not receive any salary for the performance of their duties as members. Appointed members may be reimbursed for such actual expenses as may be incurred for travel and subsistence in the performance of official duties and such per diem as is allowed by law for members of other State boards, commissions and committees.

(h) The Authority shall meet quarterly and may meet more frequently upon call.

(i) The Authority may delegate to one or more of its members, officers, employees or agents such powers and duties as it may deem proper. (1983, c. 789, s. 1; 1985, c. 583, s. 2; 1985 (Reg. Sess., 1986), c. 1011, s. 1.)

§ 122D-5. Officers and employees; administration of Chapter.

(a) The Authority shall annually elect a chairman and vice-chairman from its members.

(b) The Authority may appoint an Executive Director. The salary of the Executive Director shall be set by the General Assembly in the Current Operations Appropriation Act.

(c) The Executive Director shall administer and enforce this Chapter in accordance with rules promulgated by the Authority. The Executive Director may employ such personnel as may be necessary to administer and enforce the provisions of this Chapter, subject to the approval of the Authority. All employees other than the Executive Director shall be compensated in accordance with the salary schedules adopted pursuant to the State Personnel Act. All employees shall be under the supervision of the Executive Director.

(d) The Authority may employ legal, financial and technical experts and consultants as it deems necessary on a contractual basis. (1983, c. 789, s. 1; 1985, c. 583, s. 2; 1985 (Reg. Sess., 1986), c. 1011, s. 1.)

§ 122D-6. General powers of Authority.

The Authority shall have all the powers necessary to give effect to and carry out the purposes and provisions of this Chapter, including the following powers in addition to all other powers granted by other provisions of this Chapter, to:

- (1) Sue and be sued in its own name and in the name of any subsidiary corporation or entity which may be created pursuant to paragraph (19) of this section;
- (2) Have a seal and alter the same at its pleasure;
- (3) Adopt bylaws for the internal organization and government of the Authority;
- (4) Adopt, promulgate and amend rules for the administration of the Chapter;
- (4a) Limit the definition of agricultural loan under G.S. 122D-3(1);
- (5) Make and execute contracts and all other instruments necessary or convenient for the exercise of its powers and functions under this Chapter with any federal or State governmental agency, public or private corporation, lending institution or other entity or person, and each and any North Carolina governmental agency is hereby authorized to enter into contracts and otherwise cooperate with the agency to facilitate the purposes of this Chapter;
- (6) Accept, administer and expend donations of movable or immovable property from any source, and receive, administer and expend appropriations from the legislature and financial assistance, guarantees, insurance or subsidies from the federal or State government;
- (7) Subject to the rights of holders of bonds of the Authority, to renegotiate, refinance or foreclose on any mortgage, security interest or lien; or commence any action to protect or enforce any right or benefit conferred upon the Authority by any law, mortgage, security interest or lien; or commence any action to protect or enforce any right or benefit conferred upon the Authority by any law, mortgage, security interest, lien, contract or other agreement; and bid for and purchase property at any foreclosure or at any other sale or otherwise acquire or take possession of any property; and in any such event, the Authority may complete, administer, pay the principal of and interest on any obligation incurred in connection with such property, dispose of and otherwise deal with such property in such manner as may be necessary or desirable to protect the interest of the Authority or of holders of its bonds therein;
- (8) Procure or provide for the procurement of insurance or reinsurance against any loss in connection with its property or operations, including but not limited to insurance, reinsurance or other guarantees from any federal or State governmental agency or private insurance company for the payment of any bonds issued by the Authority, or bond, notes or any other obligations or evidences of indebtedness issued or made by any subsidiary corporation or entity created pursuant to subdivision (19) of this section or by any lending institution or other entity or person, or insurance or reinsurance against loss with respect to agricultural loans, mortgages or mortgage loans, or any other type of loans, including the power to pay premiums on such insurance or reinsurance;

- (9) Make, insure, coinsure, reinsure, or cause to be insured, coinsured or reinsured, agricultural loans, mortgage loans or mortgages, or any other type of loans and pay or receive premiums on such insurance, coinsurance or reinsurance, and establish reserves for losses, and participate in the insurance, coinsurance or reinsurance of agricultural loans, mortgage loans or mortgages, or any other type of loans with the federal or State government or any private insurance company;
- (10) Undertake and carry out or authorize the completion of studies and analyses of agricultural conditions and needs within the State and needs relating to the promotion of agricultural exports and ways of meeting such needs, and make such studies and analyses available to the public and to the agricultural industry, and to engage in research or disseminate information on agriculture and agricultural exports;
- (11) Accept federal, State or private financial or technical assistance and comply with any conditions for such assistance, proved such conditions are not in conflict with the intent of this Chapter;
- (12) Establish, pay and collect fees and charge in connection with its loans, deposits, insurance commitments and services, including but not limited to, reimbursement of costs of issuing bonds, origination and servicing fees, and insurance premiums;
- (13) Make loans to or deposits with lending institutions and purchase or sell agricultural loans;
- (14) Acquire or contract to acquire from any person, firm, corporation, municipality, federal or State agency, by grant, purchase or otherwise, movable or immovable property or any interest therein; own, hold, clear, improve, lease, construct or rehabilitate, and sell, invest, assign, exchange, transfer, convey, lease, mortgage or otherwise dispose of or encumber the same, subject to the rights of holders of the bonds of the Authority, at public or private sale, with or without public bidding;
- (15) Borrow money, issue bonds, and provide for the rights of the lenders or holders thereof and purchase, discount, sell, negotiate and guarantee, insure, coinsure and reinsure note, drafts, checks, bills of exchange, acceptances, bankers acceptances, cable transfers, letters of credit and other evidence of indebtedness;
- (16) Subject to the rights of holders of the bonds of the Authority, consent to any modification with respect to the rate of interest, time, payment of any installment of principal or interest, security or any other term or condition of any loan, contract, mortgage, mortgage loan or commitment therefor or agreement of any kind to which the Authority is a party or beneficiary;
- (17) Maintain an office at such place or places as the Authority shall determine;
- (18) Serve as the beneficiary of any public trust;
- (19) After reporting to the agriculture committees of the House of Representatives and the Senate, to create such subsidiary corporations or entities as may be necessary to borrow money, insure or reinsure agricultural loans, or issue bonds in the international financial market; and
- (20) Purchase or participate in the purchase and enter into commitments by itself or together with others for the purchase of federally issued securities; provided that the proceeds of such securities will be utilized in accordance with the provisions of this Chapter. (1983, c. 789, s. 1; 1985 (Reg. Sess., 1986), c. 1011, s. 1.)

Editor's Note. — The phrase "federally insured securities" in subdivision (20) was apparently intended to read "federally insured securities."

§ 122D-7. Purchases and sales of agricultural loans.

The Authority may purchase or contract to purchase and sell or contract to sell agricultural loans made by lending institutions. All lending institutions are hereby authorized to purchase and sell agricultural loans to the Authority in accordance with the provisions of this Chapter and the rules and regulations of the Authority. To the extent that any provisions of this section may be inconsistent with any provision of law governing lending institutions, the provisions of this section shall control. (1985 (Reg. Sess., 1986), c. 1011, s. 1.)

§ 122D-8. Loans to and deposits with lending institutions.

The Authority may make, or contract to make, loans to and deposits with lending institutions. All lending institutions may borrow funds and accept deposits from the Authority in accordance with the provisions of this Chapter and the rules and regulations of the Authority. The Authority shall require that all proceeds of its loans to or deposits with lending institutions, or an equivalent amount, shall be used by such lending institutions to make agricultural loans, subject to such terms and conditions as the Authority may prescribe. To the extent that any provisions of this section may be inconsistent with any provision of the law governing lending institutions, the provisions of this section shall control. (1983, c. 789, s. 1; 1985 (Reg. Sess., 1986), c. 1011, s. 1.)

§ 122D-9. Insurance of agricultural loans.

(a) The Authority may insure and reinsure agricultural loans made by lending institutions, subject to the terms, conditions, limitations, collateral and security provisions, and reserve requirements as shall be determined by the Authority in accordance with the rules adopted by the Authority.

(b) Unless otherwise determined by the Authority, insurance of agricultural loans shall be in the amount of one hundred percent (100%) of the unpaid principal and interest on each loan.

(c) An insured agricultural loan shall be in default when the holder of such loan makes application to the Authority for payment of insurance on such loan stating that such loan is in default in accordance with the terms of any agreement with respect to such insurance executed pursuant to this section.

(d) The Authority may enter into agreements with any person, lending institution or holder of an insured agricultural loan upon such terms as may be agreed upon between the Authority and such person, lending institution, or holder, to provide for the administration, applications therefor, repayment thereof, and to establish the conditions for payment of insurance by the Authority, and the servicing, suit upon, or foreclosure of insured agricultural loans.

(e) The aggregate value of all agricultural loans insured by the Authority and outstanding at any one time shall not exceed 20 times the total value of funds, investments, properties and other assets of the Authority except that this insurance may be further expanded by use of federal, state or private loan insurance, reinsurance, or guarantees of which the Authority is or shall become the beneficiary. (1985 (Reg. Sess., 1986), c. 1011, s. 1.)

§ 122D-10. Bonds of the Authority.

(a) The Authority may issue from time to time bonds, notes, bond anticipation notes, renewal notes, refunding bonds, interim certificates, certificates of indebtedness, debentures, warrants, commercial paper or other obligations or evidences of indebtedness, hereinafter collectively referred to as "bonds", to provide funds for and to fulfill and achieve its authorized public functions or corporate purposes, as set forth in this Chapter, including, but not limited to, the purchase of agricultural loans from lending institutions, the making of loans to or deposits with lending institutions, the payment of interest on bonds of the Authority, the establishment of reserves to secure such bonds, the establishment of reserves with respect to the insurance of agricultural loans, and all other purposes and expenditures of the Authority incident to and necessary or convenient to carry out its public functions or corporate purposes.

(b) Except as may otherwise be provided by the Authority, all bonds issued by the Authority shall be negotiable instruments and may be general obligations of the Authority, secured by the full faith and credit of the Authority and payable out of any money, assets or revenues of the Authority or from any other sources whatsoever that may be available to the Authority. Obligations issued under the provisions of this Chapter shall not be deemed to constitute a debt, liability or obligation of the State or of any political subdivision thereof or a pledge of the faith and credit of the State or of any such political subdivision, but shall be payable solely from the revenues or assets of the Authority. Each obligation issued under this Chapter shall contain on the face thereof a statement to the effect that the Authority shall not be obligated to pay the same nor the interest thereon except from the revenues or assets pledged therefor and that neither the faith and credit nor the taxing power of the State or of any political subdivision thereof is pledged to the payment of the principal of or the interest on such obligation.

(c) Bonds shall be authorized, issued and sold by a resolution or resolutions of the Authority adopted as provided in this Chapter. Such bonds may be of such series, bear such date or dates, mature at such time or times, bear interest at such rate or rates including variable, adjustable or zero interest rates, be payable at such time or times, be in such denominations, be sold at such price or prices, at public or private negotiated sale, be in such form, carry such registration and exchangeability privileges, be payable at such place or places, be subject to such terms of redemption, and be entitled to such priorities on the income, revenue and receipts of, or available to, the Authority as may be provided by the Authority in the resolution or resolutions providing for the issuance and sale of the bonds of the Authority.

(d) The bonds of the Authority shall be signed by such members or officers of the Authority, by either manual or facsimile signatures, as shall be determined by resolution or resolutions of the Authority, and shall have impressed or imprinted thereon the seal of the Authority, or a facsimile thereof. The coupons attached to coupon bonds of the Authority shall bear the facsimile signature of such member or officer of the Authority as shall be determined by resolution or resolutions of the Authority. The Authority may also provide for the authentication of the bonds, notes or coupons by a trustee or fiscal agent.

(e) Any bonds of the Authority may be validly issued, sold and delivered, notwithstanding that one or more of the members or officers of the Authority signing such bonds, or whose facsimile signature or signatures may be on the bonds or on coupons, shall have ceased to be such member or officer of the Authority at the time such bonds shall actually have been delivered.

(f) Bonds of the Authority may be sold for such price in such manner and from time to time as may be determined by the Authority to be most beneficial, and the Authority may pay all expenses, premiums, fees or commissions

which it may deem necessary or advantageous in connection with the issuance and sale thereof, subject to the provisions of this Chapter.

(g) The bonds or notes may be issued in coupon or in registered form, or both, as the Agency may determine, and provision may be made for the registration of any coupon bonds or notes as to principal alone and also as to both principal and interest, and for the reconversion into coupon bonds or notes of any bonds or notes registered as to both principal and interest, and for the interchange of registered and coupon bonds or notes.

(h) Prior to the preparation of definitive bonds, the Authority may, under like restrictions, issue interim receipts or temporary bonds, with or without coupons, exchangeable for definitive bonds when such bonds shall have been executed and are available for delivery. The Authority may also provide for the replacement of any bonds or notes which shall become mutilated or shall be destroyed or lost.

(i) Bonds or notes may be issued under the provisions of this Chapter without obtaining, except as otherwise expressly provided in this Chapter, the consent of any department, division, commission, board, body, bureau or agency of the State, and without any other proceedings or the happening of any conditions or things other than those proceedings, conditions or things which are specifically required by this Chapter and the provisions of the resolution authorizing the issuance of such bonds or notes or the trust agreement securing the same. (1983, c. 789, s. 1; 1985 (Reg. Sess., 1986), c. 1011, s. 1.)

§ 122D-11. Statutory pledge.

Any pledge made by the Authority shall be valid and binding from time to time when the pledge is made. The money, assets or revenues of the Authority so pledged and thereafter received by the Authority shall immediately be subject to the lien of such pledge without any physical delivery thereof or further act, and the lien of any pledge shall be valid and binding as against all parties having claims of any kind in tort, contract or otherwise against the Authority, irrespective of whether such parties have notice thereof. Neither the resolution nor any other instrument by which a pledge is created need be recorded or filed in order to establish and perfect a lien or security interest in the property so pledged by the Authority. Nothing herein shall be construed to prohibit the Authority from selling any assets subject to any such pledge except to the extent that any such sale may be restricted by the trust agreement or resolution providing for the issuance of such obligations. (1983, c. 789, s. 1; 1985 (Reg. Sess., 1986), c. 1011, s. 1.)

§ 122D-12. Refunding bonds.

Subject to the rights of the holders of the bonds of the Authority, the Authority may issue from time to time its bonds for the purpose of refunding any bonds of the Authority then outstanding, together with the payment of any redemption premiums thereon and interest accrued or to accrue to the date of redemption of such outstanding bonds. All such refunding bonds of the Authority shall be issued, sold or exchanged, and delivered, shall be secured, and shall be subject to the provisions of this Chapter in the same manner and to the same extent as any other bonds issued by the Authority pursuant to this Chapter, unless otherwise determined by resolution of the Authority. Refunding bonds issued by the Authority as herein provided may be sold or exchanged for outstanding bonds of the Authority and, if sold, the proceeds

thereof may be applied, in addition to any other authorized purposes, to the purchase, redemption or payment of such outstanding bonds.

Pending the application of the proceeds of any such refunding obligations, with any other available funds, to the payment of the principal, accrued interest and any redemption premium on the obligations being refunded, and, if so provided or permitted in the resolution authorizing the issuance of such refunding obligations or in the trust agreement securing the same, to the payment of any interest on such refunding obligations and any expenses in connection with such refunding, such proceeds may be invested in direct obligations of, or obligations the principal of and the interest on which are unconditionally guaranteed by, the United States of America which shall mature or which shall be subject to redemption by the holders thereof, at the option of such holders, not later than the respective dates when the proceeds, together with the interest accruing thereon, will be required for the purposes intended. (1983, c. 789, s. 1; 1985 (Reg. Sess., 1986), c. 1011, s. 1.)

§ 122D-13. Purchase of bonds by Authority.

Subject to the rights of holders of bonds, the Authority shall have the power out of any funds available therefor, to purchase bonds of the Authority, which shall thereupon be cancelled, at a price not exceeding:

- (1) If the bonds are then subject to optional redemption, the optional redemption price then applicable plus accrued interest to the next interest payment date thereon; or
- (2) If the bonds are not then subject to optional redemption, the optional redemption price applicable on the first date after such purchase upon which the notes or bonds become subject to optional redemption plus accrued interest to such date. (1985 (Reg. Sess., 1986), c. 1011, s. 1.)

§ 122D-14. Exemption from taxes.

The exercise of the powers granted by this Chapter will be in all respects for the benefit of the people of the State, for their well-being and prosperity and for the improvement of their social and economic conditions, and the Authority shall not be required to pay any tax or assessment on any property owned by the Authority under the provisions of this Chapter or upon the income therefrom.

Any obligations issued by the Authority under the provisions of this Chapter, their transfer and the income therefrom (including any profit made on the sale thereof), shall at all times be free from taxation by the State or any local unit or political subdivision or other instrumentality of the State, excepting inheritance or gift taxes. (1985 (Reg. Sess., 1986), c. 1011, s. 1.)

§ 122D-15. Covenant of State.

In consideration of the acceptance of and payment for the bonds of the Authority by the holders thereof, the State does hereby pledge to and agree with the holders of any bonds of the Authority issued pursuant to the provisions of this Chapter, that the State will not impair, limit or alter the rights hereby vested in the Authority to fulfill the terms of any agreements made with the holders of the bonds of the Authority, or in any way impair the rights or remedies of such holders thereof, until such bonds, together with the inter-

est thereon, with interest on any unpaid installments of interest, and all costs and expenses in connection with any action or proceedings by or on behalf of such holders, are fully met and discharged. The Authority is authorized to include this pledge and agreement of the State in any agreement with the holders of bonds of the Authority. (1983, c. 789, s. 1; 1985 (Reg. Sess., 1986), c. 1011, s. 1.)

§ 122D-16. Trust funds.

Notwithstanding any other provisions of law to the contrary, all moneys received pursuant to the authority of this Chapter shall be deemed to be trust funds to be held and applied solely as provided in this Chapter. The resolution authorizing any obligations or the trust agreement securing the same may provide that any of such moneys may be temporarily invested pending the disbursement thereof and shall provide that any officer with whom, or any bank or trust company with which, such moneys shall be deposited, shall act as trustee of such moneys and shall hold and apply the same for the purposes hereof, subject to such regulations as this Chapter and such resolution or trust agreement may provide. Any such moneys or any other moneys of the Authority may be invested as provided in G.S. 159-28.1. (1983, c. 789, s. 1; 1985 (Reg. Sess., 1986), c. 1011, s. 1.)

§ 122D-17. Bonds as legal investment and security for public deposits.

Obligations issued under the provisions of this Chapter are hereby made securities in which all public officers and public bodies of the State and its political subdivisions, all insurance companies, trust companies, banking associations, investment companies, executors, administrators, trustees and other fiduciaries may properly and legally invest funds, including capital in their control or belonging to them. Such obligations are hereby made securities which may properly and legally be deposited with and received by any State or municipal officer or any agency or political subdivision of the State for any purpose for which the deposit of bonds, notes or obligations of the State is now or may hereafter be authorized by law. (1983, c. 789, s. 1; 1985 (Reg. Sess., 1986), c. 1011, s. 1.)

§ 122D-18. Account and audits.

(a) Subject to the provisions of any contract with the holders of its bonds, the Authority shall establish a system of accounts.

(b) The Authority may cause an independent audit of its books and accounts to be prepared annually and the cost thereof may be paid from any available moneys of the Authority.

(c) Within six months after the end of each fiscal year, the Authority shall submit to the Governor and to the General Assembly an annual report on the operations of the Authority. Within 60 days after receipt thereof, the Authority shall submit to the Governor and to the General Assembly a copy of the report of every audit of the books and accounts of the Authority. (1983, c. 789, s. 1; 1985 (Reg. Sess., 1986), c. 1011, s. 1.)

§ 122D-19. Cooperation of State agencies.

All State officers and agencies may render such services to the Authority within their respective functions as may be requested by the Authority. (1985 (Reg. Sess., 1986), c. 1011, s. 1.)

§ 122D-20. Construction of Chapter.

This Chapter, being necessary for the welfare of the State and its residents, shall be liberally construed to effect the purposes thereof. (1983, c. 789, s. 1; 1985 (Reg. Sess., 1986), c. 1011, s. 1.)

§ 122D-21. Termination of the Authority.

In the event of the termination of the Authority, all of its rights, money, assets and revenues in excess of its obligations shall be deposited in the general fund. (1985 (Reg. Sess., 1986), c. 1011, s. 1.)

§ 122D-22. Severability.

The provisions of this Chapter are severable, and if any provision of this Chapter is held invalid by a court of competent jurisdiction, the invalidity shall not affect other provisions of this Chapter which can be given effect without the invalid provision. (1983, c. 789, s. 1; 1985 (Reg. Sess., 1986), c. 1011, s. 1.)

Chapter 126.

State Personnel System.

Article 1.

State Personnel System Established.

Sec.

126-4. Powers and duties of State Personnel Commission.

126-5. Employees subject to Chapter; exemptions.

Article 2.

Salaries and Leave of State Employees.

126-8.1. Paid leave for certain athletic competition.

Article 8.

Employee Appeals of Grievances and Disciplinary Action.

Sec.

126-37. Personnel Director to investigate, hear and recommend settlement; Personnel Commission to hear or review findings and make binding decision.

ARTICLE 1.

State Personnel System Established.

§ 126-4. Powers and duties of State Personnel Commission.

Subject to the approval of the Governor, the State Personnel Commission shall establish policies and rules governing each of the following:

- (1) A position classification plan which shall provide for the classification and reclassification of all positions subject to this Chapter according to the duties and responsibilities of the positions.
- (2) A compensation plan which shall provide for minimum, maximum, and intermediate rates of pay for all employees subject to the provisions of this Chapter.
- (3) For each class of positions, reasonable qualifications, as to age, character, physical condition, and other attributes pertinent to the work to be performed.
- (4) A recruitment program to attract applicants to public employment and determine the relative fitness of applicants for the respective positions.
- (5) Hours and days of work, holidays, vacation, sick leave, and other matters pertaining to the conditions of employment.
- (6) The appointment, promotion, transfer, demotion and suspension.
- (7) Cooperation with the Department of Public Instruction, the State Board of Education, the Board of Governors of the University of North Carolina, and the colleges and universities of the State in developing pre-service and in-service training programs.
- (7a) The separation of employees.
- (8) The evaluation of employee performance, the granting of salary increments, and a program of meritorious service awards.
- (9) The investigation of complaints and the hearing of appeals of applicants, employees, and former employees and the issuing of such binding corrective orders or such other appropriate action concerning employment, promotion, demotion, transfer, discharge, and reinstatement in all cases as the Commission shall find justified. "Reinstatement" as used in this subdivision refers to the reemployment of a former State employee who separated from service in good standing.

- (10) Such other programs and procedures as may be necessary to promote efficiency of administration and provide for a fair and reasonable system of personnel administration. This subdivision may not be construed to authorize the establishment of an incentive pay program.
- (11) In cases where the Commission finds discrimination or orders reinstatement or back pay whether (i) heard by the Commission or (ii) appealed for limited review after settlement or (iii) resolved at the agency level, the assessment of reasonable attorneys' fees and witnesses' fees against the State agency involved.
- (12) The appointment of hearing officers to hear appeals at various locations around the State as provided for in Article 3 of Chapter 150A, and the relationship of the record made by such hearing officers to proceedings by the Commission.
- (13) The employment of independent attorneys to represent the Department when some conflict would result from using Department of Justice attorneys.
- (14) The implementation of G.S. 126-5(e).
- (15) Recognition of State employees, public personnel management, and management excellence.

Such policies and rules shall not limit the power of any elected or appointed department head, in his discretion and upon his determination that it is in the best interest of the Department, to transfer, demote, or separate a State

- (1) Employee in a grade 60 or lower position who has not been continuously employed by the State of North Carolina for the immediate 12 preceding months;
- (2) Employee in a grade 61 to grade 65 position who has not been continuously employed by the State of North Carolina for the immediate 36 preceding months;
- (3) Employee in a grade 66 to grade 70 position who has not been continuously employed by the State of North Carolina for the immediate 48 preceding months; or
- (4) Employee in a grade 71 or higher position who has not been continuously employed by the State of North Carolina for the immediate 60 preceding months. (1965, c. 640, s. 2; 1971, c. 1244, s. 14; 1975, c. 667, ss. 6, 7; 1977, c. 288, s. 1; c. 866, ss. 1, 17, 20; 1985, c. 617, ss. 2, 3; c. 791, s. 50(b); 1985 (Reg. Sess., 1986), c. 1028, s. 6.)

Editor's Note. —

Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 47 provides: "Notwithstanding the provisions of G.S. 126-4(1) the number of administrative law judges and employees of the Office of Administrative Hearings, their classifications, and their grades shall be as established by the General Assembly."

Session Laws 1985 (Reg. Sess., 1986), c. 1028, ss. 3-5 provide: "Sec. 3. The Governor's Commission for Recognition of State Employees, created by Executive Order Number 53 dated October 5, 1980, is abolished. The State Personnel Commission is authorized to perform the functions of this Commission.

"Sec. 4. The Advisory Board for the Public Management Program, created by Executive Order Numbers 32 and 89, dated June 6, 1979, and January 11, 1983, respectively, is abol-

ished. The State Personnel Commission is authorized to perform the functions of this Board.

"Sec. 5. The Committee for Recognition of Management Excellence, created by Executive Order Number 94 dated July 1, 1983, is abolished. The State Personnel Commission is authorized to perform the functions of this Committee."

Session Laws 1985 (Reg. Sess., 1986), c. 1028, s. 39 provides that ss. 1-31 of the act shall not affect pending litigation.

Session Laws 1985 (Reg. Sess., 1986), c. 1028, s. 38 is a severability clause.

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective thirty days after ratification, added subdivision (15) in the first paragraph. The act was ratified July 16, 1986.

CASE NOTES

Stated in *Gibbs v. Department of Human Resources*, — N.C. App. —, 335 S.E.2d 924 (1985).

Cited in *Leiphart v. North Carolina School of Arts*, — N.C. App. —, 342 S.E.2d 914 (1986).

§ 126-5. Employees subject to Chapter; exemptions.

(c) Except as to the policies, rules, and plans established by the Commission pursuant to G.S. 126-4(1), 126-4(2), 126-4(3), 126-4(4), 126-4(5), 126-4(6), and 126-7, and except as to the provisions of Articles 6 and 7 of this Chapter, the provisions of this Chapter shall not apply to:

- (1) An employee of the State of North Carolina who:
 - a. is in a grade 60 or lower position and has not been continuously employed by the State of North Carolina for the immediate 12 preceding months;
 - b. is in a grade 61 to grade 65 position and has not been continuously employed by the State of North Carolina for the immediate 36 preceding months;
 - c. is in a grade 66 to grade 70 position and has not been continuously employed by the State of North Carolina for the immediate 48 preceding months; or
 - d. is in a grade 71 or higher position and has not been continuously employed by the State of North Carolina for the immediate 60 preceding months.
- (2) One confidential assistant and two confidential secretaries for each elected or appointed department head and one confidential secretary for each chief deputy or chief administrative assistant.
- (3) Employees in policymaking positions designated as exempt pursuant to G.S. 126-5(d).
- (4) The chief deputy or chief administrative assistant to the head of each State department who is designated either by statute or by the department head to act for and perform all of the duties of such department head during his absence or incapacity.

(c1) Except as to the provisions of Articles 6 and 7 of this Chapter, the provisions of this Chapter shall not apply to:

- (1) Constitutional officers of the State.
- (2) Officers and employees of the Judicial Department.
- (3) Officers and employees of the General Assembly.
- (4) Members of boards, committees, commissions, councils, and advisory councils compensated on a per diem basis.
- (5) Officials or employees whose salaries are fixed by the General Assembly, or by the Governor, or by the Governor and Council of State, or by the Governor subject to the approval of the Council of State.
- (6) Employees of the Office of the Governor that the Governor, at any time, in his discretion, exempts from the application of the provisions of this Chapter by means of a letter to the State Personnel Director designating these employees.
- (7) Employees of the Office of the Lieutenant Governor, that the Lieutenant Governor, at any time, in his discretion, exempts from the application of the provisions of this Chapter by means of a letter to the State Personnel Director designating these employees.
- (8) Instructional and research staff, physicians, and dentists of The University of North Carolina.
- (9) Employees whose salaries are fixed under the authority vested in the Board of Governors of The University of North Carolina by the provisions of G.S. 116-11(4), 116-1(5) [116-11(5)], and 116-14.

- (10) Employees of community colleges whose salaries are fixed in accordance with the provisions of G.S. 115D-5 and G.S. 115D-20.
- (11) North Carolina School of Science and Mathematics' employees whose salaries are fixed in accordance with the provisions of G.S. 116-235(c)(1) and G.S. 116-235(c)(2).
- (c2) The provisions of this Chapter shall not apply to:
- (1) Public school superintendents, principals, teachers, and other public school employees.
 - (2) Recodified as G.S. 126-5(c)(4) by Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 41, effective July 1, 1985.
- (c3) Except as to the policies, rules, and plans established by the Commission pursuant to G.S. 126-4(4), 126-4(5), and 126-4(6), and except as to the provisions of Articles 6 and 7 of this Chapter, the provisions of this Chapter shall not apply to: Teaching and related educational classes of employees of the Department of Correction, the Department of Human Resources, and any other State department, agency, or institution, whose salaries shall be set in the same manner as set for corresponding public school employees in accordance with Chapter 115C of the General Statutes.
- (h) In case of dispute as to whether an employee is subject to the provisions of this Chapter, the question shall be investigated by the State Personnel Office, and the dispute shall be resolved as provided in Article 3 of Chapter 150B. (1965, c. 640, s. 2; 1967, c. 24, s. 20; cc. 1038, 1143; 1969, c. 982; 1971, c. 1025, s. 2; 1973, c. 476, s. 143; 1975, c. 667, ss. 8, 9; 1977, c. 866, ss. 2-5; 1979, 2nd Sess., c. 1137, s. 40; 1983, c. 717, s. 41; c. 867, s. 2; 1985, c. 589, s. 38; c. 617, s. 1; c. 757, s. 206(c); 1985 (Reg. Sess., 1986), c. 955, s. 43; c. 1014, ss. 41, 235; c. 1022, s. 9.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. —

Section 1 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "This act may be cited as the Separation of Powers Act of 1986."

Section 127 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "If any part of this act shall be declared invalid by any court, this shall not affect any other part of this act."

Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 243, contains a severability clause.

Effect of Amendments. —

Session Laws 1985 (Reg. Sess., 1986), c. 955, s. 43, effective July 1, 1986, deleted "or consultation with the Advisory Budget Commission" at the end of subdivision (c1)(5).

Session Laws 1985 (Reg. Sess., 1986), c. 1014, ss. 41 and 235 effective July 1, 1985, recodified subdivision (c2)(2) as subdivision (c)(4), and added subsection (c3).

Session Laws 1985 (Reg. Sess., 1986), c. 1022, s. 9, effective July 15, 1986, rewrote subsection (h).

ARTICLE 2.

Salaries and Leave of State Employees.

§ 126-7. Performance salary increases for State employees.

Editor's Note. —

Section 37(e) of Session Laws 1985 (Reg. Sess., 1986), c. 1014, provides: "Notwithstanding the provisions of Section 19.1 of Chapter 1137 of the 1979 Session Laws as amended by Chapter 1053 of the 1981 Session Laws, G.S. 115C-12(9)a., G.S. 115C-12(16), G.S. 126-7, or

any other provision of law other than G.S. 20-187.3(a) or G.S. 7A-102(c), no employee or officer of the public school system shall receive an automatic increment and no State employee or officer shall receive a merit increment during the 1986-87 fiscal year, except as otherwise permitted by this act."

§ 126-8.1. Paid leave for certain athletic competition.

(c) The Department of Administration may adopt such rules and regulations as are reasonable and necessary to carry out the provisions of this section, with the approval of the Governor. Prior to taking any action under this section, the Governor may consult with the Advisory Budget Commission. (1979, c. 708; 1983, c. 717, s. 42; 1985 (Reg. Sess., 1986), c. 955, ss. 44, 45.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. —

Section 1 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "This act may be cited as the Separation of Powers Act of 1986."

Section 127 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "If any part of this act

shall be declared invalid by any court, this shall not affect any other part of this act."

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective July 1, 1986, deleted "after consultation with the Advisory Budget Commission" at the end of the first sentence of subsection (c) and added the second sentence of subsection (c).

ARTICLE 8.

Employee Appeals of Grievances and Disciplinary Action.

§ 126-35. Written statement of reason for disciplinary action.

CASE NOTES

The purpose of this section is to provide the employee with a written statement of the reasons for his discharge so that the employee may effectively appeal his discharge. *Leiphart v. North Carolina School of Arts*, — N.C. App. —, 342 S.E.2d 914 (1986).

This section was designed to prevent the employer from summarily discharging an employee and then searching for justifiable reasons for the dismissal. *Leiphart v. North Carolina School of Arts*, — N.C. App. —, 342 S.E.2d 914 (1986).

A State employee who could be discharged only for cause had a property interest of continued employment created by state law and protected by the Due Process Clause of the United States Constitution. *Leiphart v. North Carolina School of Arts*, — N.C. App. —, 342 S.E.2d 914 (1986).

This section establishes a condition precedent that must be fulfilled by the employer before disciplinary actions are taken: The employer must provide the employee with a written statement enumerating specific acts or reasons for the disciplinary action and containing a statement of the employee's appeal rights. *Leiphart v. North Carolina School of Arts*, — N.C. App. —, 342 S.E.2d 914 (1986).

Reduced in Position. — An employee is reduced in position within the meaning of this

section when he is placed in a lower paygrade. *Gibbs v. Department of Human Resources*, — N.C. App. —, 335 S.E.2d 924 (1985).

Prior to dismissal, etc. —

The requirement of this section is that a permanent state employee is entitled to three separate warnings giving notice that his performance is unsatisfactory. *Parks v. Department of Human Resources*, — N.C. App. —, 338 S.E.2d 826 (1986).

Grounds for Dismissal. — A permanent state employee may be dismissed for (1) inadequate performance of duties or, (2) personal conduct detrimental to state service. *Leiphart v. North Carolina School of Arts*, — N.C. App. —, 342 S.E.2d 914 (1986).

When Finding of Just Cause Is Required. — A finding of just cause is not required unless the employee is discharged, suspended, or reduced in pay or position. *Gibbs v. Department of Human Resources*, — N.C. App. —, 335 S.E.2d 924 (1985).

Written Notice at Time of Dismissal. — When an employee is being dismissed for personal misconduct, the requirement of timely written notice has been met where the written statement of the reasons for dismissal is given to the employee simultaneously with his dismissal. *Leiphart v. North Carolina School of Arts*, — N.C. App. —, 342 S.E.2d 914 (1986).

Contents of Notice of Dismissal. — The notice of dismissal need not explain every step in the appeal process. Rather, it must inform the employee of his right to appeal. *Leiphart v. North Carolina School of Arts*, — N.C. App. —, 342 S.E.2d 914 (1986).

This section requires that the acts or omissions be described with sufficient particularity so that the discharged employee will know precisely what acts or omissions were the basis of his discharge. *Leiphart v. North Carolina School of Arts*, — N.C. App. —, 342 S.E.2d 914 (1986).

Opportunity to Respond. — A State employee who has a right to continued employment subject to dismissal for just cause is entitled to a predetermination opportunity to respond. *Leiphart v. North Carolina School of Arts*, — N.C. App. —, 342 S.E.2d 914 (1986).

Impartial Decision Maker. — A public employee facing an administrative hearing is entitled to an impartial decision maker. However, to make out a due process claim based on this theory, an employee must show that the decision making board or individual possesses a disqualifying personal bias. *Leiphart v. North Carolina School of Arts*, — N.C. App. —, 342 S.E.2d 914 (1986).

Dean's consultation with members of the State Personnel Commission prior to dismissing petitioner could not be said to have deprived him of an impartial hearing where petitioner failed to show any disqualifying personal bias on the part of the decision makers

because of familiarity with the facts of his case. *Leiphart v. North Carolina School of Arts*, — N.C. App. —, 342 S.E.2d 914 (1986).

School's failure to follow its internal review process did not automatically entitle petitioner to reversal of dismissal determination. In order to claim any relief based on a violation of internal appeal procedures, petitioner would have had to show that there was a substantial chance there would have been a different result in his case if the established internal procedures had been followed. *Leiphart v. North Carolina School of Arts*, — N.C. App. —, 342 S.E.2d 914 (1986).

Dismissal Upheld. — Dismissal of petitioner from position as Director of Student Activities in the Student Services Department at the North Carolina School of the Arts for personal misconduct involving his role is assembling a meeting of other division directors to discuss complaints about their superior, the Dean of Student Services, in the absence of the Dean, would be upheld. *Leiphart v. North Carolina School of Arts*, — N.C. App. —, 342 S.E.2d 914 (1986).

Dismissal Held Unjustified. — Dismissal of superintendent of the Department of Correction's Treatment Facility for Women (TFW) in Charlotte, a minimum custody prison or "halfway house", on grounds of insubordination held not justified under the evidence. *Kandler v. Department of Cor.*, — N.C. App. —, 342 S.E.2d 910 (1986).

§ 126-37. Personnel Director to investigate, hear and recommend settlement; Personnel Commission to hear or review findings and make binding decision.

The State Personnel Director or any other person or persons designated by the Commission shall investigate the disciplinary action or alleged discrimination which is appealed to the Commission. Appeals involving a disciplinary action, alleged discrimination, and any other contested case arising under this Chapter shall be conducted in the Office of Administrative Hearings as provided in Article 3 of Chapter 150B; provided that no grievance may be appealed unless the employee has complied with G.S. 126-34. The State Personnel Commission shall make a final decision in these cases as provided in G.S. 150B-36. The State Personnel Commission is hereby authorized to reinstate any employee to the position from which he has been removed, to order the employment, promotion, transfer, or salary adjustment of any individual to whom it has been wrongfully denied or to direct other suitable action to correct the abuse which may include the requirement of payment for any loss of salary which has resulted from the improperly discriminatory action of the appointing authority. The decisions of the State Personnel Commission shall be binding in appeals of local employees subject to this Chapter if the Commission finds that the employee has been subjected to discrimination prohibited by Article 6 of this Chapter or in any case where a binding decision is

required by applicable federal standards. However, in all other local employee appeals, the decisions of the State Personnel Commission shall be advisory to the local appointing authority. An action brought in superior court by an employee who is dissatisfied with an advisory decision of the State Personnel Commission or with the action taken by the local appointing authority pursuant to the decision shall be heard upon the record and not as a trial de novo. (1975, c. 667, s. 10; 1981, c. 680, s. 1; 1985, c. 746, s. 15; 1985 (Reg. Sess., 1986), c. 1022, s. 10.)

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, ef-

fective July 15, 1986, rewrote the second sentence.

Chapter 128.

Offices and Public Officers.

Article 3.

Retirement System for Counties, Cities and Towns.

Sec.
128-27. Benefits.

ARTICLE 2.

Removal of Unfit Officers.

§ 128-16. Officers subject to removal; for what offenses.

CASE NOTES

A proceeding under this article is neither a civil nor criminal action. State v. Felts, — N.C. App. —, 339 S.E.2d 99 (1986).

Attorney General Is Not Authorized to Bring an Action under This Article. — Neither §§ 114-2(1) of 114-11.6 or § 128-17 gives the Attorney General or his designate the authority to file an action pursuant to this article. State v. Felts, — N.C. App. —, 339 S.E.2d 99 (1986).

But Is Limited to Advising District Attorney. — The Attorney General or his designate

is given no specific authority to file an action under this article in place of the district authority or the county attorney. Absent this statutory authorization, the Attorney General is limited to consulting with and advising the district attorney in carrying out his statutory duty to initiate a petition for removal from office of a sheriff or police officer. State v. Felts, — N.C. App. —, 339 S.E.2d 99 (1986), expressing no opinion on whether the Attorney General could have brought a similar action under his common law powers.

§ 128-17. Petition for removal; county attorney to prosecute.

CASE NOTES

Who May File Petition for Removal. — The clear language of this section specifies that only three classes of persons may file a petition for removal: (1) Five qualified electors, upon the approval of the county attorney or district attorney; (2) the county attorney; or (3) the district attorney. State v. Felts, — N.C. App. —, 339 S.E.2d 99 (1986).

Attorney General Is Not Authorized to Bring an Action under This Article. — This section does not give the Attorney General or his designate the authority to file an action pursuant to this article. State v. Felts, — N.C. App. —, 339 S.E.2d 99 (1986).

Neither § 114-2(1) nor § 114-11.6 authorizes the Attorney General or his designate to bring a proceeding under this article for removal of a sheriff or police officer. State v. Felts, — N.C. App. —, 339 S.E.2d 99 (1986).

Nor May He Be Delegated Such Authority. — There is no provision in this article authorizing the district attorney or the county attorney to delegate to the Attorney General his duty to file the petition. State v. Felts, — N.C. App. —, 339 S.E.2d 99 (1986).

§ 128-18. Petition filed with clerk; what it shall contain; answer.

CASE NOTES

Quoted in *State v. Felts*, — N.C. App. —, 339 S.E.2d 99 (1986).

ARTICLE 3.

Retirement System for Counties, Cities and Towns.

§ 128-27. Benefits.

(bb) From and after July 1, 1986, the retirement allowance to or on account of beneficiaries whose retirement commenced on or before July 1, 1985, shall be increased by three and eight-tenths percent (3.8%) of the allowance payable on July 1, 1985, in accordance with G.S. 128-27(k). Furthermore, from and after July 1, 1986, the retirement allowance to or on account of beneficiaries whose retirement commenced after July 1, 1985, but before June 30, 1986, the retirement allowance to or on account of beneficiaries whose retirement commenced after July 1, 1985, but before June 30, 1986, shall be increased by a prorated amount of three and eight-tenths percent (3.8%) of the allowance payable as determined by the Board of Trustees based upon the number of months that a retirement allowance was paid between July 1, 1985, and June 30, 1986. (1939, c. 390, s. 7; 1945, c. 526, s. 4; 1951, c. 274, ss. 4-6; 1955, c. 1153, ss. 4-6; 1957, c. 855, ss. 1-4; 1959, c. 491, ss. 5-8; 1961, c. 515, ss. 2, 6, 7; 1965, c. 781; 1967, c. 978, ss. 3-7; 1969, c. 442, ss. 7-14; c. 898; 1971, c. 325, ss. 12-16, 19; c. 326, ss. 3-7; 1973, c. 243, ss. 3-7; c. 244, ss. 1-3; c. 816, s. 4; c. 994, ss. 2, 4; c. 1313, ss. 1, 2; 1975, c. 486, ss. 1, 2; c. 621, ss. 1, 2; 1975, 2nd Sess., c. 983, ss. 126-128; 1977, 2nd Sess., c. 1240; 1979, c. 862, ss. 2, 6, 7; c. 974, s. 1; c. 1063, s. 2; 1979, 2nd Sess., c. 1196, s. 2; cc. 1213, 1240; 1981, c. 672, s. 2; c. 689, s. 1; c. 940, s. 1; c. 975, s. 2; c. 978, ss. 3, 4; c. 980, ss. 1, 2; c. 981, ss. 1, 2; 1981 (Reg. Sess., 1982), c. 1284, ss. 1, 2; 1983, c. 467; c. 761, ss. 226, 227; 1983 (Reg. Sess., 1984), c. 1019, s. 1; c. 1044; c. 1049, ss. 1-3; c. 1086; 1985, c. 138; c. 348, s. 2; c. 479, s. 196(i)-(n); c. 520, s. 2; c. 649, ss. 8, 10; c. 751, ss. 1-4, 6; c. 791, s. 56; 1985 (Reg. Sess., 1986), c. 1014, s. 49(d).)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. —

Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 243, contains a severability clause.

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective July 1, 1986, added subsection (bb).

Chapter 130A.

Public Health.

Article 8.

Sanitation.

Part 6. Regulation of Food and Lodging Facilities.

Sec.

130A-250. Exemptions; rules regulating bed and breakfast establishments.

Article 9.

Solid Waste Management.

130A-294. Solid waste management program.

Article 16.

Postmortem Investigation and Disposition.

Part 6. Final Disposition or Transportation of Deceased Migrant Agricultural Workers and Their Dependents.

130A-419 to 130A-421. [Reserved.]

Article 17.

Childhood Vaccine-Related Injury Compensation Program.

130A-422. Definitions.

130A-423. North Carolina Childhood Vaccine-Related Injury Compensation Program; exclusive remedy.

130A-424. Industrial Commission authorized to hear and determine claims; damages.

Sec.

130A-425. Filing of claims.

130A-426. Determination of claims.

130A-427. Commission awards for vaccine-related injuries; duties of Secretary of Human Resources.

130A-428. Notice of determination of claim; appeal to full Commission.

130A-429. Limitation of claims.

130A-430. Right of State to bring action against health care provider and manufacturer.

130A-431. Certain sales of vaccine made misdemeanor.

130A-432. Scope.

130A-433. Contracts for purchase of vaccines; distribution; fee; rules.

130A-434. Child Vaccine Injury Compensation Fund established; payments from Fund; transfer of appropriations and receipts.

130A-435 to 130A-439. [Reserved.]

Article 18.

Health Assessments for Kindergarten Children in the Public Schools.

130A-440. (Effective July 1, 1987) Health assessment required.

130A-441. (Effective July 1, 1987) Reporting.

130A-442. (Effective July 1, 1987) Religious exemption.

130A-443. (Effective July 1, 1987) Rules.

ARTICLE 1.

Definitions, General Provisions and Remedies.

Part 1. General Provisions.

§ 130A-2. Definitions.

CASE NOTES

Cited in *In re Environmental Mgt. Comm'n*,
— N.C. App. —, 341 S.E.2d 588 (1986).

ARTICLE 2.

Local Administration.

Part 1. Local Health Departments.

§ 130A-40. Appointment of local health director.

OPINIONS OF ATTORNEY GENERAL

The discharge of a local health director torney for Cleveland County Board of Health, must comply with Chapter 126. See opinion of 55 N.C.A.G. 113 (1986).
Attorney General to Mr. Robert W. Yelton, At-

ARTICLE 8.

Sanitation.

Part 5. Migrant Housing.

§ 130A-239. Commission to regulate sanitary conditions of migrant housing.

CASE NOTES

Cited in Howard v. Malcolm, 629 F. Supp. 952 (E.D.N.C. 1986).

§ 130A-240. Permit for migrant housing; posting.

CASE NOTES

Cited in Howard v. Malcolm, 629 F. Supp. 952 (E.D.N.C. 1986).

Part 6. Regulation of Food and Lodging Facilities.

§ 130A-250. Exemptions; rules regulating bed and breakfast establishments.

This Part shall not apply to: (i) facilities which provide food or lodging to regular boarders or permanent house guests only; (ii) private clubs; (iii) curb markets operated by the State Agricultural Extension Service; and (iv) occasional fund-raising events conducted by the same person no more frequently than two consecutive days every three months. A food or drink stand operated for two weeks or less shall comply with the rules but shall not be subject to grading. A mobile food unit or pushcart shall comply with the rules and shall be operated in conjunction with a permitted restaurant but shall not be subject to grading.

This Part shall not apply to private homes offering bed and breakfast accommodations to eight or less persons per night until such time as the Health Services Commission adopts rules regulating them in accordance with this Part. The Commission is authorized and directed to adopt reasonable rules pursuant hereto to become effective no later than July 1, 1984. (1955, c. 1030, s. 4; 1957, c. 1214, s. 3; 1983, c. 884, ss. 1, 2; c. 891, s. 2; 1985 (Reg. Sess., 1986), c. 926.)

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 7, 1986, added present clause (iii) in the first sentence

of the first paragraph and redesignated former clause (iii) as clause (iv).

ARTICLE 9.

Solid Waste Management.

§ 130A-294. Solid waste management program.

(j) The Commission may adopt rules for financial responsibility (including requirements for sufficient availability of funds for facility closure and post-closure monitoring and corrective measures, and for potential liability for sudden and nonsudden accidental occurrences), which may permit the use of insurance, financial tests, third-party guarantees by persons who can pass the financial test, guarantees by corporate parents who can pass the financial test, irrevocable letters of credit, trusts, surety bonds, or any other financial device, or any combination of the foregoing, shown to provide protection equivalent to the financial protection that would have been provided by insurance if insurance were the only mechanism used. The Department may provide a copy of any filing to meet the financial responsibility requirements to the State Treasurer, who shall review the filing and provide written comments on the equivalency of protection provided by the filing, including recommended changes. (1969, c. 899; 1973, c. 476, s. 128; 1975, c. 311, s. 4; c. 764, s. 1; 1977, c. 123; 1977, 2nd Sess., c. 1216; 1979, c. 464, s. 2; c. 694, s. 2; 1981, c. 704, s. 6; 1983, c. 795, ss. 3, 8.1; c. 891, s. 2; 1983 (Reg. Sess., 1984), c. 973, ss. 6, 7; c. 1034, s. 73; 1985, c. 582; c. 738, ss. 2, 3; 1985 (Reg. Sess., 1986), c. 1027, s. 31.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. —

Session Laws 1985 (Reg. Sess., 1986), c. 1027, s. 57, contains a severability clause.

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective July 16, 1986, added subsection (j).

ARTICLE 10.

North Carolina Drinking Water Act.

§ 130A-311. Short title.

CASE NOTES

Cited in In re Environmental Mgt. Comm'n,
— N.C. App. —, 341 S.E.2d 588 (1986).

§ 130A-312. Purpose.

CASE NOTES

Cited in In re Environmental Mgt. Comm'n,
— N.C. App. —, 341 S.E.2d 588 (1986).

§ 130A-315. Drinking water rules.

CASE NOTES

Cited in In re Environmental Mgt. Comm'n,
— N.C. App. —, 341 S.E.2d 588 (1986).

§ 130A-316. Department to examine waters.

CASE NOTES

Cited in In re Environmental Mgt. Comm'n,
— N.C. App. —, 341 S.E.2d 588 (1986).

ARTICLE 16.

Postmortem Investigation and Disposition.

Part 1. Postmortem Medicolegal Examinations and Services.

§ 130A-380. The Chief Medical Examiner's staff.

CASE NOTES

<p>Expert Testimony. — In a prosecution for murder, the witness' position as Assistant Medical Examiner and his testimony regarding the number of other cases he had seen indi-</p>	<p>cated sufficient expertise such that the trial court did not err in admitting his opinion of the cause of death. <i>State v. Hamilton</i>, — N.C. App. —, 335 S.E.2d 506 (1985).</p>
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Part 6. Final Disposition or Transportation of Deceased Migrant Agricultural Workers and Their Dependents.

§§ 130A-419 to 130A-421: Reserved for future codification purposes.

ARTICLE 17.

Childhood Vaccine-Related Injury Compensation Program.

§ 130A-422. Definitions.

The following definitions apply throughout this Article, unless the context clearly implies otherwise:

- (1) "Claimant" means any person who files a claim for compensation for a vaccine-related injury pursuant to G.S. 130A-425(b). In the case of a minor or incompetent, a claim may be filed by a guardian ad litem, parent, guardian, or other legal representative; and, in the case of a decedent, the claim may be filed by an administrator, executor, or other legal representative.
In the event that more than one person claims to have suffered compensable injuries as the result of the administration of a covered vaccine to a single individual, all these persons shall be treated for purposes of this Article as if they were a single claimant. A single joint claim shall be filed on behalf of all these persons, and the limitations on awards set forth in G.S. 130A-427(b) apply to that joint claim or subsequent joint action as if it were a claim filed on behalf of a single individual.
- (2) "Commission" means the North Carolina Industrial Commission.
- (3) "Covered vaccine" means a vaccine administered pursuant to the requirements of G.S. 130A-152.
- (4) "Respondent" means the person or entity the claimant identifies in the claim as the agent of causality of the vaccine-related injury.
- (5) "Vaccine-related injury", with respect to persons engaged in the manufacture, distribution, or sale, or administration of a covered vaccine, means any injury, disability, illness, death, or condition caused by the vaccine. "Vaccine-related injury" shall not mean any injury, disability, illness, death, or condition caused by the method of injection of the vaccine into the body. (1985 (Reg. Sess., 1986), c. 1008, s. 1.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1008, s. 5 makes this Article effective October 1, 1986, and provides that it shall expire on October 1, 1989.

Session Laws 1985 (Reg. Sess., 1986), c. 1008, s. 3(c) provides: "Of the funds appropriated to the Department of Human Resources, Division of Medical Assistance, for fiscal year 1986-87, the Secretary may use up to one hun-

dred thousand dollars (\$100,000) as start up funds needed to implement this act and as reimbursement to health care providers and facilities operated by the Department of Human Resources, or under contract with the Department to provide health care to low income children and their families."

Session Laws 1985 (Reg. Sess., 1986), c. 1008, s. 4 is a severability clause.

§ 130A-423. North Carolina Childhood Vaccine-Related Injury Compensation Program: exclusive remedy.

(a) There is established the North Carolina Childhood Vaccine-Related Injury Compensation Program.

(b) The rights and remedies granted the claimant, the claimant's parent, guardian ad litem, guardian, or personal representative shall exclude all other rights and remedies of the claimant, his parent, guardian ad litem, guardian, or personal representative against any respondent at common law or otherwise on account of such injury, illness, disability, death, or condition. If such an action is filed, it shall be dismissed, with prejudice, on the motion of any party under law. (1985 (Reg. Sess., 1986), c. 1008, s. 1.)

§ 130A-424. Industrial Commission authorized to hear and determine claims; damages.

The North Carolina Industrial Commission is authorized to hear and pass upon all claims filed pursuant to this Article. The members of the Commission, or a deputy thereof, have power to issue subpoenas, administer oaths, conduct hearings, take evidence, enter orders, opinions, settlements, and awards, and punish for contempt. The Commission may appoint deputies and clerical assistants to carry out the purpose and intent of this Article, and this deputy or deputies are vested with the same power and authority to hear and determine claims filed pursuant to this Article as is by this Article vested in the members of the Commission. (1985 (Reg. Sess., 1986), c. 1008, s. 1.)

§ 130A-425. Filing of claims.

(a) Notwithstanding any other provision of State law, no action for compensation for a vaccine-related injury may be filed against any person unless that person was named as a respondent in a claim filed pursuant to this section and unless the claim was filed within the applicable time period set forth in G.S. 130A-429.

(b) In all claims filed pursuant to this Article, the claimant or the person in whose behalf the claim is made shall file with the Commission a verified petition in duplicate, setting forth the following information:

- (1) The name and address of the claimant;
- (2) The name and address of each respondent;
- (3) The amount of compensation in money and services sought to be recovered;
- (4) The time and place where the injury occurred;
- (5) A brief statement of the facts and circumstances surrounding the injury and giving rise to the claim.

Upon receipt of this verified petition in duplicate, the Commission shall enter the case upon its hearing docket and shall determine the matter in the county where the injury occurred unless the parties agree or the Commission directs that the case may be heard in some other county. All parties shall be given reasonable notice of the date when and the place where the claim will be heard. Immediately upon receipt of the claim, the Commission shall serve a copy of the verified petition on each respondent by registered or certified mail. The Commission shall also send a copy of the verified petition to the Secretary of Human Resources, who shall be a party to all proceedings involving the

claim, and to the Attorney General who shall represent the State's interest in all the proceedings involving the claim.

The Commission shall adopt rules necessary to govern the proceedings required by this Article. The Commission shall keep a record of all proceedings conducted under this Article, and has the right to subpoena any persons and records it considers necessary in making its determinations. The Commission may require all persons called as witnesses to testify under oath or affirmation, and any member of the Commission may administer oaths. If any person refuses to comply with any subpoena issued pursuant to this Article or to testify with respect to any matter relevant to proceedings conducted under this Article, the Superior Court of Wake County, on application of the Commission, may issue an order requiring the person to comply with the subpoena and to testify. Any failure to obey any such order may be punished by the court as for contempt. (1985 (Reg. Sess., 1986), c. 1008, s. 1.)

§ 130A-426. Determination of claims.

(a) The Commission shall determine, on the basis of the evidence presented to it, the following issues:

- (1) Whether any injuries alleged in the claim are vaccine-related injuries; and
- (2) How much compensation, if any, is awardable pursuant to G.S. 130A-427.

(b) If the Commission determines pursuant to subsection (a) of this section that the injuries alleged in the claim are not vaccine-related injuries, it shall render a decision denying any compensation. If the Commission decides that any of the injuries are vaccine-related injuries it shall make an award pursuant to guidelines it establishes specifically adopted to relate to vaccine-related injuries. (1985 (Reg. Sess., 1986), c. 1008, s. 1.)

§ 130A-427. Commission awards for vaccine-related injuries; duties of Secretary of Human Resources.

(a) Upon determining that a claimant has sustained a vaccine-related injury, the Commission shall make an award providing compensation or services for any or all of the following:

- (1) Actual and projected reasonable expenses of medical care, developmental evaluation, special education, vocational training, physical, emotional or behavioral therapy, and residential and custodial care and service expenses, that cannot be provided by the Department of Human Resources pursuant to subdivision (5) of this subsection;
- (2) Loss of earnings and projected earnings, determined in accordance with generally accepted actuarial principles;
- (3) Noneconomic, general damages arising from pain, suffering, and emotional distress;
- (4) Reasonable attorneys fees;
- (5) Needs that the Secretary of Human Resources determines on a case-by-case basis shall be met by medical, health, developmental evaluation, special education, vocational training, physical, emotional, or behavioral therapy, residential and custodial care, and other essential and necessary services, to be provided the injured party by the programs and services administered by the Department. The Secretary of Human Resources shall develop an itemized list of the service needs of the injured party upon review and evaluation of the injured

party's medical record and shall present it to the Commission prior to the Commission's determination. In the event that the Commission's award includes the provision of any of these services, the Secretary shall develop a comprehensive, coordinated plan for the delivery of these services to the injured party. Notwithstanding any other provision of State law, the Secretary shall waive all eligibility criteria in determining eligibility for services provided by the Department under the plan of care developed pursuant to this subdivision. If the award includes any such services, these services shall be provided by the Department free of any cost to the injured party.

(b) The money compensation component of the award may not be made pursuant to this section in excess of an aggregate amount of the present day value amount of three hundred thousand dollars (\$300,000) with respect to all injuries claimed to have resulted from the administration of a covered vaccine to a single individual. The value of all services to be provided by the Department of Human Resources, as part of this award is in addition to the total amount of money compensation, and is not included in the limitation prescribed by this subsection on the amount of money compensation that may be awarded. No damages may be awarded pursuant to subdivision (a)(3) on behalf of any person to whom the covered vaccine was not administered. (1985 (Reg. Sess., 1986), c. 1008, s. 1.)

§ 130A-428. Notice of determination of claim; appeal to full commission.

(a) Decisions of the Commission pursuant to G.S. 130A-427 shall be final and binding on the claimant and each respondent.

(b) Notwithstanding subsection (a), upon determination of the claim, the Commission shall notify all parties concerned in writing of its decision and any party shall have 15 days after receipt of such notice within which to file notice of appeal with the Commission. This appeal, when so taken, shall be heard by the Commission, sitting as a full commission, on the basis of the record in the matter and upon oral argument of the parties, and the full commission may amend, set aside, or strike out the decision of the hearing commissioner and any issue its own findings of fact and conclusions of law. Upon determination of the claim by the Commission, sitting as a full commission, the Commission shall notify all parties concerned in writing of its decision.

(c) The decision of the Commission, if not reviewed in due time, or an award of the Commission, shall be conclusive and binding as to all questions of fact; but any party to the proceedings may, within 30 days from the date of the decision or award, or within 30 days after receipt of notice to be sent by registered mail or certified mail of the award, but not thereafter, appeal from the decision or award of the Commission to the Court of Appeals for errors of law under the same terms and conditions as govern appeals from the Superior Court to the Court of Appeals in ordinary civil actions. The procedure for the appeal shall be as provided by the Rules of Appellate Procedure. (1985 (Reg. Sess., 1986), c. 1008, s. 1.)

§ 130A-429. Limitation on claims.

(a) Except as provided in subsection (b) of this section, any claim under this Article that is filed more than six years after the administration of a vaccine alleged to have caused a vaccine-related injury is barred. Claims on behalf of minors or incompetent persons shall be filed by their parents, guardians ad litem, or guardians within the applicable limitations period established by this section.

(b) Claims that are filed in accordance with the procedures set forth in G.S. 130A-425(b) within six years after the date of the enactment of this Article shall not be barred unless, on the date the claim was filed, the claimant was barred by the applicable statute of limitations from filing an action for damages with respect to the subject matter of the claim. (1985 (Reg. Sess., 1986), c. 1008, s. 1.)

§ 130A-430. Right of State to bring action against health care provider and manufacturer.

(a) If the Industrial Commission makes an award for a claimant who it determines has sustained a vaccine-related injury, the State may, within two years of the date the Commission renders its decision, bring an action against the health care provider who administered the vaccine on the ground that the health care provider was negligent in administering the vaccine. Damages in an action brought under this section are limited to the amount of the award made by the Commission plus the estimated present value of all the services to be provided to the claimant by the Department of Human Resources under G.S. 130A-427.

(b) Manufacturer. — If the Industrial Commission makes an award for a claimant who it determines has sustained a vaccine-related injury, the State may, within two years of the date the Commission renders its decision, bring an action against the manufacturer who made the vaccine on the ground that the vaccine was a defective product. Damages in an action brought under this section are limited to the amount of the award made by the Commission plus the estimated present value of all the services to be provided to the claimant by the Department of Human Resources under G.S. 130A-427, the reasonable costs of prosecuting the action, including, but not limited to, attorneys' fees, fees charged by witnesses, and costs of exhibits. (1985 (Reg. Sess., 1986), c. 1008, s. 1.)

§ 130A-431. Certain sales of vaccine made misdemeanor.

A health care provider who receives a vaccine from the State and who gives or sells the vaccine to another, other than in the course of administering the vaccine, is guilty of a general misdemeanor. (1985 (Reg. Sess., 1986), c. 1008, s. 1.)

§ 130A-432. Scope.

This Article applies to all claims for vaccine-related injuries occurring on and after October 1, 1986, and, at the option of the claimant, to claims for vaccine-related injuries that occurred before October 1, 1986, if such claim has not been resolved by final judgment or by settlement agreement or is not barred by a statute of limitations.

This Article applies only to claims for vaccine-related injuries which occur in this State. (1985 (Reg. Sess., 1986), c. 1008, s. 1.)

§ 130A-433. Contracts for purchase of vaccines; distribution; fee; rules.

Notwithstanding any law to the contrary, the Secretary of Human Resources may enter into contracts with the manufacturers and suppliers of covered vaccines for the purchase of covered vaccines and shall distribute or sell the covered vaccines to health care providers and facilities within the State. The Secretary may charge a fee for providing a covered vaccine to a health care provider. The fee shall be set at an amount that covers the cost of the vaccine to the Department, plus the cost to the Department of storing and distributing the vaccine. The Secretary shall adopt rules to implement this article. (1985 (Reg. Sess., 1986), c. 1008, s. 2.)

§ 130A-434. Child Vaccine Injury Compensation Fund established; payments from Fund; transfer of appropriations and receipts.

(a) There is established the Child Vaccine Injury Compensation Fund within the Department of Human Resources to finance the North Carolina Childhood Vaccine-Related Injury Compensation Program created by this Article. The money compensation components of all awards made pursuant to Article 17 of Chapter 130A of the General Statutes shall be paid by the Department of Human Resources from the Fund.

(b) Should the Department of Human Resources find that the sum of appropriations and receipts is insufficient to meet financial obligations incurred by the Department in the administration of this Article, the Department may transfer appropriations and receipts which would otherwise revert to the General Fund in order to meet such obligations. The Department of Human Resources may also budget anticipated receipts as needed to implement this Article. (1985 (Reg. Sess., 1986), c. 1008, s. 3(a) and 3(b).)

§§ 130A-435 to 130A-439: Reserved for future codification purposes.

ARTICLE 18.

Health Assessments for Kindergarten Children in the Public Schools.

(This Article is effective July 1, 1987)

§ 130A-440. (Effective July 1, 1987) Health assessment required.

(a) Every child in this State entering kindergarten in the public schools shall receive a health assessment. The health assessment shall be made between the first of January prior to school entry and the 31st of December after school entry.

(b) A health assessment shall include a medical history and physical examination with screening for vision and hearing and, if appropriate, testing for anemia and tuberculosis. The health assessment may also include developmental screening which may include cognition, language, and motor function.

(c) The health assessment shall be conducted by a physician licensed to practice medicine, a certified nurse practitioner, or a public health nurse meeting the North Carolina Division of Health Services' Standards for Early Periodic Screening, Diagnosis, and Treatment Screening.

(d) This Article shall not apply to children entering kindergarten in private church schools, schools of religious charter, or qualified nonpublic schools, regulated by Article 39 of Chapter 115 of the General Statutes. (1985 (Reg. Sess., 1986), c. 1017, s. 1.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1017, s. 2 makes this Article effective July 1, 1987.

The reference in subsection (e) of this section

to Article 39 of Chapter 115 would appear to have been intended to refer to Article 39 of Chapter 115C.

§ 130A-441. (Effective July 1, 1987) Reporting.

Health assessment results shall be submitted to the school principal by the medical provider on forms developed by the Department of Human Resources and the Department of Public Instruction.

(a) Each school having a kindergarten shall maintain on file the health assessment results. The files shall be open to inspection by the Department of Human Resources, the Department of Public Instruction or their authorized representatives and persons inspecting the files shall maintain the confidentiality of the files. Upon transfer of a child to another kindergarten, a copy of the health assessment results shall be provided upon request and without charge to the new kindergarten.

(b) Within 90 days after the commencement of a new school year, the principal shall file a health assessment status report with the Department of Public Instruction on forms developed by the Department of Human Resources and the Department of Public Instruction. The report shall document the number of children in compliance and not in compliance with G.S. 130A-440(a). (1985 (Reg. Sess., 1986), c. 1017, s. 1.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1017, s. 2 makes this Article effective July 1, 1987.

§ 130A-442. (Effective July 1, 1987) Religious exemption.

If the bona fide religious beliefs of the parent, guardian or person in loco parentis of a child are contrary to the health assessment requirements contained in this Article, this Article shall not apply to the child. Upon submission of a written statement of the bona fide religious beliefs and opposition to the health assessment requirements, the child may attend kindergarten without submitting a health assessment report. (1985 (Reg. Sess., 1986), c. 1017, s. 1.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1017, s. 2 makes this Article effective July 1, 1987.

§ 130A-443. (Effective July 1, 1987) Rules.

Rules governing the contents for health assessment reports, the procedure for reporting under this Article, and those persons authorized to inspect the files shall be developed jointly by the Department of Public Instruction and the Commission for Health Services and shall be adopted by the Commission for Health Services. 1985 (Reg. Sess., 1986), c. 1017, s. 1.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1017, s. 2 makes this Article effective July 1, 1987.

Chapter 131E.

Health Care Facilities and Services.

Article 2.

Public Hospitals.

Part A. Municipal Hospitals.

Sec.

131E-8.1. Maintenance of Health Education Facilities.

Article 9.

Certificate of Need.

131E-176. (Effective until January 1, 1988) Definitions.

Sec.

131E-176. (Effective January 1, 1988) Definitions.

131E-178. Activities requiring certificate of need.

131E-181. Nature of certificate of need.

131E-190. Enforcement and sanctions.

ARTICLE 2.

Public Hospitals.

Part A. Municipal Hospitals.

§ 131E-8.1. Maintenance of Health Education Facilities.

(c) The municipality or hospital authority may provide continued access to the identical or equivalent facilities suitable for continuation of AHEC activities, including all services being provided under the existing operating contract. The municipality or hospital authority may convey all ownership rights in the hospital facility, or any part thereof, to the local AHEC Program without monetary consideration. Further, the municipality or hospital authority may reimburse the local AHEC Program for any funds used for the original construction of any office for AHEC provided by AHEC to establish or continue the hospital facility.

(1983 (Reg. Sess., 1984), c. 1056, s. 1; 1985 (Reg. Sess., 1986), c. 995.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 12, 1986, substituted the present second and third sentences of subsection (c) for the former sec-

ond sentence thereof, which read, "In the case of a free standing portion of the hospital facility, the municipality or hospital authority may convey all ownership rights in the facility to the local AHEC Program without monetary consideration."

ARTICLE 5.

Hospital Licensure Act.

§ 131E-76. Definitions.

CASE NOTES

A board of trustees is not within the contemplation of subdivision (5), which defines a medical review committee. *Shelton v.*

Morehead Mem. Hosp., — N.C. App. —, 332 S.E.2d 499 (1985).

Part B. Hospital Privileges.

§ 131E-85. Hospital privileges and procedures.

CASE NOTES

Medical Practitioner's Right to Have Application for Staff Privileges Considered by Hospital. — A medical practitioner is not granted the right to have his application for staff privileges considered by a hospital if the hospital's governing board has made a decision to deny further staff privilege requests which is reasonably related to the operation of the hospital, consistent with its responsibility as a community hospital, and administered fairly; however, if the defendant hospital's actions are

determined to be unreasonable or irrational, the plaintiff is entitled under this section to have his application for staff privileges reviewed and a decision, granting or denying him staff privileges, based on the other criteria provided in this section. *Claycomb v. HCA-Raleigh Community Hosp.*, — N.C. App. —, 333 S.E.2d 333 (1985) (decided under former § 131-126.11A).

Cited in *Cooper v. Forsyth County Hosp. Auth.*, 789 F.2d 278 (4th Cir. 1986).

Part D. Medical Review Committee.

§ 131E-95. Medical review committee.

CASE NOTES

The minutes, proceedings, and materials held by executive committee of medical staff of hospital are not discoverable pursuant to this section. To allow plaintiffs to depose the former chief executive officer of a hospital to obtain privileged information that could not be obtained directly from the hospital would circumvent the legislative intent of this section. *Shelton v. Morehead Mem. Hosp.*, — N.C. App. —, 332 S.E.2d 499 (1985).

To allow plaintiffs to depose the former chief executive officer of a hospital to obtain privileged information that could not be obtained

directly from the hospital would circumvent the legislative intent of this section, *Shelton v. Morehead Mem. Hosp.*, — N.C. App. —, 332 S.E.2d 499 (1985).

Records of Board of Trustees. — A trial court erred in its conclusion that the minutes and records of the board of trustees of a hospital were barred from discovery pursuant to this section; the members of the board of trustees were not charged with peer review functions. *Shelton v. Morehead Mem. Hosp.*, — N.C. App. —, 332 S.E.2d 499 (1985).

ARTICLE 7.

Regulation of Ambulance Services.

§ 131E-159. Requirements for certification.

Local Modification. — Currituck, Dare:
1985 (Reg. Sess., 1986), c. 951.

ARTICLE 9.

Certificate of Need.

§ 131E-175. Findings of fact.

CASE NOTES

The purposes behind enactment of the certificate of need law were to regulate health care, so that only those services which are needed and less costly but more effective are made available to the public. In re Denial of Request by Humana Hosp. Corp., Inc., — N.C. App. —, 338 S.E.2d 139 (1986), decided under former § 131-175.

The certificate of need requirements represent, etc. —

In enacting the certificate of need law, the legislature found as facts that the forces of free market competition are largely absent in health care, and that government regulation is therefore necessary to control the cost, utilization, and distribution of health services and to assure that less costly and more effective alternatives are made available. In re Denial of Request by Humana Hosp. Corp., Inc., — N.C. App. —, 338 S.E.2d 139 (1986), decided under former §§ 131-175 and 131-181.

Right to Fair Review Secured. — The Certificate of Need Law secures to applicants the right to a fair review of an application and not the absolute right to a certificate of need. In re Denial of Request by Humana Hosp. Corp., Inc., — N.C. App. —, 338 S.E.2d 139 (1986), decided under former § 131-175.

Allegation of Priority Status Without Merit. — The certificate of need Section should not be foreclosed from carrying out the purposes and intent of the certificate of need law by an alleged priority status obtained by an applicant being the only one of several applicants to exercise its rights to judicial review. In re Denial of Request by Humana Hosp. Corp., Inc., — N.C. App. —, 338 S.E.2d 139 (1986), decided under former §§ 131-175 and 131-181.

Appeal of Denial Held Moot. — Appeal brought by hospital corporation seeking a certificate of need, in which appellant contended that the Section committed violations of its own administrative procedures in a 1981 review process and in denying appellant's application for a reconsideration hearing on its 1981 application, was moot where appellant was afforded an adequate remedy for the alleged errors in the 1981 review process by its participation in a 1982 review process of an application requesting approval of a virtually identical proposal. In re Denial of Request by Humana Hosp. Corp., Inc., — N.C. App. —, 338 S.E.2d 139 (1986), decided under former § 131-175.

§ 131E-176. (Effective until January 1, 1988) Definitions.

As used in this Article, unless the context clearly requires otherwise, the following terms have the meanings specified:

- (1) "Ambulatory surgical facility" means a facility designed for the provision of an ambulatory surgical program. An ambulatory surgical facility serves patients who require local, regional or general anesthesia and a period of post-operative observation. An ambulatory surgical facility may only admit patients for a period of less than 24 hours and must provide at least one designated operating room and at least

one designated recovery room, have available the necessary equipment and trained personnel to handle emergencies, provide adequate quality assurance and assessment by an evaluation and review committee, and maintain adequate medical records for each patient. An ambulatory surgical facility may be operated as a part of a physician or dentist's office, provided the facility is licensed under G.S. Chapter 131E, Article 6, Part D, but the performance of incidental, limited ambulatory surgical procedures which do not constitute an ambulatory surgical program as defined in subdivision (1a) and which are performed in a physician or dentist's office does not make that office an ambulatory surgical facility.

- (1a) "Ambulatory surgical program" means a formal program for providing on a same-day basis those surgical procedures which require local, regional or general anesthesia and a period of post-operative observation to patients whose admission for more than 24 hours is determined, prior to surgery, to be medically unnecessary.
- (2) "Bed capacity" means space used exclusively for inpatient care, including space designed or remodeled for licensed inpatient beds even though temporarily not used for such purposes. The number of beds to be counted in any patient room shall be the maximum number for which adequate square footage is provided as established by regulations of the Department except that single beds in single rooms are counted even if the room contains inadequate square footage.
- (2a) "Capital expenditure" means an expenditure which under generally accepted accounting principles is not properly chargeable as an expense of operation and maintenance.
- (3) "Certificate of need" means a written order of the Department setting forth the affirmative findings that a proposed project sufficiently satisfies the plans, standards, and criteria prescribed for such projects by this Article and by rules and regulations of the Department as provided in G.S. 131E-183(a) and which affords the person so designated as the legal proponent of the proposed project the opportunity to proceed with the development of such project.
- (4) "Certified cost estimate" means an estimate of the total cost of a project certified by the proponent of the project within 60 days prior to or subsequent to the date of submission of the proposed new institutional health service to the Department and which is based on:
 - a. Preliminary plans and specifications;
 - b. Estimates of the cost of equipment certified by the manufacturer or vendor; and
 - c. Estimates of the cost of management and administration of the project.
- (5) "Change in bed capacity" means (i) any increase in the total number of beds, or (ii) any relocation of beds from one physical facility or site to another, or (iii) a decrease in the total number of beds when that decrease involves a capital expenditure exceeding the expenditure minimum as defined in subdivision (16)b of this section, or (iv) a redistribution of beds among different categories when that redistribution involves a capital expenditure exceeding the expenditure minimum as defined in subdivision (16)b of this section. For purposes of this subdivision "beds" means beds in hospitals, rehabilitation facilities, psychiatric facilities, chemical dependency treatment facilities, intermediate care facilities, skilled nursing facilities and intermediate care facilities for the mentally retarded.
- (5a) "Chemical dependency treatment facility" means a public or private facility, or unit in a facility, which is engaged in providing 24-hour a

day treatment for chemical dependency or substance abuse. This treatment may include detoxification, administration of a therapeutic regimen for the treatment of chemically dependent or substance abusing persons and related services. The facility or unit may be:

- a. A unit within a general hospital or an attached or freestanding unit of a general hospital licensed under Article 5, Chapter 131E, of the General Statutes,
 - b. A unit within a psychiatric hospital or an attached or freestanding unit of a psychiatric hospital licensed under Article 1A of General Statutes Chapter 122 or Article 2 of General Statutes Chapter 122C,
 - c. A freestanding facility specializing in treatment of persons who are substance abusers or chemically dependent licensed under Article 1A of General Statutes Chapter 122 or Article 2 of General Statutes Chapter 122C;
- and may be identified as "chemical dependency, substance abuse, alcoholism, or drug abuse treatment units," "residential chemical dependency, substance abuse, alcoholism or drug abuse facilities," "social setting detoxification facilities" and "medical detoxification facilities," or by other names if the purpose is to provide treatment of chemically dependent or substance abusing persons, but shall not include halfway houses or recovery farms.
- (6) "Department" means the North Carolina Department of Human Resources.
 - (7) To "develop" when used in connection with health services, means to undertake those activities which will result in the offering of institutional health service not provided in the previous 12-month reporting period or the incurring of a financial obligation in relation to the offering of such a service.
 - (8) "Final decision" means an approval, an approval with conditions, or denial of an application for a certificate of need.
 - (9) "Health care facilities" means hospitals; psychiatric facilities, skilled nursing facilities; kidney disease treatment centers, including free-standing hemodialysis units; intermediate care facilities, including intermediate care facilities for the mentally retarded or persons with related conditions; rehabilitation facilities; home health agencies; chemical dependency treatment facilities, and ambulatory surgical facilities.
 - (10) "Health maintenance organization (HMO)" means a public or private organization which has received its certificate of authority under Chapter 57B of the General Statutes and which either is a qualified health maintenance organization under Section 1310(d) of the Public Health Service Act or:
 - a. Provides or otherwise makes available to enrolled participants health care services, including at least the following basic health care services: usual physician services, hospitalization, laboratory, X ray, emergency and preventive services, and out-of-area coverage;
 - b. Is compensated, except for copayments, for the provision of the basic health care services listed above to enrolled participants by a payment which is paid on a periodic basis without regard to the date the health care services are provided and which is fixed without regard to the frequency, extent, or kind of health service actually provided; and
 - c. Provides physicians' services primarily (i) directly through physicians who are either employees or partners of such organizations,

or (ii) through arrangements with individual physicians or one or more groups of physicians organized on a group practice or individual practice basis.

- (11) "Health systems agency" means an agency, as defined by Title XV of the Public Health Service Act, as amended, and rules and regulations implementing that act.
- (12) "Home health agencies" means a private organization or public agency, whether owned or operated by one or more persons or legal entities, which furnishes or offers to furnish home health services. "Home health services" means items and services furnished to an individual by a home health agency, or by others under arrangements with such others made by the agency, on a visiting basis, and except for paragraph e of this subdivision, in a place of temporary or permanent residence used as the individual's home as follows:
- a. Part-time or intermittent nursing care provided by or under the supervision of a registered nurse;
 - b. Physical, occupational or speech therapy;
 - c. Medical social services, home health aid services, and other therapeutic services;
 - d. Medical supplies, other than drugs and biologicals and the use of medical appliances;
 - e. Any of the foregoing items and services which are provided on an outpatient basis under arrangements made by the home health agency at a hospital or nursing home facility or rehabilitation center and the furnishing of which involves the use of equipment of such a nature that the items and services cannot readily be made available to the individual in his home, or which are furnished at such facility while he is there to receive any such item or service, but not including transportation of the individual in connection with any such item or service.
- (13) "Hospital" means a public or private institution which is primarily engaged in providing to inpatients, by or under supervision of physicians, diagnostic services and therapeutic services for medical diagnosis, treatment, and care of injured, disabled, or sick persons, or rehabilitation services for the rehabilitation of injured, disabled, or sick persons. The term includes all facilities licensed pursuant to G.S. 131E-77 of the General Statutes.
- (13a) "Hospice" means any coordinated program of home care within provision for inpatient care for terminally ill patients and their families. This care is provided by a medically directed interdisciplinary team, directly or through an agreement under the direction of an identifiable hospice administration. A hospice program of care provides palliative and supportive medical and other health services to meet the physical, psychological, social, spiritual and special needs of patients and their families, which are experienced during the final stages of terminal illness and during dying and bereavement.
- (14) "Intermediate care facility" means a public or private institution which provides, on a regular basis, health-related care and services to individuals who do not require the degree of care and treatment which a hospital or skilled nursing facility is designed to provide, but who because of their mental or physical condition require health-related care and services above the level of room and board.
- (14a) "Intermediate care facility for the mentally retarded" means facilities licensed pursuant to Article 2 of Chapter 122C of the General Statutes for the purpose of providing health and habilitative services based on the developmental model and principles of normalization for

persons with mental retardation, autism, cerebral palsy, epilepsy or related conditions.

- (15) "Major medical equipment" means a single unit or a single system of components with related functions which is used to provide medical and other health services and which costs more than six hundred thousand dollars (\$600,000). In determining whether medical equipment costs more than six hundred thousand dollars (\$600,000), the costs of studies, surveys, designs, plans, working drawings, specifications and other activities essential to acquiring the equipment shall be included. If the equipment is acquired for less than fair market value, the cost shall be deemed to be the fair market value.
- (16) "New institutional health services" means:
- a. The construction, development, or other establishment of a new health care facility;
 - b. The obligation by or on behalf of a health care facility or a local health department established under Article 2 of Chapter 130A of the General Statutes of any capital expenditure, other than one to acquire an existing health care facility, which exceeds the expenditure minimum. Further, increases in approved capital expenditures, if they exceed the expenditure minimum, are also new institutional health services. The expenditure minimum is one million dollars (\$1,000,000) for the 12-month period beginning October 1, 1985. For each 12-month period thereafter the expenditure minimum shall be the figure in effect for the preceding 12-month period, adjusted to reflect the change in the preceding 12-month period in the Department of Commerce Composite Construction Cost Index. The cost of any studies, surveys, designs, plans, working drawings, specifications, and other activities, including staff effort and consulting and other services, essential to the acquisition, improvement, expansion, or replacement of any plant or equipment with respect to which an expenditure is made shall be included in determining if the expenditure exceeds the expenditure minimum;
 - c. The obligation of a capital expenditure by or on behalf of a health care facility when it is associated with a change in bed capacity and within the limits set forth in G.S. 131E-176(5);
 - d. The obligation of any capital expenditure by or on behalf of a health care facility which is associated with the addition of a health service which was not offered by or on behalf of the facility within the previous 12 months or with the termination of a health service which was offered in or through the facility;
 - e. A change in a project which was subject to review under paragraphs a, b, c, or d of this subdivision and for which a certificate of need had been issued, if the change is proposed within one year after the project was completed. For the purposes of this paragraph, a change in a project is a change in bed capacity, the addition of a health service, or the termination of a health service, regardless of whether a capital expenditure is associated with the change;
 - f. The offering of a health service by or on behalf of a health care facility if the service was not offered by or on behalf of the health care facility in the previous 12 months and if the annual operating costs of the service equal or exceed the expenditure minimum. The expenditure minimum for annual operating costs is two hundred fifty thousand dollars (\$250,000) for the 12-month period beginning October 1, 1979. For each 12-month period

thereafter the expenditure minimum shall be the figure in effect for the preceding 12-month period, adjusted to reflect the change in the preceding 12-month period in the Department of Commerce Composite Construction Cost Index;

- g. The acquisition by any person of major medical equipment that will be owned by or located in a health care facility or the acquisition by any person of major medical equipment that includes magnetic resonance imaging, regardless of ownership or location.
- h. The acquisition by any person of major medical equipment not owned by or located in a health care facility if notice of the acquisition is not filed with the Department in accordance with rules promulgated by the Department, or the Department, within 30 days after receipt of the notice, finds that the equipment will be used to provide services to inpatients of a hospital, excluding use on a temporary basis in the case of a natural disaster, a major accident, or equipment failure, or the Department, within 30 days after receipt of the notice, finds that the major medical equipment is among the types enumerated in g. above;
- i. The use, excluding use on a temporary basis in the case of a natural disaster, a major accident, or equipment failure, of major medical equipment which was acquired without a certificate of need, to treat inpatients of a hospital;
- j. The obligation of a capital expenditure by any person to acquire an existing health care facility, if a notice of intent is not filed with the Department in accordance with rules promulgated by the Department, or the Department, within 30 days after receipt of the notice of intent, finds that there will be a change in bed capacity, the addition of a health service not offered by or on behalf of the facility within the previous 12 months, or the termination of a health service which was offered by or on behalf of the facility;
- k. A change in bed capacity, the addition of a health service which was not offered by or on behalf of the facility within the previous 12 months, or the termination of a health service which was offered by or on behalf of the facility, in a health care facility which was acquired without a certificate of need, if such change occurs within one year of the acquisition;
- l. Notwithstanding the provisions of G.S. 131E-176(16)h and j, the purchase, lease or acquisition of any of the following: any health care facility, or portion thereof; major medical equipment; a controlling interest in the health care facility, or portion thereof; or a controlling interest in major medical equipment. The aforesaid are new institutional health services if the asset was obtained under a certificate of need issued pursuant to G.S. 131E-180;
- m. Any conversion of nonhealth care facility beds to health care facility beds, regardless of whether a capital expenditure is associated with the conversion. A bed is a nonhealth care facility bed if a facility that contained only that type of bed would not be a health care facility. A bed is a health care facility bed if a facility that contained only that type of bed would be a health care facility;
- n. The construction, development, or other establishment of a hospice if the operating budget thereof is in excess of one hundred thousand dollars (\$100,000) or if there is the obligation of any capital expenditure by or on behalf of the hospice as provided in G.S. 131E-176(16)b.

- (17) "North Carolina State Health Coordinating Council" means the Council as defined by Title XV of the Public Health Service Act, as amended, and rules and regulations implementing that act.
- (18) To "offer," when used in connection with health services, means that the health care facility or health maintenance organization holds itself out as capable of providing, or as having the means for the provision of, specified health services.
- (19) "Person" means an individual, a trust or estate, a partnership, a corporation, including associations, joint stock companies, and insurance companies; the State, or a political subdivision or agency or instrumentality of the State.
- (20) "Project" or "capital expenditure project" means a proposal to undertake a capital expenditure that results in the offering of a new institutional health service as defined by this Article. A project, or capital expenditure project, or proposed project may refer to the project from its earliest planning stages up through the point at which the specified new institutional health service may be offered. In the case of facility construction, the point at which the new institutional health service may be offered must take place after the facility is capable of being fully licensed and operated for its intended use, and at that time it shall be considered a health care facility.
- (21) "Psychiatric facility" means a public or private facility licensed pursuant to Article 2 of Chapter 122C of the General Statutes and which is primarily engaged in providing to inpatients, by or under the supervision of a physician, psychiatric services for the diagnosis and treatment of mentally ill persons.
- (22) "Rehabilitation facility" means a public or private inpatient or outpatient facility which is operated for the primary purpose of assisting in the rehabilitation of disabled persons through an integrated program of medical and other services which are provided under competent, professional supervision, and shall include "comprehensive outpatient rehabilitation facilities" as defined by the Social Security Act and the regulations promulgated by the Department of Health and Human Services pursuant to that act.
- (23) "Skilled nursing facility" means a public or private institution or a distinct part of an institution which is primarily engaged in providing to inpatients skilled nursing care and related services for patients who require medical or nursing care, or rehabilitation services for the rehabilitation of injured, disabled, or sick persons.
- (24) "State Health Plan" means the plan required by Title XV of the Public Health Service Act, as amended, and rules and regulations implementing that act.
- (25) "State Medical Facilities Plan" means the plan prepared by the Department of Human Resources and the North Carolina State Health Coordinating Council, as required by Title XV of the Public Health Service Act, as amended, and rules and regulations implementing that act.
- (26) Repealed by Session Laws 1983 (Regular Session, 1984), c. 1002, s. 9.
- (27) "Tuberculosis hospital" means a public or private institution which is primarily engaged in providing to inpatients, by or under the supervision of a physician, medical services for the diagnosis and treatment of tuberculosis. (1977, 2nd Sess., c. 1182, s. 2; 1981, c. 651, ss. 1, 2; c. 1127, ss. 24-29; 1983, c. 775, s. 1; 1983 (Reg. Sess., 1984), c. 1002, ss. 1-9; c. 1022, ss. 2, 3; c. 1064, s. 1; c. 1110, ss. 1, 2; 1985, c. 589, ss. 42, 43(a); c. 740, ss. 1, 2, 6; 1985 (Reg. Sess., 1986), c. 1001, s. 2.)

Section Set Out Twice. — The section above is effective until January 1, 1988. For this section as amended effective January 1, 1988, see the following section, also numbered 131E-176. See the explanatory notes under this section in the 1985 Cumulative Supplement.

Editor's Note. —

Article 1A of Chapter 122, referred to in this section, was repealed by Session Laws 1985, c. 589, s. 1, effective January 1, 1986. As to licen-

sure of facilities for the mentally ill, the mentally retarded and substance abusers, see now Article 2 of Chapter 122C, § 122C-21 et seq.

Session Laws 1985 (Reg. Sess., 1986), c. 1001, s. 3, contains a severability clause.

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective July 12, 1986, deleted "and lithotripters" following "imaging" in subdivision (16)g.

§ 131E-176. (Effective January 1, 1988) Definitions.

As used in this Article, unless the context clearly requires otherwise, the following terms have the meanings specified:

- (1) "Ambulatory surgical facility" means a facility designed for the provision of an ambulatory surgical program. An ambulatory surgical facility serves patients who require local, regional or general anesthesia and a period of post-operative observation. An ambulatory surgical facility may only admit patients for a period of less than 24 hours and must provide at least one designated operating room and at least one designated recovery room, have available the necessary equipment and trained personnel to handle emergencies, provide adequate quality assurance and assessment by an evaluation and review committee, and maintain adequate medical records for each patient. An ambulatory surgical facility may be operated as a part of a physician or dentist's office, provided the facility is licensed under G.S. Chapter 131E, Article 6, Part D, but the performance of incidental, limited ambulatory surgical procedures which do not constitute an ambulatory surgical program as defined in subdivision (1a) and which are performed in a physician or dentist's office does not make that office an ambulatory surgical facility.
- (1a) "Ambulatory surgical program" means a formal program for providing on a same-day basis those surgical procedures which require local, regional or general anesthesia and a period of post-operative observation to patients whose admission for more than 24 hours is determined, prior to surgery, to be medically unnecessary.
- (2) "Bed capacity" means space used exclusively for inpatient care, including space designed or remodeled for licensed inpatient beds even though temporarily not used for such purposes. The number of beds to be counted in any patient room shall be the maximum number for which adequate square footage is provided as established by regulations of the Department except that single beds in single rooms are counted even if the room contains inadequate square footage.
- (2a) "Capital expenditure" means an expenditure which under generally accepted accounting principles is not properly chargeable as an expense of operation and maintenance.
- (3) "Certificate of need" means a written order of the Department setting forth the affirmative findings that a proposed project sufficiently satisfies the plans, standards, and criteria prescribed for such projects by this Article and by rules and regulations of the Department as provided in G.S. 131E-183(a) and which affords the person so designated as the legal proponent of the proposed project the opportunity to proceed with the development of such project.
- (4) "Certified cost estimate" means an estimate of the total cost of a project certified by the proponent of the project within 60 days prior

- to or subsequent to the date of submission of the proposed new institutional health service to the Department and which is based on:
- a. Preliminary plans and specifications;
 - b. Estimates of the cost of equipment certified by the manufacturer or vendor; and
 - c. Estimate of the cost of management and administration of the project.
- (5) "Change in bed capacity" means (i) any increase in the total number of beds, or (ii) any relocation of beds from one physical facility or site to another, or (iii) a decrease in the total number of beds when that decrease involves a capital expenditure exceeding the expenditure minimum as defined in subdivision (16)b of this section, or (iv) a redistribution of beds among different categories when that redistribution involves a capital expenditure exceeding the expenditure minimum as defined in subdivision (16)b of this section. For purposes of this subdivision "beds" means beds in hospitals, rehabilitation facilities, psychiatric facilities, chemical dependency treatment facilities, intermediate care facilities, skilled nursing facilities and intermediate care facilities for the mentally retarded.
- (5a) "Chemical dependency treatment facility" means a public or private facility, or unit in a facility, which is engaged in providing 24-hour a day treatment for chemical dependency or substance abuse. This treatment may include detoxification, administration of a therapeutic regimen for the treatment of chemically dependent or substance abusing persons and related services. The facility or unit may be:
- a. A unit within a general hospital or an attached or freestanding unit of a general hospital licensed under Article 5, Chapter 131E, of the General Statutes,
 - b. A unit within a psychiatric hospital or an attached or freestanding unit of a psychiatric hospital licensed under [or] Article 2 of General Statutes Chapter 122C,
 - c. A freestanding facility specializing in treatment of persons who are substance abusers or chemically dependent licensed under [or] Article 2 of General Statutes Chapter 122C;
- and may be identified as "chemical dependency, substance abuse, alcoholism, or drug abuse treatment units," "residential chemical dependency, substance abuse, alcoholism or drug abuse facilities," "social setting detoxification facilities" and "medical detoxification facilities," or by other names if the purpose is to provide treatment of chemically dependent or substance abusing persons, but shall not include halfway houses or recovery farms.
- (6) "Department" means the North Carolina Department of Human Resources.
- (7) To "develop" when used in connection with health services, means to undertake those activities which will result in the offering of institutional health service not provided in the previous 12-month reporting period or the incurring of a financial obligation in relation to the offering of such a service.
- (8) "Final decision" means an approval, an approval with conditions, or denial of an application for a certificate of need.
- (9) "Health care facilities" means hospitals; psychiatric facilities; skilled nursing facilities; kidney disease treatment centers, including freestanding hemodialysis units; intermediate care facilities, including intermediate care facilities for the mentally retarded or persons with related conditions; rehabilitation facilities; home health agencies; chemical dependency treatment facilities, and ambulatory surgical facilities.

- (10) "Health maintenance organization (HMO)" means a public or private organization which has received its certificate of authority under Chapter 57B of the General Statutes and which either is a qualified health maintenance organization under Section 1310(d) of the Public Health Service Act or:
- Provides or otherwise makes available to enrolled participants health care services, including at least the following basic health care services: usual physician services, hospitalization, laboratory, X ray, emergency and preventive services, and out-of-area coverage;
 - Is compensated, except for copayments, for the provision of the basic health care services listed above to enrolled participants by a payment which is paid on a periodic basis without regard to the date the health care services are provided and which is fixed without regard to the frequency, extent, or kind of health service actually provided; and
 - Provides physicians' services primarily (i) directly through physicians who are either employees or partners of such organizations, or (ii) through arrangements with individual physicians or one or more groups of physicians organized on a group practice or individual practice basis.
- (11) "Health systems agency" means an agency, as defined by Title XV of the Public Health Service Act, as amended, and rules and regulations implementing that act.
- (12) "Home health agencies" means a private organization or public agency, whether owned or operated by one or more persons or legal entities, which furnishes or offers to furnish home health services. "Home health services" means items and services furnished to an individual by a home health agency, or by others under arrangement with such others made by the agency, on a visiting basis, and except for paragraph e of this subdivision, in a place of temporary or permanent residence used as the individual's home as follows:
- Part-time or intermittent nursing care provided by or under the supervision of a registered nurse;
 - Physical, occupational or speech therapy;
 - Medical social services, home health aid services, and other therapeutic services;
 - Medical supplies, other than drugs and biologicals and the use of medical appliances;
 - Any of the foregoing items and services which are provided on an outpatient basis under arrangements made by the home health agency at a hospital or nursing home facility or rehabilitation center and the furnishing of which involves the use of equipment of such a nature that the items and services cannot readily be made available to the individual in his home, or which are furnished at such facility while he is there to receive any such item or service, but not including transportation of the individual in connection with any such item or service.
- (13) "Hospital" means a public or private institution which is primarily engaged in providing to inpatients, by or under supervision of physicians, diagnostic services and therapeutic services for medical diagnosis, treatment, and care of injured, disabled, or sick persons, or rehabilitation services for the rehabilitation of injured, disabled, or sick persons. The term includes all facilities licensed pursuant to G.S. 131E-77 of the General Statutes.

- (13a) "Hospice" means any coordinated program of home care within provision for inpatient care for terminally ill patients and their families. This care is provided by a medically directed interdisciplinary team, directly or through an agreement under the direction of an identifiable hospice administration. A hospice program of care provides palliative and supportive medical and other health services to meet the physical, psychological, social, spiritual and special needs of patients and their families, which are experienced during the final stages of terminal illness and during dying and bereavement.
- (14) "Intermediate care facility" means a public or private institution which provides, on a regular basis, health-related care and services to individuals who do not require the degree of care and treatment which a hospital or skilled nursing facility is designed to provide, but who because of their mental or physical condition require health-related care and services above the level of room and board.
- (14a) "Intermediate care facility for the mentally retarded" means facilities licensed pursuant to Article 2 of Chapter 122C of the General Statutes for the purpose of providing health and habilitative services based on the developmental model and principles of normalization for persons with mental retardation, autism, cerebral palsy, epilepsy or related conditions.
- (15) "Major medical equipment" means a single unit or a single system of components with related functions which is used to provide medical and other health services and which costs more than six hundred thousand dollars (\$600,000). In determining whether medical equipment costs more than six hundred thousand dollars (\$600,000), the costs of studies, surveys, designs, plans, working drawings, specifications and other activities essential to acquiring the equipment shall be included. If the equipment is acquired for less than fair market value, the cost shall be deemed to be the fair market value.
- (16) "New institutional health services" means:
- a. The construction, development, or other establishment of a new health care facility;
 - b. The obligation by or on behalf of a health care facility or a local health department established under Article 2 of Chapter 130A of the General Statutes of any capital expenditure, other than one to acquire an existing health care facility, which exceeds the expenditure minimum. Further, increases in approved capital expenditures, if they exceed the expenditure minimum, are also new institutional health services. The expenditure minimum is one million dollars (\$1,000,000) for the 12-month period beginning October 1, 1985. For each 12-month period thereafter the expenditure minimum shall be the figure in effect for the preceding 12-month period, adjusted to reflect the change in the preceding 12-month period in the Department of Commerce Composite Construction Cost Index. The cost of any studies, surveys, designs, plans, working drawings, specifications, and other activities, including staff effort and consulting and other services, essential to the acquisition, improvement, expansion, or replacement of any plant or equipment with respect to which an expenditure is made shall be included in determining if the expenditure exceeds the expenditure minimum;
 - c. The obligation of a capital expenditure by or on behalf of a health care facility when it is associated with a change in bed capacity and within the limits set forth in G.S. 131E-176(5);

- d. The obligation of any capital expenditure by or on behalf of a health care facility which is associated with the addition of a health service which was not offered by or on behalf of the facility within the previous 12 months or with the termination of a health service which was offered in or through the facility;
- e. A change in a project which was subject to review under paragraphs a, b, c, or d of this subdivision and for which a certificate of need had been issued, if the change is proposed within one year after the project was completed. For the purposes of this paragraph, a change in a project is a change in bed capacity, the addition of a health service, or the termination of a health service, regardless of whether a capital expenditure is associated with the change;
- f. The offering of a health service by or on behalf of a health care facility if the service was not offered by or on behalf of the health care facility in the previous 12 months and if the annual operating costs of the service equal or exceed the expenditure minimum. The expenditure minimum for annual operating costs is two hundred fifty thousand dollars (\$250,000) for the 12-month period beginning October 1, 1979. For each 12-month period thereafter the expenditure minimum shall be the figure in effect for the preceding 12-month period, adjusted to reflect the change in the preceding 12-month period in the Department of Commerce Composite Construction Cost Index;
- g. The acquisition by any person of major medical equipment that will be owned by or located in a health care facility or the acquisition by any person of major medical equipment that includes magnetic resonance imaging, regardless of ownership or location;
- h. The acquisition by any person of major medical equipment not owned by or located in a health care facility if notice of the acquisition is not filed with the Department in accordance with rules promulgated by the Department, or the Department, within 30 days after receipt of the notice, finds that the equipment will be used to provide services to inpatients of a hospital, excluding use on a temporary basis in the case of a natural disaster, a major accident, or equipment failure, or the Department, within 30 days after receipt of the notice, finds that the major medical equipment is among the types enumerated in g. above;
- i. The use, excluding use on a temporary basis in the case of a natural disaster, a major accident, or equipment failure, of major medical equipment which was acquired without a certificate of need, to treat inpatients of a hospital;
- j. The obligation of a capital expenditure by any person to acquire an existing health care facility, if a notice of intent is not filed with the Department in accordance with rules promulgated by the Department, or the Department, within 30 days after receipt of the notice of intent, finds that there will be a change in bed capacity, the addition of a health service not offered by or on behalf of the facility within the previous 12 months, or the termination of a health service which was offered by or on behalf of the facility;
- k. A change in bed capacity, the addition of a health service which was not offered by or on behalf of the facility within the previous 12 months, or the termination of a health service which was offered by or on behalf of the facility, in a health care facility

which was acquired without a certificate of need, if such change occurs within one year of the acquisition;

- l. Notwithstanding the provisions of G.S. 131E-176(16)h and j, the purchase, lease or acquisition of any of the following: any health care facility, or portion thereof; major medical equipment; a controlling interest in the health care facility, or portion thereof; or a controlling interest in major medical equipment. The aforesaid are new institutional health services if the asset was obtained under a certificate of need issued pursuant to G.S. 131E-180;
 - m. Any conversion of nonhealth care facility beds to health care facility beds, regardless of whether a capital expenditure is associated with the conversion. A bed is a nonhealth care facility bed if a facility that contained only that type of bed would not be a health care facility. A bed is a health care facility bed if a facility that contained only that type of bed would be a health care facility.
 - n. The construction, development, or other establishment of a hospice if the operating budget thereof is in excess of one hundred thousand dollars (\$100,000) or if there is the obligation of any capital expenditure by or on behalf of the hospice as provided in G.S. 131E-176(16)b.
- (17) "North Carolina State Health Coordinating Council" means the Council as defined by Title XV of the Public Health Service Act, as amended, and rules and regulations implementing that act.
- (18) To "offer," when used in connection with health services, means that the health care facility or health maintenance organization holds itself out as capable of providing, or as having the means for the provision of, specified health services.
- (19) "Person" means an individual, a trust or estate, a partnership, a corporation, including associations, joint stock companies, and insurance companies; the State, or a political subdivision or agency or instrumentality of the State.
- (20) "Project" or "capital expenditure project" means a proposal to undertake a capital expenditure that results in the offering of a new institutional health service as defined by this Article. A project, or capital expenditure project, or proposed project may refer to the project from its earliest planning stages up through the point at which the specified new institutional health service may be offered. In the case of facility construction, the point at which the new institutional health service may be offered must take place after the facility is capable of being fully licensed and operated for its intended use, and at that time it shall be considered a health care facility.
- (21) "Psychiatric facility" means a public or private facility licensed pursuant to Article 2 of Chapter 122C of the General Statutes and which is primarily engaged in providing to inpatients, by or under the supervision of a physician, psychiatric services for the diagnosis and treatment of mentally ill persons.
- (22) "Rehabilitation facility" means a public or private inpatient or outpatient facility which is operated for the primary purpose of assisting in the rehabilitation of disabled persons through an integrated program of medical and other services which are provided under competent, professional supervision, and shall include "comprehensive outpatient rehabilitation facilities" as defined by the Social Security Act and the regulations promulgated by the Department of Health and Human Services pursuant to that act.

- (23) "Skilled nursing facility" means a public or private institution or a distinct part of an institution which is primarily engaged in providing to inpatients skilled nursing care and related services for patients who require medical or nursing care, or rehabilitation services for the rehabilitation of injured, disabled, or sick persons.
- (24) "State Health Plan" means the plan required by Title XV of the Public Health Service Act, as amended, and rules and regulations implementing that act.
- (25) "State Medical Facilities Plan" means the plan prepared by the Department of Human Resources and the North Carolina State Health Coordinating Council, as required by Title XV of the Public Health Service Act, as amended, and rules and regulations implementing that act.
- (26) Repealed by Session Laws 1983 (Regular Session, 1984), c. 1002, s. 9.
- (27) "Tuberculosis hospital" means a public or private institution which is primarily engaged in providing to inpatients, by or under the supervision of a physician, medical services for the diagnosis and treatment of tuberculosis. (1977, 2nd Sess., c. 1182, s. 2; 1981, c. 651, ss. 1, 2; c. 1127, ss. 24-29; 1983, c. 775, s. 1; 1983 (Reg. Sess., 1984), c. 1002, ss. 1-9; c. 1022, ss. 2, 3; c. 1064, s. 1; c. 1110, ss. 1, 2; 1985, c. 589, ss. 42, 43(a), (b); c. 740, ss. 1, 2, 6; 1985 (Reg. Sess., 1986), c. 1001, s. 2.)

Section Set Out Twice. — The section above is effective January 1, 1988. For this section as in effect until January 1, 1988, see the preceding section, also numbered 131E-176. See the explanatory notes under this section in the 1985 Cumulative Supplement.

Editor's Note. —

Session Laws 1985 (Reg. Sess., 1986), c. 1001, s. 3, contains a severability clause.

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective July 12, 1986, deleted "and lithotripters" following "imaging" in subdivision (16)g.

§ 131E-178. Activities requiring certificate of need.

(a) No person shall offer or develop a new institutional health service without first obtaining a certificate of need from the Department. Provided that chemical dependency treatment facilities containing beds licensed as of June 30, 1984, shall not be required to obtain a certificate of need. A hospital shall not be required to obtain a certificate of need for a new institutional health service offered or developed by or on behalf of the hospital for outpatients in a freestanding facility unless all other persons offering or developing the same new institutional health service in a freestanding facility are required under this Article to obtain a certificate of need.

No person, acute care hospital, or outpatient facility shall be required to obtain a certificate of need for the acquisition of a lithotripter or for the development, offering, or operation of a lithotripsy service.

(1977, 2nd Sess., c. 1182, s. 2; 1979, c. 876, s. 2; 1981, c. 631, s. 3; 1983, c. 775, s. 1; 1983 (Reg. Sess., 1984), c. 1110, s. 3; 1985, c. 740, s. 3; 1985 (Reg. Sess., 1986), c. 1001, s. 1.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. —

Session Laws 1985 (Reg. Sess., 1986), c. 1001, s. 3, contains a severability clause.

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective July 12, 1986, added the last paragraph of subsection (a).

§ 131E-181. Nature of certificate of need.

(a) A certificate of need shall be valid only for the defined scope, physical location, and person named in the application. A certificate of need shall not be transferred or assigned. Provided, however, that a certificate of need granted to operate a hospital may be transferred or assigned to another person undertaking a legal obligation to own or operate the hospital if the Department determines that:

- (1) The existing hospital cannot reasonably continue operating in a manner sufficient to provide the health services for which its certificate of need was granted;
- (2) Another person is ready, willing and able to assume ownership or operation of the hospital and to provide the appropriate and needed health services;
- (3) Failure to approve the transfer or assignment would likely result in a significant deficiency in the level of health services available in the area to be served; and
- (4) There is no pending application for a certificate of need which is likely to be granted for providing the appropriate and needed services within time to prevent a significant deficiency in the level of health services available in the area to be served.

Any certificate of need transferred or assigned under this section may be under such conditions as the Department considers necessary to best protect the health and lives of the people of this State.

(b) A recipient of a certificate of need, or any person who may subsequently acquire, in any manner whatsoever permitted by law, the service for which that certificate of need was issued, is required to materially comply with the representations made in its application for that certificate of need. The Department may by rule require any recipient of a certificate of need, or its successor, whose service is in operation to submit to the Department evidence that the recipient, or its successor, is in material compliance with the representations made in its application for the certificate of need which granted the recipient the right to operate that service. The Secretary is authorized to adopt, amend, and repeal rules to administer this subsection. In determining whether the recipient of a certificate of need, or its successor, is operating a service which materially differs from the representations made in its application for that certificate of need, the court shall consider cost increases to the recipient, or its successor, including, but not limited to, the following:

- (1) Any increase in the consumer price index;
- (2) Any increased cost incurred because of Government requirements, including federal, State, or any political subdivision thereof; and
- (3) Any increase in cost due to professional fees or the purchase of services and supplies. (1977, 2nd Sess., c. 1182, s. 2; 1981, c. 651, s. 5; 1983, c. 775, s. 1; 1985, c. 521, s. 1; 1985 (Reg. Sess., 1986), c. 968, s. 1.)

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective July 10, 1986, and applicable to all

awards made after July 10, 1986, designated the existing provisions of this section as subsection (a) and added subsection (b).

§ 131E-183. Review criteria.

CASE NOTES

Legislative Findings. — In enacting the certificate of need law, the legislature found as facts that the forces of free market competition are largely absent in health care, and that government regulation is therefore necessary to control the cost, utilization, and distribution of health services and to assure that less costly and more effective alternatives are made available. In re Denial of Request by Humana Hosp. Corp., — N.C. App. —, 338 S.E.2d 139 (1986), decided under former §§ 131-175 and 131-181.

Allegation of Priority Status Without Merit. — The certificate of need Section should not be foreclosed from carrying out the pur-

poses and intent of the certificate of need law by an alleged priority status obtained by an applicant being the only one of several applicants to exercise its rights to judicial review. In re Denial of Request by Humana Hosp. Corp., — N.C. App. —, 338 S.E.2d 139 (1986), decided under former §§ 131-175 and 131-181.

For case where determination that criteria for qualifying for certificate of need for construction of hospital were not met, see Hospital Group v. North Carolina Dep't of Human Resources, — N.C. App. —, 332 S.E.2d 748 (1985).

§ 131E-188. Administrative and judicial review.

CASE NOTES

Quoted in Hospital Group v. North Carolina Dep't of Human Resources, — N.C. App. —, 332 S.E.2d 748 (1985).

§ 131E-190. Enforcement and sanctions.

(i) If the Department determines that the recipient of a certificate of need, or its successor, is operating a service which materially differs from the representations made in its application for that certificate of need, the Department may bring action in Wake County Superior Court or the superior court of any county in which the certificate of need is to be utilized for injunctive relief, temporary or permanent, requiring the recipient, or its successor, to materially comply with the representations in its application. The Department may also bring action in Wake County Superior Court or the superior court of any county in which the certificate of need is to be utilized to enforce the provisions of this subdivision and G.S. 131E-181(b) and the regulations adopted in accordance with this subsection and G.S. 131E-181(b). (1977, 2nd Sess., c. 1182, s. 2; 1981, c. 651, s. 13; 1983, c. 775, s. 1; 1985 (Reg. Sess., 1986), c. 968, s. 2.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 (Reg.

Sess., 1986) amendment, effective July 10, 1986, and applicable to all awards made after July 10, 1986, added subsection (i).

Chapter 132.

Public Records.

§ 132-1. "Public records" defined.

Local Modification. — Henderson: 1985 1985 (Reg. Sess., 1986), c. 969; McDowell: 1985
(Reg. Sess., 1986), c. 962, s. 1; Clay, Durham, (Reg. Sess., 1986), c. 892, s. 1; Swain: 1985
Graham, Jackson, Macon, Polk, Transylvania: (Reg. Sess., 1986), c. 923, s. 1.

CASE NOTES

Cited in North Carolina State Bd. of Regis- veyors v. FTC, 615 F. Supp. 1155 (E.D.N.C.
tration for Professional Eng'rs & Land Sur- 1985).

§ 132-6. Inspection and examination of records.

Local Modification. — City of Gastonia:
1985 (Reg. Sess., 1986), c. 902, s. 8.

§ 132-9. Access to records.

Local Modification. — City of Gastonia:
1985 (Reg. Sess., 1986), c. 902, s. 8.

CASE NOTES

Cited in North Carolina State Bd. of Regis- veyors v. FTC, 615 F. Supp. 1155 (E.D.N.C.
tration for Professional Eng'rs & Land Sur- 1985).

Chapter 135.

Retirement System for Teachers and State Employees; Social Security.

Article 1.

Retirement System for Teachers and State Employees.

Sec.

135-5. Benefits.

Article 3.

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Article 4.

Consolidated Judicial Retirement Act.

135-65. Post-retirement increases in allow-
ances.

ARTICLE 1.

Retirement System for Teachers and State Employees.

§ 135-5. Benefits.

(1) From and after July 1, 1986, the retirement allowance to or on account of beneficiaries whose retirement commenced on or before July 1, 1985, shall be increased by three and eight-tenths percent (3.8%) of the allowance payable on July 1, 1985, in accordance with G.S. 135-5(o). Furthermore, from and after July 1, 1986, the retirement allowance to or on account of beneficiaries whose retirement commenced after July 1, 1985, but before June 30, 1986, shall be increased by a prorated amount of three and eight-tenths percent (3.8%) of the allowance payable as determined by the Board of Trustees based upon the number of months that a retirement allowance was paid between July 1, 1985, and June 30, 1986. (1941, c. 25, s. 5; 1945, c. 218; 1947, c. 458, ss. 3, 4, 7, 8a; 1949, c. 1056, ss. 3, 5; 1955, c. 1155, ss. 1, 2; 1957, c. 855, ss. 5-8; 1959, c. 490; c. 513, ss. 2, 3; c. 620, ss. 1-3; c. 624; 1961, c. 516, s. 4; c. 779, s. 1; 1963, c. 687, s. 3; 1965, c. 780, s. 1; 1967, c. 720, ss. 4-10; c. 1223; 1969, c. 1223, ss. 2, 5-12; 1971, c. 117, ss. 11-15; c. 118, ss. 3-7; 1973, c. 241, ss. 3-7; c. 242, ss. 2-4; c. 737, s. 2; c. 816, s. 2; c. 994, ss. 1, 3; c. 1312, ss. 1-3; 1975, c. 457, ss. 2-4; c. 511, ss. 1, 2; c. 634, ss. 1, 2; c. 875, s. 47; 1977, c. 561; c. 802, ss. 50.65-50.70; 1979, c. 838, s. 99; c. 862, ss. 1, 4, 5; c. 972, s. 4; c. 975, s. 1; 1979, 2nd Sess., c.

1137, ss. 63, 64, 66; c. 1196, s. 1; c. 1216; 1981, c. 672, s. 1; c. 689, s. 2; c. 859, ss. 42, 42.1, 44; c. 940, s. 1; c. 975, s. 3; c. 978, ss. 1, 2; c. 980, ss. 3, 4; 1981 (Reg. Sess., 1982), c. 1282, s. 11; 1983, c. 467; c. 761, ss. 218, 219, 228, 229; c. 902, s. 1; 1983 (Reg. Sess., 1984), c. 1019, s. 1; c. 1034, ss. 222, 232-235, 237; c. 1049, ss. 1-3; 1985, c. 348, s. 2; c. 479, ss. 189(a), 190, 191, 192(a), 194; c. 520, s. 2; c. 649, ss. 8, 10; 1985 (Reg. Sess., 1986), c. 1014, s. 49(a).

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 243, contains a severability clause.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 15, 1986, added subsection (11).

ARTICLE 3.

Other Teacher, Employee Benefits.

Part 1. General Provisions.

§ 135-37. Confidentiality.

Any information as herein described in this section which is in the possession of the Executive Administrator and the Board of Trustees of the Teachers' and State Employees' Comprehensive Major Medical Plan or its Claims Processor under the Teachers' and State Employees' Comprehensive Major Medical Plan shall be confidential and shall be exempt from the provisions of Chapter 132 of the General Statutes or any other provision requiring information and records held by State agencies to be made public or accessible to the public. This section shall apply to all information concerning individuals, including the fact of coverage or noncoverage, whether or not a claim has been filed, medical information, whether or not a claim has been paid, and any other information or materials concerning a plan participant. Provided, however, such information may be released to the State Auditor, or to the Attorney General, or to the persons designated under G.S. 135-39.3 in furtherance of their statutory duties and responsibilities, or to such persons or organizations as may be designated and approved by the Executive Administrator and Board of Trustees of the Teachers' and State Employees' Comprehensive Major Medical Plan, but any information so released shall remain confidential as stated above and any party obtaining such information shall assume the same level of responsibility for maintaining such confidentiality as that of the Executive Administrator and Board of Trustees of the Teachers' and State Employees' Comprehensive Major Medical Plan. (1981, c. 355; 1981 (Reg. Sess., 1982), c. 1398, ss. 3, 4; 1983, c. 922, s. 21.10; 1985, c. 732, s. 38; 1985 (Reg. Sess., 1986), c. 1020, s. 20.)

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, by c. 1020, s. 20, effective July 1, 1986, substi-

tuted "Claims Processor" for "Plan Administrator" in the first sentence.

Part 2. Administrative Structure.

§ 135-39. Board of Trustees established.

(h) No member of the Board of Trustees may serve more than three consecutive two-year terms.
(1981 (Reg. Sess., 1982), c. 1398, s. 6; 1983, c. 922, s. 1; 1985, c. 732, ss. 2-5, 8, 11, 42, 59, 60; 1985 (Reg. Sess., 1986), c. 1020, s. 1.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.
Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 1, 1986, substituted "Board of Trustees" for "Commissioner" in subsection (h).

§ 135-39.1. Auditing of the Plan.

The Board of Trustees and the Executive Administrator of the Teachers' and State Employees' Comprehensive Major Medical Plan and the Claims Processor shall be subject to the oversight of the State Auditor pursuant to Article 5A of Chapter 147 of the General Statutes. (1981 (Reg. Sess., 1982), c. 1398, s. 6; 1983, c. 913, s. 24; 1985, c. 732, s. 46; 1985 (Reg. Sess., 1986), c. 1020, s. 20.)

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, by c. 1020, s. 20, effective July 1, 1986, substituted "Claims Processor" for "Plan Administrator."

§ 135-39.3. Oversight team.

(a) The Committee on Employee Hospital and Medical Benefits may use employees of the Legislative Services Office and may employ contractual services as approved by the Legislative Services Commission to monitor the Executive Administrator and Board of Trustees, the Claims Processor, and the Comprehensive Major Medical Plan. The Director of the Budget may use employees of the Office of State Budget and Management to monitor the Executive Administrator and Board of Trustees, the Claims Processor, and the Comprehensive Major Medical Plan. Such assistance to the Committee on Employee Hospital and Medical Benefits and to the Director of the Budget shall comprise an oversight team.
(b) The oversight team shall, jointly or individually, have access to all records of the Board of Trustees, the Executive Administrator, the Claims Processor, and the Comprehensive Major Medical Plan. They shall, jointly or individually, be entitled to attend all meetings of the Board of Trustees.
(1981 (Reg. Sess., 1982), c. 1398, s. 6; 1985, c. 732, ss. 47, 67; 1985 (Reg. Sess., 1986), c. 1020, s. 20.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.
Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, by c. 1020, s. 20, effective July 1, 1986, substituted "Claims Processor" for "Plan Administrator" twice in subsection (a) and once in subsection (b).

§ 135-39.4: Repealed by Session Laws 1985 (Reg. Sess., 1986), c. 1020, s. 2.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1020, s. 2 repealed subsections (c) and (e), effective July 1, 1986, and repealed subsections (a) and (b) effective October 1, 1986.

Subsection (d) was recodified as § 135-39.5(16) by Session Laws 1985, c. 732, s. 23, effective July 12, 1985.

§ 135-39.4A. Executive Administrator.

(f) The Executive Administrator may employ such clerical and professional staff, and such other assistance as may be necessary to assist the Executive Administrator and the Board of Trustees in carrying out their duties and responsibilities under this Article. The Executive Administrator may also negotiate, renegotiate and execute contracts with third parties in the performance of his duties and responsibilities under this Article; provided any contract negotiations, renegotiations and execution with a Claims Processor shall be done only after consultation with the Committee on Employee Hospital and Medical Benefits.

(1985, c. 732, s. 10; 1985 (Reg. Sess., 1986), c. 1020, s. 20.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 (Reg.

Sess., 1986) amendment, by c. 1020, s. 20, effective July 1, 1986, substituted "Claims Processor" for "Plan Administrator" in subsection (f).

§ 135-39.5. Powers and duties of the Executive Administrator and Board of Trustees.

The Executive Administrator and Board of Trustees of the Teachers' and State Employees' Comprehensive Major Medical Plan shall have the following powers and duties:

- (1) Supervising and monitoring of the Claims Processor.
- (5) Making payments at appropriate intervals to the Claims Processor for benefit costs and administrative costs.
- (7) Annually assessing the performance of the Claims Processor.
- (13) Requiring bonding of the Claims Processor in the handling of State funds.
- (15) In case of termination of the contract under G.S. 135-39.5A, to select a new Claims Processor, after competitive bidding procedures approved by the Department of Administration.

(1981 (Reg. Sess., 1982), c. 1398, s. 6; 1983, c. 922, s. 2; 1985, c. 732, ss. 7, 9, 23, 24, 50; 1985 (Reg. Sess., 1986), c. 1020, ss. 3, 20.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — Session Laws 1985 (Reg. Sess., 1986), c. 1020, s. 3, effective July 1, 1986, deleted "or failure to contract under G.S. 135-39.4(b)" following "In case of ter-

mination of the contract under G.S. 135-39.5A," at the beginning of subdivision (15).

Session Laws 1985 (Reg. Sess., 1986), c. 1020, s. 20, effective July 1, 1986, substituted "Claims Processor" for "Plan Administrator" in subdivisions (1), (5), (7), (13), and (15).

§ 135-39.5A. Termination.

The Executive Administrator and Board of Trustees may terminate the contract with the Claims Processor as provided in the request for proposal. (1981 (Reg. Sess., 1982), c. 1398, s. 6; 1985, c. 732, s. 51; 1985 (Reg. Sess., 1986), c. 1020, s. 20.)

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, by c. 1020, s. 20, effective July 1, 1986, substituted "Claims Processor" for "Plan Administrator."

§ 135-39.5B. Prepaid plans.

The Executive Administrator and Board of Trustees may, after consultation with the Committee on Employee Hospital and Medical Benefits, provide for optional prepaid hospital and medical benefits plans. Benefits offered under such optional plans shall be comparable to those offered under the Plan. The amounts of State funds contributed for such optional plans shall not be more than the amounts contributed for each person eligible under G.S. 135-40.2 on a noncontributory Employee Only basis, with the person selecting an optional plan paying any excess, if necessary. The amount of State funds contributed to such optional plans shall also not exceed the amount of an optional plan's cost for Employee Only coverage. The provisions of G.S. 57B-11 shall not apply to any optional prepaid hospital and medical benefits plans provided for by the Executive Administrator and Board of Trustees. (1981 (Reg. Sess., 1982), c. 1398, s. 6; 1985, c. 732, s. 37; 1985 (Reg. Sess., 1986), c. 1020, s. 6.)

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, inserted "Employee Only" in the third sentence and added the next-to-last sentence.

§ 135-39.6. Special funds created.

(b) Disbursement from the Public Employee Health Benefit Fund may be made by warrant drawn on the State Treasurer by the Executive Administrator, or the Executive Administrator and Board of Trustees may by contract authorize the Claims Processor to draw the warrant. (1981 (Reg. Sess., 1982), c. 1398, s. 6; 1985, c. 732, ss. 43, 63; 1985 (Reg. Sess., 1986), c. 1020, s. 20.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, by c. 1020, s. 20, effective July 1, 1986, substituted "Claims Processor" for "Plan Administrator" near the end of subsection (b).

§ 135-39.7. Administrative review.

If, after exhaustion of internal appeal handling as outlined in the contract with the Claims Processor any person is aggrieved, the Claims Processor shall bring the matter to the attention of the Executive Administrator and Board of Trustees, which may make a binding decision on the matter in accordance with procedures established by the Executive Administrator and Board of Trustees. (1981 (Reg. Sess., 1982), c. 1398, s. 6; 1985, c. 732, s. 53; 1985 (Reg. Sess., 1986), c. 1020, s. 20.)

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, by c. 1020, s. 20, effective July 1, 1986, substi-

tuted "Claims Processor" for "Plan Administrator" in two places.

§ 135-39.9. Reports to the General Assembly.

(c) Repealed by Session Laws 1985 (Reg. Sess., 1986), c. 1020, s. 7, effective July 1, 1986. (1981 (Reg. Sess., 1982), c. 1398, s. 6; 1985, c. 732, ss. 55, 55.1; 1985 (Reg. Sess., 1986), c. 1020, s. 7.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective July 1, 1986, deleted subsection (c), relating to the monitoring of expenditures under the Plan.

Part 3. Comprehensive Major Medical Plan.

§ 135-40. Undertaking.

(b) The Plan benefits will be provided under contracts between the State and the Claims Processor selected by the State. Claims Processor refers to the administrator, third party administrator or other party contracting with the State to administer the Plan benefits. Such contracts shall include the substance of G.S. 135-40.1 through G.S. 135-40.13 and the description of Plan in the request for proposal, and shall be administered by the respective Claims Processor of the State which will determine benefits and other questions arising thereunder. The contracts necessarily will conform to applicable State laws. If any of the provisions of G.S. 135-40.1 through G.S. 135-40.13 and the request for proposals must be modified for inclusion in the contract because of State laws, such modification will be made.

(1981 (Reg. Sess., 1982), c. 1398, s. 6; 1985, c. 732, ss. 44, 61; 1985 (Reg. Sess., 1986), c. 1020, ss. 8, 20.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective July 1, 1986, deleted "Parts I through K

of" preceding "the description of Plan" in the third sentence of subsection (b), substituted "the request for proposals" for "Parts I through K" in the last sentence of subsection (b), and substituted "Claims Processor" for "Plan Administrator" throughout subsection (b).

§ 135-40.1. General definitions.

As used in Parts 2 and 3 of this Article, the following terms have the meaning specified as follows:

- (1a) Covered Services. — Any medically necessary, reasonable, and customary items of service, at least a portion of the expense of which is covered under at least one of the plans covering the person for whom claim is made or service provided. To the extent legally possible, it shall be synonymous with allowable expenses.
- (3) Dependent Child. — A natural, legally adopted, or foster child of the employee and/or spouse, unmarried, up to the first of the month following his or her 19th birthday, whether or not the child is living with the employee, as long as the employee is legally responsible for such child's maintenance and support. Dependent child shall also

include any child under age 19 who has reached his or her 18th birthday, provided the employee was legally responsible for such child's maintenance and support on his or her 18th birthday.

A foster child is covered (i) if living in a regular parent-child relationship with the expectation that the employee will continue to rear the child into adulthood, (ii) if at the time of enrollment, or at the time a foster child relationship is established, whichever occurs first, the employee applies for coverage for such child and submits evidence of a bona fide foster child relationship, identifying the foster child by name and setting forth all relevant aspects of the relationship, (iii) if the Claims Processor accepts the foster child as a participant through a separate written document identifying the foster child by name and specifically recognizing the foster child relationship, and (iv) if at the time a claim is incurred, the foster child relationship, as identified by the employee, continues to exist. Children placed in a home by a welfare agency which obtains control of, and provides for maintenance of, the child(ren), are not eligible participants.

Coverage may be extended beyond the 19th birthday under the following conditions:

- a. If the dependent is a full-time student, between the ages of 19 and 26, who is pursuing a course of study that represents at least the normal workload of a full-time student at a school or college accredited by the state of jurisdiction.
 - b. The dependent is physically or mentally incapacitated to the extent that he or she is incapable of earning a living and (i) such handicap developed or began to develop before the dependent's 19th birthday, and (ii) the dependent was covered by the Plan and/or the Predecessor Plan when such handicap began and there has been no lapse in coverage since that time or, the dependent was not covered by the Predecessor Plan at the time the handicap began, but was subsequently covered by the Predecessor Plan and there has been no lapse in coverage since that time.
- (6) **Employing Unit.** — A North Carolina School System; Technical Institute; Community College; State Department, Agency or Institution; Administrative Office of the Courts; or Association or Examining Board whose employees are eligible for membership in a State-Supported Retirement System.
- (7) **Enrollment.** — New employees must enroll themselves and their dependents within 30 days from the date of employment. Coverage may become effective on the first day of the month following date of entry on payroll or on the first day of the following month. New employees not enrolling themselves and their dependents within 30 days, or not adding dependents when first eligible as provided herein may enroll on the first day of any month but will be subject to a 12-month waiting period for preexisting health conditions, except for employees who elect to change their coverage in accordance with rules established by the Executive Administrator and Board of Trustees for optional prepaid hospital and medical benefit plans. Children born to covered employees having coverage type (2), or (3), as outlined in G.S. 135-40.3(d) shall be automatically covered at the time of birth without any waiting period for preexisting health conditions. Children born to covered employees having coverage type (1) shall be automatically covered at birth without any waiting period for preexisting health conditions so long as the Claims Processor receives notification within 30 days of the date of birth that the employee desires to change from coverage (1) to coverage type (2), or (3), provided that

the employee pays any additional premium required by the coverage type selected retroactive to the first day of the month in which the child was born.

- (19) Usual, Customary and Reasonable. — The meaning of the term "UCR" shall be developed from criteria used for determining reasonable charges for services, including usual preoperative examination and customary postoperative care and care of usual complications, and shall be based on the usual charge made by an individual doctor for his or her private patients for a particular service, or the customary charge within the range of usual fees charged by most doctors of similar skill and training in North Carolina for the comparable service, whichever is the lower. A fee is reasonable if it meets the above two criteria. In cases of unusual complexity and cases involving supplemental skills of two or more doctors, reasonable charges will be determined by the Claims Processor upon advice of its medical advisors. (1981 (Reg. Sess., 1982), c. 1398, s. 6; 1983, c. 922, ss. 4, 21.1, 21.2, 21.7; 1983 (Reg. Sess., 1984), c. 1110, s. 10; 1985, c. 192, ss. 7, 16.1, 16.2; c. 732, ss. 12, 19, 25, 26; 1985 (Reg. Sess., 1986), c. 1020, ss. 5(a), 9, 20, 24, 27.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendments, it is not set out.

Effect of Amendments. — Session Laws 1985 (Reg. Sess., 1986), c. 1020, ss. 9, 20, 24 and 27, effective July 1, 1986, inserted "medically" following "Any" in the first sentence of subdivision (1a); substituted "a State-Supported Retirement System" for "the Teachers' and State Employees' Retirement System" at the end of subdivision (6); inserted

"without any waiting period for preexisting health conditions" at the end of the fourth sentence and near the middle of the fifth sentence of subsection (7); and substituted "Claims Processor" for "Plan Administrator" in the second paragraph of subdivision (3) and in subdivisions (7) and (19).

Session Laws 1985 (Reg. Sess., 1986), c. 1020, s. 5(a), effective January 1, 1987, substituted "or (3)" for "(3) or (5)" in two places in subdivision (7).

§ 135-40.2. (Effective until January 1, 1988) Eligibility.

(a) The following persons are eligible for coverage under the Plan, on a noncontributory basis, subject to the provisions of G.S. 135-40.3:

- (1) All permanent full-time employees of an employing unit who meet the following conditions:
 - a. Paid from general or special State funds, or
 - b. Paid from non-State funds and in a group for which his or her employing unit has agreed to provide coverage.
- (2) Retired teachers, State employees, and members of the General Assembly.
- (3) Surviving spouses of deceased retirees and surviving spouses of deceased teachers, State employees, and members of the General Assembly who are receiving a survivor's alternate benefit under any of the State-supported retirement programs provided the death of the former Plan member occurred prior to October 1, 1986.
- (3a) Employees of the General Assembly, not otherwise covered by this section, as determined by the Legislative Services Commission, except for legislative interns and pages.
- (4) Members of the General Assembly.

(b) The following person shall be eligible for coverage under the Plan, on a fully contributory basis, subject to the provisions of G.S. 135-40.3:

- (1) Repealed by Session Laws 1983, c. 761, s. 255, effective upon the convening of the 1985 Regular Session.
- (2) Former members of the General Assembly who enroll before October 1, 1986.
- (2a) For enrollments after September 30, 1986, former members of the General Assembly if covered under the Plan at termination of membership in the General Assembly.
- (3) Surviving spouses of deceased former members of the General Assembly who enroll before October 1, 1986.
- (3a) Employees of the General Assembly, not otherwise covered by this section, as determined by the Legislative Services Commission, except for legislative interns and pages.
- (3b) For enrollments after September 30, 1986, surviving spouses of deceased former members of the General Assembly, if covered under the Plan at the time of death of the former member of the General Assembly.
- (4) All permanent part-time employees (designated as half-time or more) of an employing unit who meets the conditions outlined in subdivision (a)(1)a. above.
- (5) The spouses and eligible dependent children of enrolled employees, retirees, and members of the General Assembly.
- (6) Blind persons licensed by the State to operate vending facilities under contract with the Department of Human Resources, Division of Services for the Blind and its successors, who are:
 - a. Operating such a vending facility;
 - b. Former operators of such a vending facility whose service as an operator would have made these operators eligible for an early or service retirement allowance under Article 1 of this Chapter had they been members of the Retirement System; and
 - c. Former operators of such a vending facility who attain five or more years of service as operators and who become eligible for and receive a disability benefit under the Social Security Act upon cessation of service as an operator.
- (7) Repealed by Session Laws 1985 (Reg. Sess., 1986), c. 1020, s. 29(j), effective October 1, 1986.
- (8) Surviving spouses of deceased retirees and surviving spouses of deceased teachers, State employees, and members of the General Assembly provided the death of the former Plan member occurred after September 30, 1986, and the surviving spouse was covered under the Plan at the time of death.
- (9) Reserved.
- (10) Any eligible dependent child of the deceased retiree, teacher, State employee, or member of the General Assembly, provided the child was covered at the time of death of the retiree, teacher, State employee, or member of the General Assembly (or was *in esse* at the time and is covered at birth under this Part), or was covered under the Plan on September 30, 1986. Any eligible spouse or dependent child of a person eligible under subdivisions (8) or (9) of this subsection if the spouse or dependent child was enrolled before October 1, 1986.
 - (c) No person shall be eligible for coverage as an employee or retired employee and as a dependent of an employee or retired employee at the same time. In addition, no person shall be eligible for coverage as a dependent of more than one employee or retired employee at the same time.
 - (d) Former employees who are receiving disability retirement benefits shall be eligible for the benefit provisions of this Plan, as set forth in this Part, on

the same basis as a retired employee. Such coverage shall terminate as of the end of the month in which such former employee is no longer eligible for disability retirement benefits.

(e) Employees on official leave of absence without pay may elect to continue this group coverage at group cost provided that they pay the full employee and employer contribution through the employing unit during the leave period.

(f) For the support of the benefits made available to any member vested at the time of retirement, their spouses or surviving spouses, and the surviving spouses of employees who are receiving a survivor's alternate benefit under G.S. 135-5(m) of those associations listed in G.S. 135-27(a), licensing and examining boards under G.S. 135-1.1, the North Carolina Art Society, Inc., and the North Carolina Symphony Society, Inc., each association, organization or board shall pay to the Plan the full cost of providing these benefits under this section as determined by the Board of Trustees of the Teachers' and State Employees' Comprehensive Major Medical Plan. In addition, each association, organization or board shall pay to the Plan an amount equal to the cost of the benefits provided under this section to presently retired members of each association, organization or board since such benefits became available at no cost to the retired member. (1981 (Reg. Sess., 1982), c. 1398, s. 6; 1983, c. 499; c. 761, ss. 252-255; c. 867, s. 4; c. 922, s. 5; 1985, c. 400, ss. 5, 6; 1985 (Reg. Sess., 1986), c. 1020, s. 29(a), (c)-(g), (i)-(l).)

Section Set Out Twice. — The section above is effective until January 1, 1988. For this section as amended effective January 1, 1988, see the following section, also numbered 135-40.2.

Effect of Amendments. —

Session Laws 1985 (Reg. Sess., 1986), c. 1020, s. 29(a), (c) to (g), and (i) to (l), effective October 1, 1986, added "provided the death of

the former Plan member occurred prior to October 1, 1986" at the end of subdivision (a)(3), substituted "on a fully" for "in a full" in the introductory language of subsection (b), rewrote subdivision (b)(2), added new subdivision (b)(2a), rewrote subdivision (b)(3), added subdivision (b)(3b), rewrote subdivision (b)(5), deleted subdivision (b)(7), added subdivision (b)(8), added subdivision (b)(10).

§ 135-40.2. (Effective January 1, 1988) Eligibility.

(a) The following persons are eligible for coverage under the Plan, on a noncontributory basis, subject to the provisions of G.S. 135-40.3:

- (1) All permanent full-time employees of an employing unit who meet the following conditions:
 - a. Paid from general or special State funds, or
 - b. Paid from non-State funds and in a group for which his or her employing unit has agreed to provide coverage.
- (2) Retired teachers, State employees, and members of the General Assembly.
- (3) Repealed by Session Laws 1985 (Reg. Sess., 1986), c. 1020, s. 29(b), effective January 1, 1988.
- (3a) Employees of the General Assembly, not otherwise covered by this section, as determined by the Legislative Services Commission, except for legislative interns and pages.
- (4) Members of the General Assembly.

(b) The following person shall be eligible for coverage under the Plan, on a fully contributory basis, subject to the provisions of G.S. 135-40.3:

- (1) Repealed by Session Laws 1983, c. 761, s. 255, effective upon the convening of the 1985 Regular Session.
- (2) Former members of the General Assembly who enroll before October 1, 1986.

- (2a) For enrollments after September 30, 1986, former members of the General Assembly if covered under the Plan at termination of membership in the General Assembly.
- (3) Surviving spouses of deceased former members of the General Assembly who enroll before October 1, 1986.
- (3a) Employees of the General Assembly, not otherwise covered by this section, as determined by the Legislative Services Commission, except for legislative interns and pages.
- (3b) For enrollments after September 30, 1986, surviving spouses of deceased former members of the General Assembly, if covered under the Plan at the time of death of the former member of the General Assembly.
- (4) All permanent part-time employees (designated as half-time or more) of an employing unit who meets the conditions outlined in subdivision (a)(1)a. above.
- (5) The spouses and eligible dependent children of enrolled employees, retirees, and members of the General Assembly.
- (6) Blind persons licensed by the State to operate vending facilities under contract with the Department of Human Resources, Division of Services for the Blind and its successors, who are:
 - a. Operating such a vending facility;
 - b. Former operators of such a vending facility whose service as an operator would have made these operators eligible for an early or service retirement allowance under Article 1 of this Chapter had they been members of the Retirement System; and
 - c. Former operators of such a vending facility who attain five or more years of service as operators and who become eligible for and receive a disability benefit under the Social Security Act upon cessation of service as an operator.
- (7) Repealed by Session Laws 1985 (Reg. Sess., 1986), c. 1020, s. 29(j), effective October 1, 1986.
- (8) Surviving spouses of deceased retirees and surviving spouses of deceased teachers, State employees, and members of the General Assembly provided the death of the former Plan member occurred after September 30, 1986, and the surviving spouse was covered under the Plan at the time of death.
- (9) Surviving spouses of deceased retirees and surviving spouses of deceased teachers, State employees, and members of the General Assembly provided the death of the former Plan member occurred prior to October 1, 1986.
- (10) Any eligible dependent child of the deceased retiree, teacher, State employee, or member of the General Assembly, provided the child was covered at the time of death of the retiree, teacher, State employee, or member of the General Assembly (or was *in esse* at the time and is covered at birth under this Part), or was covered under the Plan on September 30, 1986. Any eligible spouse or dependent child of a person eligible under subdivisions (8) or (9) of this subsection if the spouse or dependent child was enrolled before October 1, 1986.

(c) No person shall be eligible for coverage as an employee or retired employee and as a dependent of an employee or retired employee at the same time. In addition, no person shall be eligible for coverage as a dependent of more than one employee or retired employee at the same time.

(d) Former employees who are receiving disability retirement benefits shall be eligible for the benefit provisions of this Plan, as set forth in this Part, on the same basis as a retired employee. Such coverage shall terminate as of the

end of the month in which such former employee is no longer eligible for disability retirement benefits.

(e) Employees on official leave of absence without pay may elect to continue this group coverage at group cost provided that they pay the full employee and employer contribution through the employing unit during the leave period.

(f) For the support of the benefits made available to any member vested at the time of retirement, their spouses or surviving spouses, and the surviving spouses of employees who are receiving a survivor's alternate benefit under G.S. 135-5(m) of those associations listed in G.S. 135-27(a), licensing and examining boards under G.S. 135-1.1, the North Carolina Art Society, Inc., and the North Carolina Symphony Society, Inc., each association, organization or board shall pay to the Plan the full cost of providing these benefits under this section as determined by the Board of Trustees of the Teachers' and State Employees' Comprehensive Major Medical Plan. In addition, each association, organization or board shall pay to the Plan an amount equal to the cost of the benefits provided under this section to presently retired members of each association, organization or board since such benefits became available at no cost to the retired member. (1981 (Reg. Sess., 1982), c. 1398, s. 6; 1983, c. 499; c. 761, ss. 252-255; c. 867, s. 4; c. 922, s. 5; 1985, c. 400, ss. 5, 6; 1985 (Reg. Sess., 1986), c. 1020, s. 29 (a)-(I).)

Section Set Out Twice. — The section above is effective January 1, 1988. For this section as in effect until January 1, 1988, see the preceding section, also numbered 135-40.2.

Effect of Amendments. —

Session Laws 1985 (Reg. Sess., 1986), c. 1020, s. 29(a), (c) to (g), and (i) to (I), effective October 1, 1986, added "provided the death of the former Plan member occurred prior to October 1, 1986" at the end of subdivision (a)(3), substituted "on a fully" for "in a full" in the

introductory language of subsection (b), rewrote subdivision (b)(2), added new subdivision (b)(2a), rewrote subdivision (b)(3), added subdivision (b)(3b), rewrote subdivision (b)(5), deleted subdivision (b)(7), added subdivision (b)(8), added subdivision (b)(10).

Session Laws 1985 (Reg. Sess., 1986), c. 1020, s. 29(b) and (h), effective January 1, 1988, deleted subdivision (a)(3), relating to surviving spouses, and added subdivision (b)(9).

§ 135-40.3. Effective dates of coverage.

(c) Dependents of Employees and Retired Employees. —

- (1) Dependents of employees and retired employees who have family coverage under the Predecessor Plan will continue to be covered subject to the terms hereof.
- (2) Employees who have dependents may apply for family coverage at the time they enroll as provided in subdivisions (a)(2) and (a)(3) and such dependents will be covered under the Plan beginning the same date as such employees.
- (3) Employees and retired employees may change from individual to family coverage upon written application at any time after acquiring a dependent, and such dependent will be covered under the Plan beginning the first of the next calendar month following receipt of such application by the Claims Processor.
- (4) Employees who wish to change from family coverage to individual coverage shall give written notice to the Claims Processor within 31 days after any change in the status of dependents, (resulting from death, divorce, etc.) which requires a change from family coverage to individual coverage.
- (5) Employees not adding dependents when first eligible may enroll later on the first of any following month, but dependents will be subject to

a 12-month waiting period for preexisting health conditions except as provided in subdivision (a)(3) of this section.

(d) Types of Coverage Available. — There are five types of coverage which an employee or retiree may elect.

- (1) Employee Only. — Covers enrolled employees only. Maternity benefits are provided to employee only.
- (2) Employee and Child(ren). — Covers enrolled employee and all eligible dependent children. Maternity benefits are provided to the employee only.
- (3) Employee and Family. — Covers employee and spouse, and all eligible dependent children. Maternity benefits are provided to employee or enrolled spouse.
- (4), (5) Repealed by Session Laws 1985 (Reg. Sess., 1986), c. 1020, s. 5(b), effective January 1, 1987.) (1981 (Reg. Sess., 1982), c. 1398, s. 6; 1983, c. 499; c. 761, ss. 252-255; c. 867, s. 4; c. 922, s. 5; 1985, c. 400, ss. 5, 6; 1985 (Reg. Sess., 1986), c. 1020, ss. 5(b), 20.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — Session Laws 1985 (Reg. Sess., 1986), c. 1020, s. 20, effective July 1, 1986, substituted "Claims Processor"

for "Plan Administrator" in subdivisions (c)(3) and (4).

Session Laws 1985 (Reg. Sess., 1986), c. 1020, s. 5(b), effective January 1, 1987, deleted subdivisions (d)(4) and (d)(5), relating to split coverage.

§ 135-40.5. Benefits not subject to deductible or coinsurance.

(d) Second Surgical Opinions. — The Plan will pay one hundred percent (100%) of reasonable and customary charges for one presurgical consultation by a second surgeon regarding the performance of nonemergency surgery. The Plan will also pay one hundred percent (100%) of the reasonable and customary charges for diagnostic, laboratory and x-ray examinations required by the second surgeon. Second surgical opinions for tonsillectomy and adenoidectomy procedures may be provided by Board-qualified pediatricians and family practitioners when qualified surgeons are not available to provide a second surgical opinion. Should the first two opinions differ as to the necessity of surgery, the Plan will pay one hundred percent (100%) of reasonable and customary charges for the consultation of the third surgeon.

As used in this section and the provisions of G.S. 135-40.8(b), second surgical opinions shall be required for the following procedures otherwise covered by the Plan: transurethral resection of the prostate, hemorrhoidectomy, hysterectomy, tonsillectomy and adenoidectomy, cholecystectomy, revision of the nasal structure, coronary artery bypass surgery, thyroid surgery, and surgery on the knee (except in procedures involving orthoscopic surgery when the diagnosis and the surgery can be performed in the same procedure and through the same incision). Second surgical opinions for coronary by-pass surgery may be provided by doctors who are Board-qualified in internal medicine when qualified surgeons are not available to provide a second surgical opinion. The Claims Processor may waive the requirement for obtaining a second surgical opinion required by this subsection or required by G.S. 135-40.8(b) if the location and availability of surgeons qualified to provide second opinions creates an unjust hardship or if the medical condition of the patient would be adversely affected. (1981 (Reg. Sess., 1982), c. 1398, s. 6; 1983, c. 922, s. 7; 1985, c. 192, ss. 5, 9, 12; c. 732, ss. 16-18; 1985 (Reg. Sess., 1986), c. 1020, ss. 10, 20.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective July 1, 1986, added "(except in procedures involving orthoscopic surgery when the

diagnosis and the surgery can be performed in the same procedure and through the same incision)" at the end of the first sentence of the second paragraph of subsection (d), and substituted "Claims Processor" for "Plan Administrator" in the second paragraph of subsection (d).

§ 135-40.6. Benefits subject to deductible and coinsurance (comprehensive benefits).

The following benefits are subject to a deductible of one hundred fifty dollars (\$150.00) per covered individual to an aggregate maximum of four hundred fifty dollars (\$450.00) per family per fiscal year and are payable on the basis of ninety percent (90%) by the Plan and ten percent (10%) by the covered individual up to a maximum of three hundred dollars (\$300.00) out-of-pocket per calendar year:

- (1) In-Hospital Benefits. — The Plan pays in-hospital benefits for each single confinement, when charged by a hospital, for room accommodation, including bed, board and general nursing care, but not to exceed the charge for semiprivate room or ward accommodations.

The Plan will pay the following covered charges, when charged by a hospital, for each confinement.

- a. Intensive and cardiac nursing care.
- b. All recognized drugs and medicines for use in the hospital.
- c. Radiation services, including diagnostic x-rays, x-ray therapy, radiation therapy and treatment.
- d. Clinical and pathological laboratory examinations.
- e. Electrocardiograms and electroencephalograms.
- f. Physical therapy.
- g. Intravenous solutions.
- h. Oxygen and oxygen therapy, plus the use of equipment.
- i. Dressings, ordinary splints, plaster casts and sterile supplies.
- j. Use of operating, delivery, recovery and treatment rooms and equipment.
- k. Routine nursery charges, if the mother is eligible to receive maternity benefits.
- l. Anesthetics and the administration thereof by the hospital's employee anesthesiologist.
- m. Devices or appliances surgically inserted within the body.
- n. Processing and administering of blood and blood plasma.
- o. Children who are born under the coverage type (2), (3), or (5), as outlined in G.S. 135-40.3(d), and who remain continuously covered are entitled to benefits for treatment of illnesses or congenital defect, incubation or isolette care, and treatment of prematurity or postmaturity.

If the mother is a covered individual, benefits are provided for the newborn's circumcision and routine nursery care.

- p. When a covered individual is admitted to or transferred to a section of a hospital providing ambulant, convalescent, or rehabilitative care, benefits are provided up to the average number of days of service for treatment of the particular diagnosis or condition involved, or more if medical necessity requires.
- q. The Plan pays benefits for laboratory testing and administration of blood provided to a covered individual. When a covered individual is the recipient of transplanted organs or bones, benefits

are provided for services to the donor which are directly and specifically related to the transplantation.

- r. Thirty days per fiscal year are provided for inpatient treatment of mental illness. Readmission for this condition within 365 days of last discharge shall be considered a single confinement. When furnished to a patient in a skilled nursing facility, 30 days less the days of care already provided for the same illness in a hospital are provided. Additional inpatient treatment, based on individual consideration, may be provided if prior approval is obtained from the Claims Processor.
 - s. The use of nebulizers when authorized as medically necessary by the attending physician.
- (2) Limitations and Exclusions to In-Hospital Benefits. —
- a. The services of physicians, surgeons and technicians not employed by or under contract to the hospital are not covered.
 - b. Any admission for diagnostic tests or procedures which could be, and generally are, performed on an outpatient basis, if no hospitalization would have been required except for such diagnostic services is not covered. However, benefits are provided at ninety percent (90%) of Plan benefits for diagnostic tests and procedures consistent with the symptoms or diagnosis for which admitted.
 - c. The Plan will not cover any admission to a hospital prior to the effective date of coverage or beginning prior to the expiration of any waiting period so long as the individual remains continuously in a hospital.
 - d. Hospitalization for custodial, domiciliary or sanitarium care, or rest cures, is not covered.
 - e. Hospitalization for dental care and treatment is not covered, except when a hospital setting is medically necessary.
 - f. Prior to admission for scheduled inpatient hospitalization and following admission for unscheduled inpatient hospitalization, the admitting physician shall contact the Plan and secure approval certification for an inpatient admission, including a length of stay, based upon clinical criteria established by the medical community, before any in-hospital benefits are allowed under G.S. 135-40.8(a). Effective January 1, 1987, failure to secure certification, or denial of certification, shall result in in-hospital benefits being allowed at the rate maximum amount of out-of-pocket expenses established by G.S. 135-40.8(b). Denial of certification by the Plan shall be made only after contact with the admitting physician and shall be subject to appeal to the Executive Administrator and Board of Trustees.
- (4) Outpatient Hospital Benefits. — The Plan pays for services rendered in the outpatient department of a hospital, in a doctor's office, in an ambulatory surgical facility, or elsewhere, as follows:
- a. Accidental injury: All covered services. Dental services are excluded except for oral surgery specifically listed in subsection (5)c of this section.
 - b. All hospital services for operative procedures.
 - c. All hospital services for radiation therapy, treatment by use of x-rays, radium, cobalt and other radioactive substances.
 - d. All hospital services in connection with pathological examinations of tissue removed by resection or biopsy. Routine Pap smears are not covered.
 - e. Charges for diagnostic x-rays, clinical laboratory tests, and other diagnostic tests and procedures such as electrocardiograms and electroencephalograms.

No benefits are provided for screening examinations and routine physical examinations to assess general health status in the absence of specific symptoms of active illness, routine office visits or for doctor's services for diagnostic procedures covered under surgical benefits.

(5) **Surgical Benefits.** — The Plan pays the usual, customary and reasonable charges for covered surgical services as follows:

- a. **Surgery:** Cutting procedures, treatment of fractures, transfusions, operative preparation for diagnostic x-ray examinations, surgical implantation radiation sources, major endoscopic examinations, biopsies, surgical sterilization, other standard services and operations.

For the purpose of this subdivision, the term "standard services and operations" includes the following organ transplants: liver, corneal, bone marrow, and kidney. All other organ transplants shall be considered nonreimbursable under the Plan. Benefits for the above listed organ transplants shall be payable only in accordance with rules established by the Executive Administrator and Board of Trustees.

- b. **Anesthesia:** Administration of general, spinal block or local anesthesia. Covered services include pre- and postoperative visits, the administration of the anesthetic, fluids and/or blood provided by the anesthesiologist and incidental to the anesthesia, and necessary drugs and materials provided by the anesthesiologist. No benefits are provided for administration of local anesthesia or for anesthesia administered by the operating surgeon or surgical assistant(s).
- c. **Oral Surgery:** Services which are within the scope of practice of both a doctor of medicine and a dentist, such as excision of tumors and lesions of the mouth, treatment of jaw fractures and surgery to correct injuries of the mouth structure other than teeth and their supporting structure. Developmental and congenital orthognathic surgery procedures will be covered under the Plan, provided such surgery is medically necessary, is the only method of treatment which will correct the patient's deformity, is not performed for cosmetic reasons, and is approved in advance by the Claims Processor on the basis of the surgeon's documentation that the correction of the deformity is medically necessary for the maintenance of good physical health.
- d. **Maternity Care:** Independent operative procedures in connection with pregnancy, such as: manipulative obstetrical delivery, delivery by Caesarean section, removal of ectopic pregnancy, dilation and curettage. Benefits for manipulative obstetrical delivery include use of forceps and/or episiotomy. No benefits are provided for antepartum or postpartum care, except for direct surgical procedures of delivery and surgical treatment.
- e. **Surgical Assistants:** Services of an assistant surgeon when medical judgment requires the services of an assistant surgeon and no hospital-employed doctor in training is available.
- f. **Multiple Procedures:** When multiple or bilateral surgical procedures are performed by the same doctor through separate incisions or approaches during the same session, the surgical benefits will be the greater UCR allowance, plus fifty percent (50%) of the lesser UCR allowance. Anesthesia benefits will be the greater UCR allowance.

When multiple surgical procedures are performed by the same doctor through the same incision or operative approach, the surgical benefits are limited to the procedure which has the highest UCR allowance.

When a surgical procedure is performed in two or more stages, the surgical benefit for the entire procedure is the same as it would be were the procedure performed in one stage (except where otherwise provided in the benefit schedule). This limitation does not apply to anesthesia benefits.

- g. Cleft Palate: Notwithstanding G.S. 135-40.6(6)a and G.S. 135-40.7(11), medical treatment and care needed by an individual born with cleft palate, including specialized dental and orthodontic care necessitated by the congenital condition, provided that the individual was covered at the time of birth by the Plan or the Predecessor Plan.

(6) Limitations and Exclusions to Surgical Benefits. —

- a. No benefits are provided for dental prostheses such as crowns, or dentures; orthodontic care; operative restoration of teeth (fillings); dental extractions (whether impacted or not impacted); apicoectomies; treatment of dental caries, gingivitis, or periodontal diseases by gingivectomies or other periodontal surgery; vestibuloplasties, alveoplasties, removal of exostosis and tori preparatory to fitting of dentures; correction of malocclusion by orthognathic surgery or other procedures by repositioning of bone tissue except as permitted pursuant to G.S. 135-40.6(5)c; removal of cysts incidental to apicoectomies or extraction of teeth.
- b. Cosmetic surgery or surgery solely for beautifying purposes is not covered, except for procedures related to injury sustained while the individual is continuously covered under the Plan.
- c. If a covered individual is admitted for medical and surgical treatment for the same condition, by the same doctor, either medical or surgical care may be paid, whichever is greater, but not both.
- d. When a covered individual is admitted for medical treatment and during the hospital admission is subsequently referred to another doctor for surgery, medical benefits are provided for hospital days prior to the date of referral.
- e. If during the hospital admission for necessary medical treatment, surgery is provided for a wholly distinct and unrelated condition, both medical and surgical benefits are payable, however, the same doctor may not be paid both medical and surgical benefits provided on the same day.
- f. If during hospital admission for necessary medical treatment, a covered individual receives related surgical procedures such as paracentesis, biopsy, endoscopy, operative preparation for x-ray examination, or other diagnostic procedures for which benefits are applicable under the surgical benefits section of the Plan, both medical and surgical benefits are payable.
- g. No benefits are provided for concurrent co-attending medical and surgical care by two or more doctors for the same condition other than as provided above.
- h. No benefits will be payable for surgical procedure specifically listed by the American Medical Association or the North Carolina Medical Association as having no medical value.
- i. No benefits are payable for organ transplants not listed in G.S. 135-40.6(5)a, nor will benefits be payable for surgical procedures

determined in the opinion of the Claims Processor to be experimental.

- j. No benefits are payable for radial keratotomy surgical procedures.
- (8) Other Covered Charges. —
- a. Prescription Drugs: Prescription legend drugs in excess of the first two dollars (\$2.00) per prescription for generic drugs and brand name drugs without a generic equivalent and in excess of the first three dollars (\$3.00) per prescription for brand name drugs for use outside of a hospital or skilled nursing facility. A prescription legend drug is defined as an article the label of which, under the Federal Food, Drug, and Cosmetic Act, is required to bear the legend: "Caution: Federal Law Prohibits Dispensing Without Prescription." Such articles may not be sold to or purchased by the public without a prescription order. Benefits are provided for insulin even though prescription is not required.
 - b. Private Duty Nursing: Services of licensed nurses (not immediate relatives or members of the participant's household or private duty nursing used in lieu of or as a substitute for hospital staff nurses) ordered by the attending doctor for a condition requiring skilled nursing services.
 - c. Home Health Agency Services: Services provided in a covered individual's home, when ordered by the attending physician. Services may include medical supplies, equipment, appliances, therapy services (when provided by a qualified speech therapist or licensed physiotherapist), and nursing services. Nursing services will be allowed for:
 - 1. Services of a registered nurse (RN); or
 - 2. Services of a licensed practical nurse (LPN) under the supervision of a RN; or
 - 3. Services of a home health aide under the supervision of a RN, limited to four hours a day.Home health services shall be limited to 60 days per fiscal year, except that additional home health services may be provided on an individual basis if prior approval is obtained from the Claims Processor.
 - d. Licensed Ambulance Service: Local ambulance transportation:
 - To or from a hospital for inpatient care or outpatient accident care;
 - From a hospital to the nearest facility able to provide needed services not available at the transferring hospital; or
 - From a hospital to a skilled nursing facility.The word "local" means ambulance transportation of not more than 50 miles unless the Administrator authorizes ambulance transportation beyond this distance.
 - e. Prosthetic and Orthopedic Appliances and Durable Medical Equipment: Appliances and equipment including corrective and supportive devices such as artificial limbs and eyes, wheelchairs, traction equipment, inhalation therapy and suction machines, hospital beds, braces, orthopedic corsets and trusses, and other prosthetic appliances or ambulatory apparatus which are provided solely for the use of the participant. Eligible charges include repair and replacement when medically necessary. Benefits will be provided on a rental or purchase basis at the sole discretion of the Administrator and agreements to rent or purchase shall be between the Administrator and the supplier of the appliance.

For the purposes of this subdivision, the term "durable medical equipment" means standard equipment normally used in an institutional setting which can withstand repeated use, is primarily and customarily used to serve a medical purpose, is generally not useful to a person in the absence of an illness or injury and is appropriate for use in the home. Decisions of the Claims Processor, the Executive Administrator and Board of Trustees as to compliance with this definition and coverage under the Plan shall be final.

- f. **Dental Services:** Dental surgery and appliances for mouth, jaw, and tooth restoration necessitated because of external violent and accidental means, such as the impact of moving body, vehicle collision, or fall occurring while an individual is covered under G.S. 135-40.3. No benefits are provided in connection with injury incurred in the act of chewing, nor for damage or breakage of an appliance such as bridge or denture being cleaned or otherwise not in normal mouth usage at the time of accident, nor for appliances for orthodontic treatment when a class of malocclusion, other than orthognathic, or cross bite has been diagnosed. Benefits for temporomandibular joint (TMJ) disfunction appliance therapy are limited to cases where the TMJ disfunction has been diagnosed as solely resulting from accidental means as certified by the attending practitioner and approved by the Claims Processor.

Benefits shall include extractions, fillings, crowns, bridges, or other necessary therapeutic and restorative techniques and appliances to reasonably restore condition and function to that existing immediately prior to the accident. Injury or breakage of existing appliances such as bridges and dentures is limited to repair of such appliances unless certified as damaged beyond repair.

- g. **Medical Supplies:** Colostomy bags, catheters, dressings, oxygen, syringes and needles, and other similar supplies.
- h. **Blood:** Transfusions including cost of blood, plasma, or blood plasma expanders.
- i. **Physical Therapy:** Recognized forms of physical therapy for restoration of bodily function, provided by a doctor, hospital, or by a licensed professional physiotherapist. No benefits are provided for eye exercises or visual training.
- j. **Inhalation Therapy:** When provided by a doctor, hospital, or other organization.
- k. **Speech Therapy:** Speech therapy provided by certified speech therapist. Benefits are provided only in connection with a condition, illness, or injury arising while continuously covered under this Plan.
- l. **Cataract Lenses:** Cataract lenses prescribed as medically necessary for aphakia persons, including charges for necessary examinations and fittings. Benefits will be limited to one set of cataract lenses every 24 months for persons 18 years of age or older, and one set of cataract lenses every 12 months for persons less than 18 years of age.
- m. **Cardiac Rehabilitation:** Charges not to exceed six hundred fifty dollars (\$650.00) per fiscal year for cardiac testing and exercise therapy, when determined medically necessary by an attending physician and approved by the Claims Processor for patients with a medical history of myocardial infarction, angina pectoris,

arrhythmias, cardiovascular surgery, hyperlipidemia, or hypertension, provided such charges are incurred in a medically supervised facility fully certified by the North Carolina Department of Human Resources.

- n. Chiropractic Services: Limited to the alignment of the spine and releasing of pressure by manipulation in accordance with the definitions in G.S. 90-143.1 [G.S. 90-143]. Maximum benefits for x-rays, manipulations, and modalities shall be one thousand dollars (\$1,000) per fiscal year.
- o. Foot Surgery: All foot surgery on bones and joints in excess of one thousand dollars (\$1,000), except for emergencies, shall require prior approval from the Claims Processor.
- p. Outpatient Diabetes Self-Care Programs: Charges, not to exceed three hundred dollars (\$300.00) per fiscal year, when determined to be medically necessary by an attending physician and approved by the Executive Administrator and Claims Processor as meeting the standards of the National Diabetes Advisory Board for patients with a medical history of diabetes, provided such charges are incurred in a medically supervised facility.

(1981 (Reg. Sess., 1982), c. 1398, s. 6; 1983, c. 922, ss. 8-14, 21.3, 21.5, 21.9; 1983 (Reg. Sess., 1984), c. 1110, s. 12; 1985, c. 192, ss. 2, 3, 6, 6.1, 11, 16-17; c. 732, ss. 1, 14, 15, 20-22, 27-29, 31-33, 35, 65, 66; 1985 (Reg. Sess., 1986), c. 1020, ss. 4, 11-15, 20, 23.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — The reference in paragraph (8)n to G.S. 90-143.1 was apparently intended to refer to G.S. 90-143.

Effect of Amendments. —

Session Laws 1985 (Reg. Sess., 1986), c. 1020, s. 12, effective retroactive to July 1, 1985, inserted "liver" in the first sentence of the second paragraph of paragraph (5)a.

Session Laws 1985 (Reg. Sess., 1986), c. 1020, ss. 11, 13-15, 20 and 23, effective July 1, 1986, substituted "January 1, 1987" for "July 1, 1986" near the beginning of the second sentence of paragraph 2(f); substituted "All cov-

ered services" for "When services are furnished within 30 days of the actual occurrence of injury and provided treatment is initiated within five days of injury occurrence" in paragraph (4)a; rewrote paragraphs (8)m and (8)o; added paragraph (8)p; and substituted "Claims Processor" for "Plan Administrator" in paragraphs (1)r, (5)c, (6)i, (8)c, (8)e, and (8)f.

Session Laws 1985 (Reg. Sess., 1986), c. 1020, s. 4, effective January 1, 1987, inserted "in excess of the first two dollars (\$2.00) per prescription for generic drugs and brand name drugs without a generic equivalent and in excess of the first three dollars (\$3.00) per prescription for brand name drugs" near the beginning of the first sentence of paragraph (8)a.

§ 135-40.6A. Prior approval procedures.

(a) The Executive Administrator and Board of Trustees shall establish procedures to require prior medical approvals for the following services:

- (1) Home Health Care Agency Services in accordance with G.S. 135-40.6(8)c.
- (2) Inpatient Psychiatric Care (after initial 30 days) in accordance with G.S. 135-40.6(1)r.
- (3) Ambulance Transport over 50 miles in accordance with G.S. 135-40.6(8)d.
- (4) Oral Surgery in accordance with G.S. 135-40.6(5)c.
- (5) Durable Medical Equipment (rental and purchase) in accordance with G.S. 135-40.6(8)e.
- (6) Covered Transplants in accordance with G.S. 135-40.6(5)a.
- (7) Foot Surgery in accordance with G.S. 135-40.6(8)o.

(b) The Executive Administrator and Board of Trustees may establish procedures to require prior medical approvals for the following services:

- (1) Skilled Nursing Facility Care (after the initial 30 days);
- (2) Private Duty Nursing;
- (3) Speech Therapy (unless rendered in an inpatient hospital);
- (4) Physical Therapy (in the home);
- (5) Argon Laser Trabeculoplasty;
- (6) Radioallergosorbent Test (RAST);
- (7) Surgical Procedures:
 - a. Elepharoplasties
 - b. Surgery for Hermaphroditism
 - c. Excision of Keloids
 - d. Reduction Mammoplasty
 - e. Morbid Obesity Surgery
 - f. Penile Prosthesis
 - g. Excision of Gynecomastia
 - h. Cochlear Implants
 - i. Revision of the Nasal Structure
- (8) Subcutaneous injection of "filling" material (Example: zyderm, silicone); and
- (9) Suction Lipectomy

(c) No procedure for prior approval may be established except as provided by this section as it may be amended from time to time. (1985 (Reg. Sess., 1986), c. 1020, s. 22.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1020, s. 31 makes this section effective July 1, 1986.

§ 135-40.7. General limitations and exclusions.

The following shall in no event be considered covered expenses nor will benefits described in G.S. 135-40.5 through G.S. 135-40.11 be payable for:

- (2) Charges for care in a nursing home, home for the aged, convalescent home, or in any other facility or location for custodial or domiciliary care or for rest cures.
- (5) Charges for any care, treatment, services or supplies other than those which are certified by a physician who is attending the individual as being required for the [medically] necessary treatment of the injury or disease.
- (10) Charges in excess of either the usual, customary and reasonable charge for or the fair and reasonable value of the services or supply which gives rise to the expense; provided that in each instance the extent that a particular charge is usual, customary and reasonable or fair and reasonable shall be measured and determined by comparing the charge with charges made for similar things to individuals of similar age, sex, income and medical condition in the locality concerned, and the result of such determination shall constitute the maximum allowable as covered medical expenses unless the Claims Processor finds that considerations of fairness and equity in a particular set of circumstances require that greater or lesser charges be considered as covered medical expenses in that set of circumstances.
- (12) Charges incurred for any medical observations or diagnostic study when no disease or injury is revealed, unless proof satisfactory to the Claims Processor is furnished that (i) the claim is in order in all other

- respects, (ii) the covered individual had a definite symptomatic condition of disease or injury other than hypochondria, and (iii) the medical observation and diagnostic studies concerned were not undertaken as a matter of routine physical examination or health checkup.
- (16) Costs denied by the Claims Processor as part of its overall program of claim review and cost containment.
 - (17) If a covered service becomes excluded from coverage under the Plan, the Executive Administrator and Claims Processor may, in the event of exceptional situations creating undue hardships or adverse medical conditions, allow persons enrolled in the Plan to remain covered by the Plan's previous coverage for up to three months after the effective date of the change in coverage, provided the persons so enrolled had been undergoing a continuous plan of specific treatment initiated within three months prior to the effective date of the change in coverage.
 - (18) Charges for services unless a claim is filed within 18 months from the date of service. (1981 (Reg. Sess., 1982), c. 1398, s. 6; 1983, c. 922, ss. 15, 21.4; 1985 (Reg. Sess., 1986), c. 1020, ss. 16, 20, 21, 25, 26.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. —

Session Laws 1985 (Reg. Sess., 1986), c. 1020, ss. 16, 20, 21 and 25, effective July 1, 1986, deleted "or" preceding "convalescent home" and inserted "or in any other facility or location" thereafter in subdivision (2); substituted "Claims Processor" for "Plan Adminis-

trator" in subdivisions (10), (12) and (16); and added subdivisions (17) and (18).

Session Laws 1985 (Reg. Sess., 1986), c. 1020, s. 26, effective July 1, 1986, directed that subdivision (5) of this section be "amended in the last line between the words 'the' and 'necessary' the word 'medically'." At the direction of the Revisor of Statutes, "medically" has been inserted in brackets preceding "necessary treatment" in subdivision (5).

§ 135-40.8. Out-of-pocket expenditures.

(b) Where a covered individual fails to obtain a second surgical opinion as required under the Plan, the covered individual shall be responsible for fifty percent (50%) of the eligible expenses, provided, however, that no covered individual shall be required to pay out-of-pocket in excess of five hundred dollars (\$500.00).

(1981 (Reg. Sess., 1982), c. 1398, s. 6; 1983, c. 922, s. 16; 1985, c. 192, ss. 4, 8, 10, 18; 1985 (Reg. Sess., 1986), c. 1020, s. 17.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective October 1, 1986, substituted "five hundred dollars (\$500.00)" for "one thousand dollars (\$1,000)" at the end of subsection (b).

§ 135-40.10. Persons eligible for Medicare.

(d) Notwithstanding the foregoing provisions of this section or any other provisions of the Plan, the Executive Administrator and Board of Trustees may enter into negotiations with the Health Care Financing Administration, U.S. Department of Health and Human Services, in order to secure a more favorable coordination of the Plan's benefits with those provided by Medicare, including but not limited to, measures by which the Plan would provide Medicare benefits for all of its Medicare-eligible members in return for adequate payments from the federal government in providing such benefits. Should

such negotiations result in an agreement favorable to the Plan and its Medicare-eligible members, the Executive Administrator and Board of Trustees may, after consultation with the Committee on Employee Hospital and Medical Benefits, implement such an agreement which shall supersede all other provisions of the Plan to the contrary related to its payment of claims for Medicare-eligible members. (1981 (Reg. Sess., 1982), c. 1398, s. 6; 1985 (Reg. Sess., 1986), c. 1020, s. 18.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 1, 1986, added subsection (d).

§ 135-40.11. Cessation of coverage.

(a) Coverage under this Plan of an employee and his or her surviving spouse or eligible dependent children or of a retired employee and his or her surviving spouse or eligible dependent children shall cease on the earliest of the following dates:

- (1) The last day of the month in which an employee or retired employee dies. Provided such surviving spouse or eligible dependent children were covered under the Plan at the time of death of the former employee or retired employee, or were covered on September 30, 1986, any such surviving spouse or eligible dependent children may then elect to continue coverage under the Plan by submitting written application to the Claims Processor and by paying the cost for such coverage when due at the applicable fees. Such coverage shall cease on the last day of the month in which such surviving spouse or eligible dependent children die, except as provided by this Article.
- (2) The last day of the month in which an employee's employment with the State is terminated as provided in subsection (c) of this section.
- (3) The last day of the month in which a divorce becomes final.
- (4) The last day of the month in which an employee or retired employee requests cancellation of coverage.
- (5) The last day of the month in which a covered individual enters active military service.

(b) Coverage under this Plan as a dependent child ceases when the child ceases to be a dependent child as defined by G.S. 135-40.1(3) except, coverage may continue under this Plan for a period of not more than 36 months after loss of dependent status on a fully contributory basis provided the dependent child was covered under the Plan at the time of loss of dependent status.

(c) Termination of employment shall mean termination for any reason, including layoff and leave of absence, except as provided in (a)(1) and (2) of this section, but shall not, for purposes of this Plan, include retirement upon which the employee is granted an immediate service or disability pension under and pursuant to a State-supported Retirement System.

- (1) In the event of termination for any reason other than death, coverage under the Plan for an employee and his or her eligible spouse or dependent children, provided the eligible spouse or dependent children were covered under the Plan at termination of employment or were covered on September 30, 1986, may be continued for a period of not more than 18 months following termination of employment on a fully contributory basis.
- (2) Repealed by Session Laws 1985 (Reg. Sess., 1986), c. 1020, s. 29(r), effective October 1, 1986.
- (3) In the event of approved leave of absence without pay, other than for active duty in the armed forces of the United States, coverage under

this Plan for an employee and his or her dependents may be continued during the period of such leave of absence by the employee's paying one hundred percent (100%) of the cost.

- (4) If employment is terminated in the second half of a calendar month and the covered individual has made the required contribution for any coverage in the following month, that coverage will be continued to the end of the calendar month following the month in which employment was terminated.
- (5) Employees paid for less than 12 months in a year, who are terminated at the end of the work year and who have made contributions for the non-work months, will continue to be covered to the end of the period for which they have made contributions, with the understanding that if they are not employed by another State-covered employer under this Plan at the beginning of the next work year, the employee will refund to the ex-employer the amount of the employer's cost paid for them during the non-paycheck months.
- (6) Any employee receiving disability salary continuation under a program of benefits established under G.S. 135-34, or an employee on leave of absence without pay due to illness or injury for up to 12 months, is entitled to continue coverage under the Plan for the employee and any eligible dependents by the employee's paying one hundred percent (100%) of the cost.
- (e) A legally divorced spouse and any eligible dependent children of a covered employee or retired employee may continue coverage under this Plan for a period of not more than 36 months following the first of the month after a divorce becomes final on a fully contributory basis, provided the former spouse and any eligible dependent children were covered under the Plan at the time a divorce became final.
- (f) A legally separated spouse of a covered employee or retired employee may continue coverage under this Plan for a period not to exceed 36 months from the separation date on a fully contributory basis, provided the separated spouse was covered under the Plan at the time of separation and provided the covered employee's or retired employee's actions result in the loss of coverage for the separated spouse. Eligible dependent children may also continue coverage if covered under the Plan at time of separation, provided the employee's or retired employee's actions result in the loss of coverage for the dependent children.
- (g) Whenever this section gives a right to continuation coverage, such coverage must be elected no later than a date set by the Executive Administrator and Board of Trustees.
- (h) Continuation coverage under this Plan shall not be continued past the occurrence of any one of the following events:
 - (1) The termination of the Plan.
 - (2) Failure of a Plan member to pay monthly in advance any required premiums.
 - (3) A member becomes a covered employee under any group health plan or, in the case of a surviving spouse, when the surviving spouse remarries and becomes covered under a group health plan.
 - (4) A member becomes eligible for Medicare benefits.
- (i) Notice requirements concerning continuation coverage shall be developed by the Executive Administrator and Board of Trustees.
- (j) The spouse and any eligible dependent children of a covered employee may continue coverage under the Plan on a fully contributory basis for a period not to exceed 36 months from the date the employee becomes eligible for Medicare benefits which results in a loss of coverage under the Plan, provided that the spouse and eligible dependent children were covered under

the Plan at the time the employee became eligible for Medicare benefits which results in a loss of coverage under the Plan. (1981 (Reg. Sess., 1982), c. 1398, s. 6; 1983, c. 922, ss. 17, 19-21; 1985, c. 732, ss. 13, 34; 1985 (Reg. Sess., 1986), c. 1020, ss. 19, 29(m)-(x).)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — Session Laws 1985 (Reg. Sess., 1986), c. 1020, s. 19, effective July 1, 1986, substituted "a State-supported Retirement System" for "the Teachers' and State Employees' Retirement System of North Carolina" at the end of subsection (c).
Session Laws 1985 (Reg. Sess., 1986), c.

1020, s. 29(m) to 29(x), effective October 1, 1986, substituted "surviving spouse or eligible dependent children" for "dependents" in two places in the introductory language of subsection (a), rewrote subdivisions (a)(1) and (a)(3), rewrote subsection (b), rewrote subdivision (c)(1), deleted subdivision (c)(2), relating to lay-offs, and added subsections (e), (f), (g), (h), (i), and (j).

§ 135-40.12. Conversion.

(a) Upon a cessation of group coverage under the Plan and/or eligibility for group coverage under the Plan, an employee or dependent shall be entitled to a conversion to nongroup coverage without the necessity of a physical examination. Such conversion coverage shall include hospitalization, surgical, and medical benefits as contained in the major medical and alternative plan conversion provisions of Article 26C of Chapter 58 of the General Statutes. The Executive Administrator and Board of Trustees in their sole discretion shall approve the conversion coverage, which shall be administered by the Claims Processor through an insurance contract arranged by the Claims Processor, or administered as otherwise directed by the Executive Administrator and Board of Trustees. An eligible employee or dependent must apply for conversion coverage within 30 days after termination of group eligibility.

(1981 (Reg. Sess., 1982), c. 1398, s. 6; 1983, c. 922, s. 21.6; 1985, c. 732, ss. 30, 56; 1985 (Reg. Sess., 1986), c. 1020, s. 20.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. —

Session Laws 1985 (Reg. Sess., 1986), c. 1020, s. 28 repeals Session Laws 1983, c. 922, s. 21.12, which was noted in the 1985 Cumula-

tive Supplement under this section, effective October 1, 1986.

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, by c. 1020, s. 20, effective July 1, 1986, substituted "Claims Processor" for "Plan Administrator" in two places in subsection (a).

§ 135-40.13. Coordination of benefits.

(c) Effect on Benefits. —

(1) This provision shall apply in determining the benefits as to a person covered under this Plan for any claim determination period if, for the covered services incurred as to such a person during such claim determination period, the sum of:

- a. The benefits that would be payable under this Plan in the absence of this provision, and
- b. The benefits that would be payable under all other plans in the absence therein of provisions of similar purpose of this provision would exceed the usual and customary charges for such covered services.

(2) As to any claim determination period with respect to which this provision is applicable, the benefits that would be payable under this Plan

in the absence of this provision for the covered services incurred as to such person during such claim determination period shall be reduced to the extent necessary so that the sum of such reduced benefit and all the benefits payable for such covered services under all other plans, except as provided in Item (3) immediately below, shall not exceed the total of such covered services. Benefits payable under another Plan include the benefits that would have been payable had claim been duly made therefor. In the case of another Plan which does not contain a provision coordinating its benefits, the benefits of such other Plan shall be determined before the benefits of this Plan. A Plan without a coordination of benefits provision shall be deemed to be the primary carrier within the meaning of this Plan.

- (3) If:
- a. Another Plan which is involved in Item (2) immediately above and which contains provisions coordinating its benefits with those of this Plan would, according to its rules, determine its benefits after the benefits of this Plan have been determined, and
 - b. The rules set forth in Item (4) immediately below would require this Plan to determine its benefits before such other Plan, then the benefits of such other plan will be ignored for the purposes of determining the benefits under this Plan.
- (4) For the purposes of Item (3) immediately above, the rules establishing the order of benefit determination are:
- a. The benefits of a Plan which covers the person on whose covered services claim is based other than as a dependent shall be determined before the benefits of a Plan which covers such person as a dependent;
 - b. Except as stated in sub-subdivision c. of this subdivision when this Plan and another Plan cover the same child as a dependent of different persons called parents:
 1. the benefits of the Plan of the parent whose birthday falls earlier in the calendar year are determined before the benefits of the Plan of the parent whose birthday falls later in the calendar year; but
 2. if both parents have the same birthday, the benefits of the Plan that has covered a parent for a longer period of time are determined before those of the Plan that has covered the other parent for a shorter period of time; however, if the other Plan has a rule based on the gender of the parent, and if as a result, the Plans do not agree on the order of benefits, the rule in the other Plan will determine the order of benefits.
 - c. If two or more Plans cover a person as a dependent child of divorced or separated parents, benefits for the child are determined in this order:
 1. first, the Plan of the parent with custody of the child;
 2. second, the Plan of the spouse of the parent with custody of the child; and
 3. third, the Plan of the parent not having custody of the child.
- However, if the specific terms of a court decree state that one of the parents is responsible for the health care expenses of the child, and the entity obligated to pay or provide the benefits of the Plan of that parent has actual knowledge of those terms, the benefits of that Plan are determined first. This paragraph does not apply with respect to any claim determination period or Plan year during which any benefits are actually paid or provided before the entity has actual knowledge.

- d. The benefits of a Plan that covers the person as an employee who is neither laid off nor retired (or as that employee's dependent) are determined before those of a Plan that covers that person as a laid-off or retired employee (or as that employee's dependent). If the other Plan does not have this rule, and if, as a result, the Plans do not agree on the order of benefits, this rule is ignored.
- e. When rules [rules] a and b immediately above do not establish an order of benefit determination, the benefits of a Plan which has covered the person on whose covered services claim is based for the longer period of time shall be determined before the benefits of a Plan which had covered such person for the shorter period of time.

- (5) When this provision operates to reduce the total amount of benefits otherwise payable as to a person covered under this Plan during any claim determination period, each benefit that would be payable in the absence of this provision shall be reduced proportionately, and such reduced amount shall be charged against any applicable benefit limit of this Plan.

(e) Right to Receive and Release Necessary Information. — For the purpose of determining the applicability of and implementing the terms of this provision of this Plan or any provision of similar purpose of any other Plan, the Claims Processor may, without the consent of or notice to any person, release to or obtain from any insurance company or other organization or person any information, with respect to any person, which the Claims Processor deems to be necessary for such purposes. Any person claiming benefits under this Plan shall furnish to the Claims Processor such information as may be necessary to implement the provision.

(f) Facility of Payment. — Whenever payments which should have been made under this Plan, in accordance with this provision, have been made under any other plans, the Claims Processor shall have the right, exercisable alone and in its sole discretion, to pay over to any organizations making such other payments any amounts it shall determine to be warranted in order to satisfy the intent of this provision, and amounts to be paid shall be deemed to be benefits paid under this Plan, and, to the extent of such payments, the Claims Processor shall be fully discharged from liability under the Plan.

(g) Right of Recovery. — Whenever payments have been made by the Claims Processor with respect to covered services in a total amount which is, at any time, in excess of the maximum amount of payment necessary at that time to satisfy the intent of this provision, irrespective of to whom paid, the Claims Processor shall have the right to recover such payments, to the extent of such excess, from among one or more of the following, as the Claims Processor shall determine: any persons to or for or with respect to whom such payments were made, any insurance companies, or any other organizations. (1981 (Reg. Sess., 1982), c. 1398, s. 6; 1983, c. 922, s. 18; 1985 (Reg. Sess., 1986), c. 1020, ss. 20, 30.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — Session Laws 1985 (Reg. Sess., 1986), c. 1020, s. 20, effective July 1, 1986, substituted "Claims Processor" for "Plan Administrator" throughout subsections (e), (f), and (g).

Session Laws 1985 (Reg. Sess., 1986), c. 1020, s. 30, effective October 1, 1986, deleted

former paragraph (c)(4)b, which read "The benefits of a Plan which covers the person on whose covered services claim is based as a dependent of a male person shall be determined before the benefits of a Plan which covers such person as a dependent of a female person", redesignated former paragraph (c)(4)c as paragraph (c)(4)e, and inserted paragraphs (c)(4)b, c, and d.

ARTICLE 4.

Consolidated Judicial Retirement Act.

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1031, s. 1, rewrote the title of Article 4, which formerly read "Uniform Judicial Retirement Act of 1973."

§ 135-65. Post-retirement increases in allowances.

(g) From and after July 1, 1986, the retirement allowance to or on account of beneficiaries whose retirement commenced on or before July 1, 1985, shall be increased by three and eight-tenths percent (3.8%) of the allowance payable on July 1, 1985. Furthermore, from and after July 1, 1986, the retirement allowance to or on account of beneficiaries whose retirement commenced after July 1, 1985, but before June 30, 1986, shall be increased by a prorated amount of three and eight-tenths percent (3.8%) of the allowance payable as determined by the Board of Trustees based upon the number of months that a retirement allowance was paid between July 1, 1985, and June 30, 1986. (1973, c. 640, s. 1; 1979, c. 838, s. 104; 1979, 2nd Sess., c. 1137, s. 69; 1983, c. 761, s. 221; 1983 (Reg. Sess., 1984), c. 1034, s. 224; 1985, c. 479, s. 189(b); 1985 (Reg. Sess., 1986), c. 1014, s. 49(b).)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 243, contains a severability clause.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 1, 1986, added subsection (g).

Chapter 136.

Roads and Highways.

Article 2.

Powers and Duties of Department and Board of Transportation.

Sec.

136-27.1. Relocation of water and sewer lines of municipalities and nonprofit water or sewer corporations or associations.

136-28.1. Letting of contracts to bidders after advertisement; exceptions.

136-29. Adjustment of claims.

136-41.1. Appropriation to municipalities; allocation of funds generally; allocation to Butner.

Sec.

136-41.2. Eligibility for funds; municipalities incorporated since January 1, 1945.

136-41.2A. Eligibility for funds; municipalities incorporated before January 1, 1945.

Article 2D.

Railroad Revitalization.

136-44.37. Department to provide nonfederal matching share.

136-44.38. Department to provide State and federal financial assistance to counties for rail revitalization.

ARTICLE 2.

Powers and Duties of Department and Board of Transportation.

§ 136-18. Powers of Department of Transportation.

Legal Periodicals. —

For survey of 1984 administrative law, "A

Declining Role for the Attorney General," see 63 N.C.L. Rev. 1051 (1985).

§ 136-19. Acquirement of land and deposits of materials; condemnation proceedings; federal parkways.

CASE NOTES

I. GENERAL CONSIDERATION.

In a consolidated action brought by property owners as a result of the disposal of waste materials from a highway project, where no party challenged the trial court's conclusion that the acts of the defendants in dis-

posing of the waste materials from the project were not for a public purpose, neither the plaintiffs nor the other defendants could maintain an action against the Department of Transportation arising from those acts. *Clark v. Asheville Contracting Co.*, — N.C. —, 342 S.E.2d 832 (1986).

§ 136-27.1. Relocation of water and sewer lines of municipalities and nonprofit water or sewer corporations or associations.

The Department of Transportation shall pay the nonbetterment cost for the relocation of water and sewer lines, located within the existing State highway right-of-way, that are necessary to be relocated for a State highway improvement project and that are owned by: (i) a municipality with a population of 5,500 or less according to the latest decennial census; (ii) a nonprofit water or sewer association or corporation; or (iii) any water or sewer system organized

pursuant to Chapter 162A of the General Statutes. (1983 (Reg. Sess., 1984), c. 1018, s. 22 provides that insofar as the provisions of the act are inconsistent with the provisions of any general or special laws or parts thereof, the provisions of the act shall be controlling.

Editor's Note. —

Session Laws 1985 (Reg. Sess., 1986), c. 1018, s. 22 provides that insofar as the provisions of the act are inconsistent with the provisions of any general or special laws or parts thereof, the provisions of the act shall be controlling.

Session Laws 1985 (Reg. Sess., 1986), c. 1018, s. 23 is a severability clause.

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective June 1, 1986, and applicable only to State highway improvement projects let to contract on or after that date, substituted "5,500" for "5,000" in clause (i).

§ 136-28.1. Letting of contracts to bidders after advertisement; exceptions.

(a) All contracts over one hundred fifty thousand dollars (\$150,000) that the Department of Transportation may let for construction or repair necessary to carry out the provisions of this Chapter shall be let to a responsible bidder after public advertising under rules and regulations to be made and published by the Department of Transportation. The right to reject any and all bids shall be reserved to the Board of Transportation.

(b) In those cases in which the amount of the work to be let to contract for highway construction or repair is one hundred fifty thousand dollars (\$150,000) or less, at least three informal bids shall be solicited. All such contracts shall be awarded to the lowest responsible bidder, taking into consideration quality, performance, and the time specified in the bids for the performance of the contract. The Secretary of Transportation shall keep a record of all bids submitted, which record shall be subject to public inspection at any time.

(f) The Department of Transportation is required to solicit proposals under rules and regulations published by the Department of Transportation for all contracts for professional engineering services and other kinds of professional or specialized services necessary in connection with highway construction or repair that are over ten thousand dollars (\$10,000). The right to reject any and all proposals is reserved to the Board of Transportation, but the Board of Transportation may consult with the Advisory Budget Commission before awarding any such contract.

(1971, c. 972, s. 1; 1973, c. 507, ss. 5, 16; c. 1194, ss. 4, 5; 1977, c. 464, ss. 7.1, 16; 1979, c. 174; 1981, c. 200, ss. 1, 2; c. 859, s. 68; 1985, c. 122, s. 2; 1985 (Reg. Sess., 1986), c. 955, s. 46; c. 1018, s. 2.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendments, it is not set out.

Editor's Note. —

Section 1 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "This act may be cited as the Separation of Powers Act of 1986."

Section 127 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "If any part of this act shall be declared invalid by any court, this shall not affect any other part of this act."

Session Laws 1985 (Reg. Sess., 1986), c. 1018, s. 22 provides that insofar as the provisions of the act are inconsistent with the provisions of any general or special laws or parts

thereof, the provisions of the act shall be controlling.

Session Laws 1985 (Reg. Sess., 1986), c. 1018, s. 23 is a severability clause.

Effect of Amendments. — Session Laws 1985 (Reg. Sess., 1986), c. 955, s. 46, effective July 1, 1986, substituted "may consult" for "shall consult" in the second sentence of subsection (f).

Session Laws 1985 (Reg. Sess., 1986), c. 1018, s. 2, effective July 1, 1986, substituted "one hundred fifty thousand dollars (\$150,000)" for "thirty thousand dollars (\$30,000)" in subsections (a) and (b).

§ 136-29. Adjustment of claims.

(c1) Alternatively, in lieu of instituting a civil action in superior court pursuant to subsection (b) above, the contractor may, as to the portion of the claim as is denied by the State Highway Administrator, within 30 days from receipt of the decision, appeal the decision to the Board of State Contract Appeals as provided in G.S. 143-135.10.

(1939, c. 318; 1947, c. 530; 1957, c. 65, s. 11; 1963, c. 667; 1965, c. 55, s. 11; 1967, c. 873; 1973, c. 507, ss. 5, 17, 18; 1977, c. 464, s. 7.1; 1983, c. 761, s. 191.)

Only Part of Section Set Out. — As the rest of the section was not affected, it is not set out.

Editor's Note. — Subsection (c1) of this section is set out above to correct the internal reference to § 143-135.10 therein.

The internal reference at the end of subdivi-

sion (c1) was changed from § 143-135.5 to § 143-135.10 at the direction of the Revisor of Statutes, because §§ 143-135.5 to 143-135.15, as enacted by Session Laws 1983, c. 761, s. 187, was renumbered as §§ 143-135.10 to 143-135.20.

CASE NOTES

Timely Filing of Claim as Condition Precedent to Recovery. — To satisfy this section the contractor must submit a claim, accompanied by evidence of verification, within the statutory time limit. *Crow v. Citicorp Acceptance Co.*, — N.C. App. —, 339 437 (1986).

Where plaintiff's verification was not filed with its first claim and its second claim was not received within the prescribed period, plaintiff failed to fulfill a condition precedent to maintaining its action in superior court and plaintiff's complaint was properly dismissed. *E.F. Blankenship Co. v. North Carolina Dep't of Transp.*, — N.C. App. —, 339 S.E.2d 439 (1986).

Administrative Remedies Must First Be, etc. —

Clearly, the requirement of proceeding first through administrative channels for a resolution of a claim and the requirement that if the claimant receives an adverse ruling a suit must be instituted within six months are con-

ditions precedent and do not preempt the Rules of Civil Procedure. These conditions must be satisfied to vest the trial court with jurisdiction to hear the action. *C.W. Matthews Contracting Co. v. State*, — N.C. App. —, 330 S.E.2d 630 (1985).

Claimant Allowed To Take Voluntary Dismissal and Refile Claim. — Once the conditions of subsection (a) (administrative adjustment of claims) were satisfied — the claimant filed its claim within six months of an adverse ruling by the state highway administrator —, the trial court was vested with jurisdiction and the claimant was allowed, as a matter of right under § 1A-1, Rule 41(a)(1), to take a voluntary dismissal and refile its claim within one year. *C.W. Matthews Contracting Co. v. State*, — N.C. App. —, 330 S.E.2d 630 (1985).

Cited in *Hardaway Constructors, Inc. v. North Carolina Dep't of Transp.*, — N.C. App. —, 342 S.E.2d 52 (1986).

§ 136-41.1. Appropriation to municipalities; allocation of funds generally; allocation to Butner.

(a) There is hereby annually appropriated out of the State Highway Fund a sum equal to the net amount after refunds that was produced during the fiscal year by a one and three-fourths cents ($1\frac{3}{4}\text{¢}$) tax on each gallon of motor fuel as taxed by G.S. 105-434 and 105-435, to be allocated in cash on or before October 1 of each year to the cities and towns of the State in accordance with the following formula:

Seventy-five percent (75%) of said funds shall be distributed among the several eligible municipalities of the State in the percentage proportion that the population of each eligible municipality bears to the total population of all eligible municipalities according to the most recent annual estimates of population as certified to the Secretary of Revenue by the State Budget Officer.

This annual estimation of population shall include increases in the population within the municipalities caused by annexations accomplished through July 1 of the calendar year in which these funds are distributed. Twenty-five percent (25%) of said fund shall be distributed among the several eligible municipalities of the State in the percentage proportion that the mileage of public streets in each eligible municipality which does not form a part of the highway system bears to the total mileage of the public streets in all eligible municipalities which do not constitute a part of the State highway system.

It shall be the duty of the mayor of each municipality to report to the Department of Transportation such information as it may request for its guidance in determining the eligibility of each municipality to receive funds by virtue of G.S. 136-41.1 and 136-41.2 and in determining the amount of allocation to which each is entitled. Upon failure of any municipality to make such report within the time prescribed by the Department of Transportation, the Department of Transportation may disregard such defaulting unit in making said allotment.

The funds to be allocated under this section shall be paid in cash to the various eligible municipalities on or before October 1 each year after March 15, 1951. Provided that eligible municipalities are authorized within the discretion of their governing bodies to enter into contracts for the purpose of maintenance, repair, construction, reconstruction, widening, or improving streets of such municipalities at any time after January 1 of any calendar year in total amounts not to exceed ninety percent (90%) of the amount received by such municipality during the preceding fiscal year, in anticipation of the receipt of funds under this section during the next fiscal year, to be paid for out of such funds when received.

No allocation to cities and towns shall be made under the provisions of this section from the one cent (1¢) per gallon additional tax on gasoline imposed by Chapter 46 of the Session Laws of 1965, unless and until said additional one cent (1¢) per gallon tax produces funds which are not needed for or committed by said Chapter 46 of the Session Laws of 1965, to the payment of the principal of or the interest on the secondary road bonds issued pursuant to the provisions of said Chapter 46 of the Session Laws of 1965. The Department of Transportation is hereby authorized to withhold each year an amount not to exceed one percent (1%) of the total amount appropriated in G.S. 136-41.1 for the purpose of correcting errors in allocations: Provided, that the amount so withheld and not used for correcting errors will be carried over and added to the amount to be allocated for the following year.

The word "street" as used in this section is hereby defined as any public road maintained by a municipality and open to use by the general public, and having an average width of not less than 16 feet. In order to obtain the necessary information to distribute the funds herein allocated, the Department of Transportation may require that each municipality eligible to receive funds under G.S. 136-41.1 and 136-41.2 submit to it a statement, certified by a registered engineer or surveyor of the total number of miles of streets in such municipality. The Department of Transportation may in its discretion require the certification of mileage on a biennial basis.

(1951, c. 260, s. 2; c. 948, ss. 2, 3; 1953, c. 1127; 1957, c. 65, s. 11; 1963, c. 854, ss. 1, 2; 1969, c. 665, ss. 1, 2; 1971, c. 182, ss. 1-3; 1973, c. 476, s. 193; c. 500, s. 1; c. 507, s. 5; c. 537, s. 6; 1975, c. 513; 1977, c. 464, s. 7.1; 1979, 2nd Sess., c. 1137, s. 50; 1981, c. 690, s. 4; c. 859, s. 9.2; c. 1127, s. 54; 1985 (Reg. Sess., 1986), c. 982, s. 1.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1018, s. 15 provides that notwithstanding this section and § 136-44.2A, the amount appropriated in c. 1018 shall be the basis for distribution to municipalities due on or before October 1, 1986.

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective July 11, 1986, and applicable to distributions made under this section after October 1, 1986, substituted "one and three-fourths cents ($1\frac{3}{4}\%$)" for "one and three-eighths cents ($1\frac{3}{8}\%$)" in the first paragraph of subsection (a).

§ 136-41.2. Eligibility for funds; municipalities incorporated since January 1, 1945.

(d) The provisions of this section shall not apply to any municipality incorporated prior to January 1, 1945. (1963, c. 854, ss. 3, $3\frac{1}{2}$; 1985 (Reg. Sess., 1986), c. 934, ss. 5, 6.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 (Reg.

Sess., 1986) amendment, effective September 1, 1986, repealed Session Laws 1963, c. 854, s. $3\frac{1}{2}$, which had been codified as subsection (d), and reenacted the same subsection (d).

§ 136-41.2A. Eligibility for funds; municipalities incorporated before January 1, 1945.

(a) No municipality shall be eligible to receive funds under G.S. 136-41.1 unless it has within the four-year period next preceding the annual allocation of funds conducted an election for the purpose of electing municipal officials and currently imposes an ad valorem tax or provides other funds for the general operating expenses of the municipality.

(b) The provisions of this section apply only to municipalities incorporated prior to January 1, 1945. (1985 (Reg. Sess., 1986), c. 934, s. 4.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 934, s. 7 makes this section effective September 1, 1986.

ARTICLE 2A.

State Roads Generally.

§ 136-44.2A. Secondary road construction.

Editor's Note. —

Session Laws 1985 (Reg. Sess., 1986), c. 1018, s. 15 provides that notwithstanding § 136-41.1 and this section, the amount appro-

priated in c. 1018 shall be the basis for distribution to municipalities due on or before October 1, 1986.

§ 136-44.5. Secondary roads; mileage study; allocation of funds.

Editor's Note. —

Session Laws 1985 (Reg. Sess., 1986), c. 1018, s. 14 appropriates funds for small urban construction projects, and provides that none of

these funds used for rural secondary road construction are subject to the county formula allocation as provided in this section.

ARTICLE 2D.

Railroad Revitalization.

§ 136-44.37. Department to provide nonfederal matching share.

The Department of Transportation upon approval by the Board of Transportation and the Director of the Budget may provide for the matching share of federal rail revitalization assistance programs through private resources, county funds or State appropriations as may be provided by the General Assembly. Prior to taking any action under this section, the Director of the Budget may consult with the Advisory Budget Commission. (1979, c. 658, s. 3; 1983, c. 717, s. 48; 1985 (Reg. Sess., 1986), c. 955, ss. 47, 48.)

Editor's Note. —

Section 1 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "This act may be cited as the Separation of Powers Act of 1986."

Section 127 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "If any part of this act shall be declared invalid by any court, this shall not affect any other part of this act."

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective July 1, 1986, substituted "may" for "after the Director of the Budget consults with the Advisory Budget Commission is authorized to" in the first sentence, and added the second sentence.

§ 136-44.38. Department to provide State and federal financial assistance to counties for rail revitalization.

(a) The Department of Transportation is authorized to distribute to counties State financial assistance for local rail revitalization programs provided that every rail revitalization project for which State financial assistance would be utilized must be approved by the Board of Transportation and by the Director of the Budget. Prior to taking any action under this subsection, the Director of the Budget may consult with the Advisory Budget Commission.

(1979, c. 658, s. 3; 1983, c. 717, s. 48; 1985 (Reg. Sess., 1986), c. 955, ss. 49, 50.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. —

Section 1 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "This act may be cited as the Separation of Powers Act of 1986."

Section 127 of Session Laws 1985 (Reg. Sess.,

1986), c. 955 provides: "If any part of this act shall be declared invalid by any court, this shall not affect any other part of this act."

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective July 1, 1986, deleted "after the Director of the Budget consults with the Advisory Budget Commission" at the end of the first sen-

tence of subsection (a), and added the second sentence of subsection (a).

ARTICLE 4.

Neighborhood Roads, Cartways, Church Roads, etc.

§ 136-67. Neighborhood public roads.

CASE NOTES

Legislative Intent. — In enacting this section, the legislature intended to preserve the public right to use roads that would no longer be maintained by any government. *Jarvis v. Powers*, — N.C. App. —, 343 S.E.2d 195 (1986).

The legislature in 1933 did not intend for courts to further whittle down the portions of roads referred to in this section to the bare necessary access routes between dwellings and state roads. *Jarvis v. Powers*, — N.C. App. —, 343 S.E.2d 195 (1986).

History of Section. — The first statutory definition of neighborhood public road was enacted in 1933. The "private use" exclusion was added by amendment in 1941. And the remainder of the proviso, beginning after the phrase "essentially private use," was added in 1949. *Jarvis v. Powers*, — N.C. App. —, 343 S.E.2d 195 (1986).

Date of Determination of Roadway's Status. — The declaratory language used by the legislature in this section indicates the legislature's intention for the status of roadways to be determined as of the enactment dates of the applicable statutory definitions and exceptions. *Jarvis v. Powers*, — N.C. App. —, 343 S.E.2d 195 (1986).

Provisos Distinguished. — The proviso

that no road serving an "essentially private use" could be declared a neighborhood public road should be distinguished from the requirement under the third definition that a road must have served a public use. The proviso allows for some public use, but requires a determination of whether the road was "essentially" a private or a public roadway. *Jarvis v. Powers*, — N.C. App. —, 343 S.E.2d 195 (1986).

The position of the "private use" proviso at the end of the entire, unified definitional part of this section indicates the probable intent of the legislature that the proviso be applied to each definition. *Jarvis v. Powers*, — N.C. App. —, 343 S.E.2d 195 (1986), remanding for a determination of whether roadway served "an essentially private purpose" in 1941.

Treatment of Roadway as Single Unit. — The fact that part of a roadway which petitioners sought to establish as a "neighborhood public road" grew in with trees and other plants in the late 1940's or that a portion was claimed under a deed was immaterial under this section, and the court did not err in treating it as a single unit. *Jarvis v. Powers*, — N.C. App. —, 343 S.E.2d 195 (1986).

§ 136-68. Special proceeding for establishment, alteration or discontinuance of cartways, etc.; petition; appeal.

CASE NOTES

This Section and § 136-69 to Be Strictly Construed. —

In accord with 2nd paragraph in the main volume. See *Turlington v. McLeod*, — N.C. App. —, 339 S.E.2d 44 (1986).

A petitioner is not entitled to condemn a cartway if he presently has access to a public road. The fact that such permission may be

temporary in nature, and may be withdrawn at some future time, is not relevant. *Turlington v. McLeod*, — N.C. App. —, 339 S.E.2d 44 (1986).

A petition for a cartway will be denied if the petitioner has other reasonable access through a permissive right of way. *Turlington v. McLeod*, — N.C. App. —, 339 S.E.2d 44 (1986).

§ 136-69. Cartways, tramways, etc., laid out; procedure.

CASE NOTES

I. GENERAL CONSIDERATION.

Section Strictly Construed. —

In accord with 1st paragraph in the main volume. See *Campbell v. Connor*, — N.C. App. —, 335 S.E.2d 788 (1985).

In accord with 2nd paragraph in the main volume. See *Turlington v. McLeod*, — N.C. App. —, 339 S.E.2d 44 (1986).

When Petitioner Is Entitled to Cartway.

— Petitioner is entitled to a cartway upon proof that (1) the land in question is used for one of the purposes enumerated in the statute, (2) the land is without adequate access to a public road or other adequate means of transportation affording necessary and proper ingress and egress, and (3) the granting of a private way over the lands of other persons is necessary, reasonable and just. *Campbell v. Connor*, — N.C. App. —, 335 S.E.2d 788 (1985).

A landowner is entitled to condemn a cartway over the lands of another provided that he show that (1) he is engaged in, or taking action preparatory to engaging in, an activity enumerated by the statute, (2) there is no public road or other adequate means of transportation allowing him reasonable access to his property, and (3) it is necessary, reasonable and just that he have a private way.

Turlington v. McLeod, — N.C. App. —, 339 S.E.2d 44 (1986).

Petitioner Must Have No Other Adequate, etc. —

In accord with 1st paragraph in the main volume. See *Campbell v. Connor*, — N.C. App. —, 335 S.E.2d 788 (1985).

A petitioner is not entitled to condemn a cartway if he presently has access to a public road. The fact that such permission may be temporary in nature, and may be withdrawn at some future time, is not relevant. *Turlington v. McLeod*, — N.C. App. —, 339 S.E.2d 44 (1986).

A petition for a cartway will be denied if the petitioner has other reasonable access through a permissive right of way. *Turlington v. McLeod*, — N.C. App. —, 339 S.E.2d 44 (1986).

A proposed cartway may not be approved simply because it is more convenient or less expensive than alternative outlets to a public road available for use by petitioner. *Campbell v. Connor*, — N.C. App. —, 335 S.E.2d 788 (1985).

Infeasibility of Creating Access Must Be Shown. — To demonstrate that an existing outlet to a public road is not adequate, the infeasibility of modifying the terrain to create access must be shown. *Campbell v. Connor*, — N.C. App. —, 335 S.E.2d 788 (1985).

ARTICLE 9.

Condemnation.

§ 136-106. Answer, reply and plat.

CASE NOTES

Cited in North Carolina Dep't of Transp. v. Kaplan, — N.C. App. —, 343 S.E.2d 182 (1986).

§ 136-108. Determination of issues other than damages.

CASE NOTES

Cited in North Carolina Dep't of Transp. v. Kaplan, — N.C. App. —, 343 S.E.2d 182 (1986).

§ 136-111. Remedy where no declaration of taking filed; recording memorandum of action.

CASE NOTES

The statutory time begins to run on completion of the project or the taking, whichever is later. *Smith v. City of Charlotte*, — N.C. App. —, 339 S.E.2d 844 (1986).

Limitation on Action Involving Airport Runway. — Where plaintiffs' action, involving a taking incident to the construction of an airport runway, accrued in June, 1979, and over two years later, in July, 1981, new Chapter 40A was enacted, the period between such

enactment and the cutoff date under the new limitation, five months and three weeks (July 10, 1981 to January 1, 1982), was not itself so unreasonably short as to deny plaintiffs due process of law, particularly in light of the fact that plaintiffs lived in an area where large numbers of inverse condemnation actions were filed within the statutory period. *Smith v. City of Charlotte*, — N.C. App. —, 339 S.E.2d 844 (1986).

§ 136-112. Measure of damages.

CASE NOTES

I. GENERAL CONSIDERATION.

Where defendants acquired two tracts as separate tracts at different times, considered them to be separate tracts, and put them to different usages, and as of the date of taking, neither tract was necessary to defendants' use or enjoyment of the other, and the trial court found that there was no connection between the two tracts such as would render defen-

dants' enjoyment of the smaller tract necessary to their enjoyment of the larger one, the court's findings supported its conclusion that there did not exist, on the date of taking, any unity of use between the two tracts, and such conclusion supported its order that the tracts be considered separately in assessing damages. *North Carolina Dep't of Transp. v. Kaplan*, — N.C. App. —, 343 S.E.2d 182 (1986).

Chapter 138.

Salaries, Fees and Allowances.

Sec.

138-4. Governor to set salaries of administrative officers; exceptions.

138-5. Per diem and allowances of State boards, etc.

Sec.

138-6. Travel allowances of State officers and employees.

§ 138-4. Governor to set salaries of administrative officers; exceptions.

The salaries of all State administrative officers not subject to the State Personnel Act shall be payable in equal monthly installments, and if no provision is otherwise made by law, shall be set by the Governor.

Whenever by law it is provided that a salary shall be fixed or set by the General Assembly in the Current Operations Appropriations Act, and that office or position is filled by appointment of the Governor, or the appointment is subject to the approval of the Governor, or is made by a commission a majority of whose members are appointed by the Governor, then the Governor may, increase or decrease the salary of a new appointee by a maximum of ten percent (10%) over or under the salary of that position as provided in the Current Operations Appropriations Act, such increased or decreased salary to remain in effect until changed by the General Assembly or until the end of the fiscal year, whichever occurs first. The Governor under this paragraph may not increase the salary of any nonelected official above the level set in the Current Operations Appropriations Act for any member of the Council of State. This section does not apply to any office filled by election by the people, and does not apply to any office in the legislative or judicial branches.

Prior to taking any action under this section, the Governor may consult with the Advisory Budget Commission. (1947, c. 898; 1957, c. 541, s. 1; 1983, c. 717, s. 49; 1983 (Reg. Sess., 1984), c. 1034, ss. 164, 216; 1985 (Reg. Sess., 1986), c. 955, ss. 51-53.)

Editor's Note. —

Section 1 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "This act may be cited as the Separation of Powers Act of 1986."

Section 127 of c. 955 provides: "If any part of this act shall be declared invalid by any court, this shall not affect any other part of this act."

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective July 1, 1986, deleted "subject to consultation with the Advisory Budget Commission" at the end of the first paragraph, deleted "after consultation with the Advisory Budget Commission" following "the Governor may" in the first sentence of the second paragraph, and added the last paragraph.

§ 138-5. Per diem and allowances of State boards, etc.

(a) Except as provided in subsections (c) and (f) of this section, members of State boards, commissions, committees and councils which operate from funds deposited with the State Treasurer shall be compensated for their services at the following rates:

- (1) Compensation at the rate of fifteen dollars (\$15.00) per diem for each day of service;
- (2) A subsistence allowance of
 - a. Fifteen dollars (\$15.00) per day for each day of service when the member did not spend the night away from his home,

b. Fifty-two dollars (\$52.00) per day for each day of service when the member spent the night away from his home;

(3) Reimbursement of travel expenses at the rates allowed to State officers and employees by subdivisions (1) and (2) of G.S. 138-6(a).

(4) For convention registration fees, the actual amount expended, as shown by receipt.

(1961, c. 833, s. 5; 1963, c. 1049, s. 1; 1965, c. 169; 1971, c. 1139; 1973, c. 1397; 1979, c. 838, s. 18; 1979, 2nd Sess., c. 1137, s. 29; 1983, c. 761, s. 24; c. 923, s. 217; 1983 (Reg. Sess., 1984), c. 1034, s. 185; 1985, c. 757, s. 201(b); 1985 (Reg. Sess., 1986), c. 1014, s. 39(a).)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. —

Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 243, contains a severability clause.

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective January 1, 1987, substituted "Fifty-two dollars (\$52.00)" for "Forty-seven dollars (\$47.00)" at the beginning of subdivision (a)(2)b.

§ 138-6. Travel allowances of State officers and employees.

(a) Travel on official business by the officers and employees of State departments, institutions and agencies which operate from funds deposited with the State Treasurer shall be reimbursed at the following rates:

(1) For transportation by privately owned automobile, twenty-five cents (25¢) per mile of travel and the actual cost of tolls paid. No reimbursement shall be made for the use of a personal car in commuting from an employee's home to his duty station in connection with regularly scheduled work hours. Any designation of an employee's home as his duty station by a department head shall require prior approval by the Office of State Budget and Management on an annual basis.

(2) For bus, railroad, Pullman, or other conveyance, actual fare.

(3) In lieu of actual expenses incurred for subsistence, payment of fifty-two dollars (\$52.00) per day when traveling in-state or sixty-four dollars (\$64.00) per day when traveling out-of-state. When travel involves less than a full day (24-hour period), a reasonable prorated amount shall be paid in accordance with regulations and criteria which shall be promulgated and published by the Director of the Budget. Reimbursement to State employees for lunches eaten while on official business may be made only in the following circumstances:

a. When an overnight stay is required reimbursement is allowed while an employee is in travel status;

b. When the cost of the lunch is included as part of a registration fee for a formal congress, conference, assembly, or convocation, by whatever name called. Such assembly must involve the active participation of persons other than the employees of a single State department, institution, or agency and must be necessary for conducting official State business.

(4) For convention registration fees not to exceed thirty dollars (\$30.00) per convention.

(1961, c. 833, s. 6; 1963, c. 1049, s. 2; 1965, c. 1089; 1969, c. 1153; 1971, c. 881, ss. 1, 2; 1973, c. 595, s. 1; c. 1456; 1975, c. 892, s. 1; 1977, c. 928; 1977, 2nd Sess., c. 1136, s. 38.1; c. 1237, ss. 1, 2; 1979, c. 34, s. 1; c. 1002, s. 1; c. 1050, s. 1; 1979, 2nd Sess., c. 1137, s. 26; 1981, c. 859, ss. 57-59; 1983, c. 761, s. 22; c. 913, s. 27; c. 923, s. 217; 1985, c. 757, s. 201(a); 1985 (Reg. Sess., 1986), c. 1014, s. 39(b).)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. —

Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 243, contains a severability clause.

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective January 1, 1987, substituted "fifty-two dollars (\$52.00)" for "forty-seven dollars (\$47.00)" and substituted "sixty-four dollars (\$64.00)" for "fifty-nine dollars (\$59.00)" in the first sentence of subdivision (a)(3).

Chapter 140.

State Art Museum; Symphony and Art Societies.

Article 1A.

Article 3.

Art Museum Building Commission.

North Carolina Art Society.

Sec.
140-5.3 to 140-5.6. [Repealed.]

Sec.
140-12. Department of Administration authorized to provide space for Art Society.

Article 1B.

North Carolina Museum of Art.

140-5.17. State Art Museum Building Commission.

ARTICLE 1A.

Art Museum Building Commission.

§§ 140-5.3 to 140-5.6: Repealed by Session Laws 1985 (Reg. Sess., 1986), c. 1028, s. 16.

Editor's Note. — Section 41 of Session Laws 1985 (Reg. Sess., 1986) provided that the repeal of these sections became effective 30 days after ratification. The act was ratified on July 16, 1986.

Session Laws 1985 (Reg. Sess., 1986), c. 1028, s. 39 provides that §§ 1 through 31 of the act shall not affect pending litigation.
Session Laws 1985 (Reg. Sess., 1986), c. 1028, s. 38 is a severability clause.

ARTICLE 1B.

North Carolina Museum of Art.

§ 140-5.17. State Art Museum Building Commission.

No provision of this Article shall to any extent abrogate or diminish the powers and duties of the State Art Museum Building Commission, provided for in Part 3, Article 2, of Chapter 143B of the General Statutes. (1979, 2nd Sess., c. 1306, s. 1; 1985 (Reg. Sess., 1986), c. 1028, s. 17.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1028, s. 39 provides that §§ 1 through 31 of the act shall not affect pending litigation.
Session Laws 1985 (Reg. Sess., 1986), c. 1028, s. 38 is a severability clause.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective thirty days after ratification, deleted "Article 1A of Chapter 140 and in" preceding "Part 3, Article 2". The act was ratified July 16, 1986.

ARTICLE 3.

*North Carolina Art Society.***§ 140-12. Department of Administration authorized to provide space for Art Society.**

Subject to the approval of the Governor, the Department of Administration is authorized and empowered to set apart, for the administration of the affairs of the State Art Society, Incorporated, space in any of the public buildings in Wake County which may be so used without interference with the conduct of the business of the State. Prior to taking any action under this section, the Governor may consult with the Advisory Budget Commission. (1961, c. 1152; 1983, c. 717, ss. 52, 53; 1985 (Reg. Sess., 1986), c. 955, ss. 54, 55.)

Editor's Note. —

Section 1 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "This act may be cited as the Separation of Powers Act of 1986."

Section 127 of c. 955 provides: "If any part of this act shall be declared invalid by any court, this shall not affect any other part of this act."

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective July 1, 1986, deleted "after consultation with the Advisory Budget Commission" following "Governor" in the first sentence and added the second sentence.

Chapter 142.

State Debt.

Article 3.

Refunding Bonds.

Sec.

142-20 to 142-29. [Repealed.]

Article 3A.

Refunding Bonds.

142-29.1. Title of Article.

Sec.

142-29.2. Definitions.

142-29.3. Purpose.

142-29.4. Powers.

142-29.5. Authorization of refunding obligations.

142-29.6. Sale of refunding obligations and provisions thereof.

142-29.7. Additional refunding obligation provisions.

ARTICLE 3.

Refunding Bonds.

§§ 142-20 to 142-29: Repealed by Session Laws 1985 (Reg. Sess., 1986), c. 823, s. 1, effective June 27, 1986.

Cross References. — As to the State Refunding Bond Act, see now § 142-29.1 et seq.

ARTICLE 3A.

Refunding Bonds.

§ 142-29.1. Title of Article.

This Article may be known and cited as the "State Refunding Bond Act." (1935, c. 445, s. 1; 1985 (Reg. Sess., 1986), c. 823, s. 1.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 823, s. 4 makes this article effective upon ratification. The act was ratified June 27, 1986.

Sections 2 and 3 of Session Laws 1985 (Reg. Sess., 1986), c. 823 provide:

"Section 1 of this act shall be deemed to provide an additional and alternative method for the doing of the things authorized thereby by the State and shall be regarded as supplemental and additional to powers conferred by other laws and shall not be regarded as in derogation

of any powers now existing; provided, however, that the issuance of bonds, bond anticipation notes and notes under the provisions of this act need not comply with the requirements of any other law applicable to the issuance of bonds, bond anticipation notes and notes of the State.

"Nothing in this act shall be construed to impair the obligation of any bond, bond anticipation note, note or coupon issued by the State under the provisions of Article 3 of Chapter 142 of the General Statutes and outstanding on the effective date of this act."

§ 142-29.2. Definitions.

The words and phrases defined in this section shall have the meanings indicated when used in this Article, unless the context clearly requires another meaning:

- (1) "authorized investments" means
 - a. direct obligations of the United States government,
 - b. obligations the principal of and the interest on which are guaranteed by the United States government,
 - c. evidences of ownership of proportionate interests in future interest and principal payments on specified obligations described in a. and b. above, which obligations are held by a bank or trust company organized and existing under the laws of the United States of America or any state thereof in the capacity of custodian,
 - d. obligations of state or local government municipal bond issuers, provision for the payment of the principal of and interest on which shall have been made by deposit with a trustee or escrow agent of obligations described in a., b. or c. above, the maturing principal of and interest on which, when due and payable, shall provide sufficient money with any other money held in trust for such purpose to pay the principal of, premium, if any, and interest on such obligations of state or local government municipal bond issuers, and which are rated in the highest rating by Standard & Poor's Corporation and Moody's Investors Service, Inc.,
 - e. obligations of state or local government municipal bond issuers, the principal of and interest on which, when due and payable, have been insured by a bond insurance company which is rated in the highest rating category by Standard & Poor's Corporation and Moody's Investors Service, Inc.,
 - f. full faith and credit obligations of state or local government bond issuers which are rated in the highest rating category by Standard & Poor's Corporation and Moody's Investors Service, Inc., and
 - g. any obligations or investments in which the State Treasurer is authorized, at the time of such investment, to invest funds of the State.
- (2) "bond documentation" means any resolution, order, trust agreement, trust indenture or other document authorizing the issuance of and securing any outstanding obligations.
- (3) "bonds" means any bonds issued under the provisions of this Article.
- (4) "credit facility" means an agreement entered into by the State Treasurer on behalf of the State with a bank, savings and loan association or other banking institution, an insurance company, reinsurance company, surety company or other insurance institution, a corporation, investment banking firm or other investment institution, or any financial institution providing for prompt payment of all or any part of the principal (whether at maturity, presentment for purchase, redemption or acceleration), redemption premium, if any, and interest on any refunding obligations payable on demand or tender by the owner issued in accordance with this Article, in consideration of the State agreeing to repay the provider of such credit facility in accordance with terms and provisions of such agreement, provided, that any such agreement shall provide that the obligation of the State thereunder shall have only such sources of payment as are permitted for the payment of refunding obligations issued under this Article.

- (5) "notes" means any bond anticipation notes or notes issued under the provisions of this Article.
- (6) "outstanding obligations" means any outstanding bonds, bond anticipation notes or notes of the State, whether now outstanding or hereafter issued, the payment of the principal of and the interest on which are secured by a pledge of the full faith, credit and taxing power of the State and which may also be secured, as and to the extent provided in applicable bond documentation, by additional security.
- (7) "par formula" shall mean any provision or formula adopted by the State to provide for the adjustment, from time to time, of the interest rate or rates borne by any refunding obligations so that the purchase price of such refunding obligations in the open market would be as close to par as possible.
- (8) "refunding obligations" means any notes or bonds issued under the provisions of this Article. (1935, c. 445, s. 2; 1985 (Reg. Sess., 1986), c. 823, s. 1.)

§ 142-29.3. Purpose.

The purpose of this Article is to provide statutory procedures or to supplement existing procedures for the issuance of refunding obligations. (1935, c. 445, s. 3; 1985 (Reg. Sess., 1986), c. 823, s. 1.)

§ 142-29.4. Powers.

In addition to the powers it may now or hereafter have, the State shall have the following powers, subject to the provisions of this Article and applicable bond documentation:

- (1) to borrow money and issue one or more series of refunding obligations for the purpose of refunding all or any part of any series or combination of series of outstanding obligations including, without limitation, the payment of any redemption premium thereon and any interest accrued or to accrue to the date of redemption or maturity or maturities of such outstanding obligations;
- (2) to apply the proceeds of refunding obligations
 - a. to the payment and retirement of outstanding obligations by direct application to such payment and retirement,
 - b. to the payment and retirement of outstanding obligations, whether by redemption or in accordance with their terms, by the deposit in trust of such proceeds,
 - c. to the payment of any expenses incurred in connection with such refunding, including the expense of any credit facility employed in connection with such refunding obligations, including, without limitation, bond insurance policies, letters of credit and lines of credit, and
 - d. for such other uses not inconsistent with any such refunding,
- (3) to issue refunding obligations in combination with any other bonds, bond anticipation notes, notes or financial obligations issued by the State;
- (4) to issue refunding obligations bearing interest at rates lower, the same as or higher than and having maturities shorter, the same as or longer than the outstanding obligations being refunded;
- (5) to issue one series of refunding obligations to refund one or more series of outstanding obligations;

- (6) to issue refunding obligations in exchange for outstanding obligations;
- (7) to apply to any purpose consistent with any refunding, including the funding of an escrow fund or account to be used for the payment or redemption of any outstanding obligations, moneys made available as a consequence of such refunding, including, without limitation, any moneys then on deposit in debt service reserve funds, principal accounts, interest accounts and sinking fund accounts in respect of the outstanding obligations being refunded and, subject to the approval of the Council of State, any moneys appropriated by the General Assembly for the payment of principal of or interest on the outstanding obligations being refunded; and
- (8) to invest any moneys, including any moneys held in trust, in authorized investments. (1935, c. 445, s. 4; 1985 (Reg. Sess., 1986), c. 823, s. 1.)

§ 142-29.5. Authorization of refunding obligations.

By and with the consent of the Council of State, the State Treasurer is authorized to issue and sell, from time to time, refunding obligations for the purpose of refunding outstanding obligations as and to the extent authorized by this Article. The principal amount of any such refunding obligations shall not exceed the principal amount of outstanding obligations to be refunded.

Refunding obligations issued pursuant to the provisions of this Article shall not be subject to limitations imposed by any other law including, without limitation, the other Articles of this Chapter. (1935, c. 445, s. 5; 1985 (Reg. Sess., 1986), c. 823, s. 1.)

§ 142-29.6. Sale of refunding obligations and provisions thereof.

(a) The bonds shall bear such date or dates, shall be serial or term bonds, shall mature in such amounts and at such times, not exceeding 40 years from their date or dates, and shall bear interest at such rate or rates, which may vary from time to time as hereinafter authorized, and which may be represented, in part, by evidences of additional interest, and the bonds may be made redeemable before maturity, at the option of the State or otherwise as may be provided by the State, at such price or prices and under such terms and conditions, all as may be fixed by the State Treasurer with the consent of the Council of State.

(b) The bonds shall be signed on behalf of the State by the Governor or shall bear his facsimile signature; shall be signed by the State Treasurer or shall bear his facsimile signature; and shall bear the Great Seal of the State or a facsimile thereof impressed or imprinted thereon; and interest coupons, if any, shall bear a facsimile of the signature of the State Treasurer. If the bonds shall bear the facsimile signatures of the Governor and the State Treasurer, the bonds shall also bear a manual signature which may be that of a bond registrar, trustee, paying agent or designated assistant of the State Treasurer. Should any officer whose signature or facsimile signature appears on any bonds or coupons (if any) cease to be such officer before the delivery of the bonds, such signature or facsimile signature shall nevertheless have the same validity for all purposes as if the officer had remained in office until delivery and any bond or coupon may bear the facsimile signatures of such persons who at the actual time of the execution of such bond or coupon shall be the

proper officers to sign any bond or coupon although at the date of such bond or coupon such persons may not have been such officers. The form and denomination of the bonds and any coupons, including the provisions with respect to registration of the bonds, shall be as the State Treasurer may determine in conformity with this Article; provided, however, that nothing in this Article shall prohibit the State Treasurer from proceeding, with respect to the issuance and form of the bonds, under the provisions of the Registered Public Obligations Act as well as this Article.

(c) Subject to determination by the Council of State as to the manner in which the bonds shall be offered for sale, whether at public or private sale and whether by publishing notices in certain newspapers and financial journals, mailing notices, inviting bids by correspondence, negotiating contracts of purchase or otherwise, the State Treasurer is authorized to sell the bonds, at one time or from time to time, at a price equal to, greater than or less than the face amount of the bonds as the State Treasurer may determine to be in the best interests of the State.

All expenses incurred in the preparation, sale and issuance of the refunding obligations shall be paid by the State Treasurer from the proceeds of any such refunding obligations or any other available moneys.

(d)(1) By and with the consent of the Council of State, the State Treasurer is hereby authorized to borrow money at such rate or rates of interest as the State Treasurer may determine to be in the best interests of the State, which may vary from time to time as hereinafter authorized, and to execute and issue bond anticipation notes or notes of the State for the same, but only in the following circumstances and under the following conditions:

- a. for anticipating the sale of any bonds to the issuance of which the Council of State shall have given consent, if the State Treasurer shall deem it advisable to postpone the issuance of such bonds;
- b. for the payment of interest upon or any installment of principal of any of the bonds then outstanding, if there shall not be sufficient funds in the State Treasury with which to pay the interest or installment of principal as they respectively become due; or
- c. for the renewal of any loan evidenced by bond anticipation notes or notes herein authorized.

(2) Funds derived from the sale of bonds may be used in the payment of any bond anticipation notes issued under this Article. Funds provided by the General Assembly for the payment of interest on or principal of bonds shall be used in paying the interest on or principal of any notes and any renewals thereof, the proceeds of which shall have been used in paying interest on or principal of such bonds.

Nothing in this Article shall be construed as a limitation on the duration of any deposit in trust for the retirement of outstanding obligations which shall not have matured and which shall not be then redeemable or, if then redeemable, shall not have been called for redemption.

(e) Coupons (if any) and any evidences of additional interest appertaining to bonds and notes shall, after the maturity of such coupons or evidences of additional indebtedness, be receivable in payment of all taxes, debts, dues, licenses, fines and demands of any kind whatever due the State.

(f) All refunding obligations, coupons (if any) and any evidences of additional interest appertaining thereto, and their transfer (including any profit made on the sale thereof), shall be exempt from all State, county and municipal taxation or assessment, direct or indirect, general or special, whether imposed for the purpose of general revenue or otherwise, including inheritance and gift taxes, and the interest on the refunding obligations shall not be subject to taxation as to income, nor shall the refunding obligations or cou-

pons (if any) or evidences of additional indebtedness be subject to taxation when constituting a part of the surplus of any bank, trust company or other corporation.

(g) Refunding obligations, coupons (if any) and any evidences of additional indebtedness are hereby made securities in which all public officers, agencies and public bodies of the State and its political subdivisions, all insurance companies, trust companies, investment companies, banks, savings banks, building and loan associations, credit unions, pension or retirement funds, other financial institutions engaged in business in the State, executors, administrators, trustees and other fiduciaries may properly and legally invest funds, including capital in their control or belonging to them. Such refunding obligations, coupons (if any) and any evidences of additional indebtedness are hereby made securities which may properly and legally be deposited with and received by any officer or agency of the State or political subdivision of the State for any purpose for which the deposit of bonds, notes or obligations of the State or any political subdivision is now or may hereafter be authorized by law.

(h) The full faith, credit and taxing power of the State are hereby pledged for the payment of the principal of and the interest on refunding obligations, coupons (if any) and any evidences of additional indebtedness to the same extent as pledged to the outstanding obligations being refunded. To the extent additional security has been pledged to outstanding obligations, such additional security may, at the discretion of the State, be continued and similarly pledged to the appropriate refunding obligations, coupons (if any) and any evidences of additional indebtedness. (1935, c. 445, s. 6; 1985 (Reg. Sess., 1986), c. 823, s. 1.)

§ 142-29.7. Additional refunding obligation provisions.

In fixing the details of refunding obligations, the State Treasurer may provide that any of the refunding obligations:

- (1) may be made payable from time to time on demand or tender for purchase by the owner thereof provided a credit facility supports such refunding obligations, unless the State Treasurer specifically determines that a credit facility is not required upon a finding and determination by the State Treasurer that the absence of a credit facility will not materially and adversely affect the financial position of the State and the marketing of the refunding obligations at a reasonable interest cost to the State;
- (2) may be additionally supported by a credit facility;
- (3) may be made subject to redemption prior to maturity with such variations as may be permitted in connection with a par formula;
- (4) may bear interest at a rate or rates that may vary as permitted pursuant to a par formula and for such period or periods of time, all as may be provided in the proceedings providing for the issuance of such refunding obligations; and
- (5) may be made the subject of a remarketing agreement whereby an attempt is made to remarket the refunding obligations to new purchasers prior to their presentment for payment to the provider of the credit facility or to the State.

If the aggregate principal amount repayable by the State under an agreement is in excess of the aggregate principal amount of refunding obligations secured by the related credit facility, whether as a result of the inclusion in the credit facility of a provision for the payment of interest for a limited period of time or the payment of a redemption premium or for any other reason, then

the amount of authorized but unissued refunding obligations during the term of such agreement shall not be less than the amount of such excess, unless the payment of such excess is otherwise provided for by agreement of the State executed by the State Treasurer. (1935, c. 445, s. 7; 1985 (Reg. Sess., 1986), c. 823, s. 1.)

Chapter 143.

State Departments, Institutions, and Commissions.

Article 1.

Executive Budget Act.

Sec.

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- 143-3. Examination of officers and agencies; disbursements.
 - 143-3.1. Transfers of functions.
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- 143-4. Advisory Budget Commission.
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- 143-34.2. Information as to requests for nonstate funds for projects imposing obligation on State; statement of participation in contracts, etc., for nonstate funds; limiting clause required in certain contracts or grants.
- 143-34.5. [Repealed.]

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- 143-47.21. (Effective July 1, 1987) Creation of Board.

Article 3.

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- 143-49. Powers and duties of Secretary.
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- 143-116.7. Motor vehicle laws applicable to streets, alleys and driveways on the grounds of Department of Human Resources institutions; traffic regulations; registration and regulation of motor vehicles.

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- 143-127.1. Parental liability for payment of cost of care for long-term patients in Department of Human Resources facilities.

Article 9A.**Manufactured Housing and Mobile Homes.****Part 1. North Carolina Manufactured Housing Board.**

- 143-143.13. Grounds denying, suspending or revoking license.

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- 143-166 to 143-166.04. [Repealed.]

Article 12D.**Separation Allowances for Law-Enforcement Officers.**

- 143-166.41. Special separation allowance.
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Article 12E.**Retirement Benefits for Local Governmental Law-Enforcement Officers.**

- 143-166.50. (Effective July 1, 1987) Retirement benefits for local governmental law-enforcement officers.

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- 143-166.83. Disbursements.
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Article 21.**Water and Air Resources.****Part 1. Organization and Powers Generally; Control of Pollution.**

- 143-215.1. Control of sources of water pollution; permits required.

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- 143-215.73. Recommendation and disbursal of grants.

Part 9. Nonpoint Source Pollution Control Program.

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- 143-318.10. All official meetings of public bodies open to the public.
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Article 36.**Department of Administration.**

- 143-341. Powers and duties of Department.

ARTICLE 1.*Executive Budget Act.***§ 143-1. Scope and definitions.**

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 238 and c. 1018, s. 18

provide that the provisions of this Article, the Executive Budget Act, are reenacted and shall

remain in full force and effect and are incorporated in the acts by reference.

§ 143-3. Examination of officers and agencies; disbursements.

The Director shall have power to examine under oath any officer or any head, any clerk or employee, of any department, institution, bureau, division, board, commission, corporation, association, or any agency; to cause the attendance of all such persons, requiring such persons to furnish any and all information desired relating to the affairs of such agency; to compel the production of books, papers, accounts, or other documents in the possession or under the control of such person so required to attend. The Director or his authorized representative shall have the right and the power to examine any State institution or agency, board, bureau, division, commission, corporation, person, and to inspect its property, and inquire into the method of operation and management.

The Director shall have power to have the books and accounts of any of such agencies or persons audited, and supervise generally the budget accounts of such departments, institutions and agencies within the terms of this Article. The Director may require that the cost of making all audits shall be paid from the regular maintenance appropriation made by the General Assembly for such department, institution or agency which may be thus audited.

It shall be the duty of the Director to recommend to the General Assembly at each session such changes in the organization, management and general conduct of the various departments, institutions and other agencies of the State, and included within the terms of this Article, as in his judgment will promote the more efficient and economical operation and management thereof.

The State Controller under the provisions of the Executive Budget Act shall prescribe the manner in which disbursements of the several institutions and departments shall be made and may require that all warrants, vouchers or checks, except those drawn by the State Auditor, State Treasurer, and Administrative Officer of the Courts shall bear two signatures of such officers as will be designated by the State Controller. (1925, c. 89, s. 3; 1929, c. 100, s. 3; c. 337, s. 4; 1969, c. 458, s. 3; 1981, c. 859, s. 47.1; 1985 (Reg. Sess., 1986), c. 1024, s. 2.)

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective August 1, 1986, substituted "State Con-

troller" for "Director of the Budget" in two places in the last paragraph.

§ 143-3.1. Transfers of functions.

The functions of preaudit of State agency expenditures, issuance of warrants on the State Treasurer for State agency expenditures, and maintenance of records pertaining to these functions shall be transferred from the Director of the Budget to the Office of the State Controller. All statutory authority, personnel, unexpended balances of appropriations or other funds, books, papers, reports, files and other records of the Office of State Budget and Manage-

ment pertaining to and used in the performance of these functions shall be transferred to the Office of the State Controller; office machinery and equipment used primarily in the performance of these functions shall also be transferred to the Office of the State Controller. The Governor is authorized to do all things necessary to effect an orderly and efficient transfer.

The functions of accounting systems development, maintenance, and coordination shall be transferred from the Office of the State Auditor to the Office of the State Controller. All statutory authority, personnel, unexpended balances of appropriations or other funds, books, papers, reports, files, software, documentation, and other records of the Auditor's Office pertaining to and used in the performance of these functions shall be transferred to the Office of the State Controller; office machinery, equipment, terminals and the like used primarily in the performance of these functions shall also be transferred to the Office of the State Controller. The State Auditor, with the advice and consent of the Governor, is authorized to do all things necessary to effect an orderly and efficient transfer. (1955, c. 578, s. 2; 1957, c. 269, s. 2; 1979, 2nd Sess., c. 1137, s. 37; 1985 (Reg. Sess., 1986), c. 1024, s. 3.)

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective August 1, 1986, rewrote this section.

§ 143-3.2. Issuance of warrants upon State Treasurer.

The State Controller shall have the exclusive responsibility for the issuance of all warrants for the payment of money upon the State Treasurer. All warrants upon the State Treasurer shall be signed by the State Controller, who before issuing them shall determine the legality of payment and the correctness of the accounts.

When the State Controller finds it expedient to do so because of a State agency's size and location, the State Controller may authorize a State agency to make expenditures through a disbursing account with the State Treasurer. The State Controller shall authorize the Judicial Department and the General Assembly to make expenditures through such disbursing accounts. All deposits in these disbursing accounts shall be by the State Controller's warrant. A copy of each voucher making withdrawals from these disbursing accounts and any supporting data required by the State Controller shall be forwarded to the Office of the State Controller monthly or as otherwise required by the State Controller.

A central payroll unit operating under the Office of the State Controller may make deposits and withdrawals directly to and from a disbursing account. The disbursing account shall constitute a revolving fund for servicing payrolls passed through the central payroll unit.

The State Controller may use a facsimile signature machine in affixing his signature to warrants. (1955, c. 578, s. 2; 1957, c. 269, s. 2; 1961, c. 1194; 1969, c. 844, s. 12; 1979, 2nd Sess., c. 1137, s. 37; 1981, c. 859, s. 47.1; c. 884, s. 10; 1985, c. 290, s. 2; 1985 (Reg. Sess., 1986), c. 1024, s. 4.)

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective August 1, 1986, rewrote this section.

§ 143-3.3. Assignments of claims against State.

(a) All transfers and assignments made of any claim upon the State of North Carolina or any of its departments, bureaus or commissions or upon any State institution or of any part or share thereof or interest therein, whether absolute or conditional and whatever may be the consideration therefor and all powers of attorney, orders or other authorities for receiving payment of any such claim or any part or share thereof shall be absolutely null and void unless such claim has been duly audited and allowed and the amount due thereon fixed and a warrant for the payment thereof has been issued; and no warrant shall be issued to any assignee of any claim or any part or share thereof or interest therein: Provided that this section shall not apply to assignments made in favor of hospitals, building and loan associations, prepaid legal services, uniform rental firms to allow employees of the Department of Transportation to rent day-glo orange shirts or vests as required by federal and State law, and medical, hospital, disability and life insurance companies: Provided further, that any employee of the State or of any of its institutions, departments, bureaus, agencies or commissions, who is a member of any credit union organized pursuant to Chapter 54 of the North Carolina General Statutes having a membership at least one half of whom are employed by the State or its institutions, departments, bureaus, agencies or commissions, may authorize, in writing, the periodic deduction from his salary of wages as such employee of a designated lump sum, which shall be paid to such credit unions when said salaries or wages are payable, for deposit to such accounts, purchase of such shares or payment of such obligations as the employee and the credit union may agree: Provided further, that any employee of the State or of any of its institutions, departments, bureaus, agencies or commissions, who is a member of a domiciled State employees' association with a membership of not less than 5,000 members may authorize in writing the periodic deduction from his salary or wages a designated sum to be paid to the employees' association. This plan of payroll deductions for State employees and other association members shall become null and void at such time as the employee association engages in collective bargaining. Nothing in this last proviso shall apply to local boards of education, county or municipal governments or any local governmental units. Provided further, that subject to the rules and regulations adopted by the State Controller, any employee of the State or of any of its institutions, departments, bureaus, agencies or commissions may authorize in writing the withholding from his salary or wages an amount to satisfy his pledge to the State Employees Combined Campaign. Provided further, that subject to any rules and regulations adopted by the State Controller, any employee of a local board of education or community college may authorize in writing the withholding from his salary or wages a periodic deduction of a designated sum to be paid to any organization which qualifies for recognition of exemption by the Internal Revenue Service as a charitable organization as defined in section 501(c)(3) of the Internal Revenue Code which has first been approved by his local board of education or community college board.

(1925, c. 249; 1935, c. 19; 1939, c. 61; 1941, c. 128; 1965, c. 1179; 1969, c. 625; 1977, c. 88; 1981, c. 869; 1981 (Reg. Sess., 1982), c. 1282, ss. 14, 15; 1983, c. 680; c. 913, s. 49; 1983 (Reg. Sess., 1984), c. 1034, s. 147; c. 1036, s. 1; 1985 (Reg. Sess., 1986), c. 1024, s. 5.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective August 1, 1986, substituted "State Controller" for "Director of the Budget" in two places in subsection (a).

§ 143-4. Advisory Budget Commission.

Five Senators appointed by the President of the Senate, a chairman of the House Appropriations Committee, a chairman of the House Finance Committee, three other Representatives appointed by the Speaker of the House and five persons appointed by the Governor shall constitute the Advisory Budget Commission. If the Governor appoints any members of the General Assembly to the Advisory Budget Commission, he must appoint an equal number from the Senate and House of Representatives. If there is more than one House Appropriations Committee Chairman, or more than one House Finance Committee Chairman, the Speaker of the House of Representatives shall designate which shall serve on the Advisory Budget Commission.

The Chairman of the Advisory Budget Commission shall also receive an additional two thousand five hundred dollars (\$2,500) payable in quarterly installments, for expenses.

The members of the Advisory Budget Commission shall receive no per diem compensation for their services, but shall receive the same subsistence and travel allowance as are provided for members of the General Assembly for services on interim legislative committees. The Governor may call a meeting of the Commission during the period beginning with the convening of each regular session and ending 30 days later. Otherwise, meetings of the Commission may be called by the Governor or by the chairman.

Members of the Commission shall take the oath of office at or before the first meeting of the Commission they attend.

The Office of State Budget and Management, under the direction of the State Budget Officer, may serve as staff to the Commission. The State Budget Officer shall designate a secretary to the Commission.

After the agenda for a meeting has been delivered to the members of the Commission, no other item shall be considered at that meeting except upon the approval of a majority of the members present and voting.

Except for the Governor, persons who are not members of the Commission may address the Commission only at the invitation of the Governor, the chairman, or a majority of the members present and voting.

A vacancy in a seat on the Commission filled by the chairman of a House Finance or a House Appropriations Committee shall be filled by appointment by the officer who appointed the chairman causing the vacancy. A vacancy in one of the other seats on the Commission shall be filled by appointment by the officer who appointed the person causing the vacancy.

Before the end of each fiscal year or as soon thereafter as practicable, the Advisory Budget Commission shall contract with a competent certified public accountant who is in no way otherwise affiliated with the State or with any agency thereof to conduct a thorough and complete audit of the receipts and expenditures of the State Auditor's office during the immediate fiscal year just ended, and to report to the Advisory Budget Commission on such audit not later than the following October first. A sufficient number of copies of such audit shall be provided so that at least one copy is filed with the Governor's Office, one copy with the Office of State Budget and Management and at least two copies filed with the Secretary of State.

In all matters where action on the part of the Advisory Budget Commission is required by this Article, 10 members of the Commission shall constitute a quorum for performing the duties or acts required by the Commission. (1925,

c. 89, s. 4; 1929, c. 100, s. 4; 1931, c. 295; 1951, c. 768; 1955, c. 578, s. 3; 1957, c. 269, s. 2; 1973, c. 820, ss. 1-3; 1979, 2nd Sess., c. 1137, ss. 25, 29.1, 37; 1981, c. 859, s. 47.1; 1983, c. 48, ss. 1-3; 1983 (Reg. Sess., 1984), c. 1034, s. 148; 1985, c. 3, ss. 1-2.1; c. 290, s. 3; 1985 (Reg. Sess., 1986), c. 955, ss. 56, 57.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 955, s. 58 purported to amend the last paragraph of this section by deleting "is required by law", and substituting "is required or permitted by law or by action of any officer of the Executive". However, the phrase "is required by law" does not occur in the last paragraph. Therefore, no change has been made in this paragraph.

Section 1 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "This act may be cited as the Separation of Powers Act of 1986."

Section 127 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "If any part of this act shall be declared invalid by any court, this shall not affect any other part of this act."

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment by c. 955, ss. 56 and 57, effective July 1, 1986, substituted "may call" for "shall call" in the second sentence of the third paragraph and substituted "may serve" for "shall serve" in the first sentence of the fifth paragraph.

§ 143-4.1. Biennial inspection.

The Commission shall make a biennial inspection of those physical facilities of the State it deems necessary. The Governor may make a biennial inspection of those facilities of the State he deems necessary. (1983, (Reg. Sess., 1984), c. 1034, s. 149; 1985 (Reg. Sess., 1986), c. 955, s. 59.)

Editor's Note. —

Section 1 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "This act may be cited as the Separation of Powers Act of 1986."

Section 127 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "If any part of this act

shall be declared invalid by any court, this shall not affect any other part of this act."

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 1, 1986, added the second sentence.

§ 143-7. Itemized statements and forms; exemptions from § 147-64.6(c)(10).

The statements and estimates required under G.S. 143-6 shall be itemized in accordance with the budget classification adopted by the State Controller, and upon forms prescribed by the Director, and shall be approved and certified by the respective heads or responsible officer of each department, bureau, board, commission, institution, or agency submitting same. Official estimate blanks which shall be used in making these reports shall be furnished by the Director of the Budget. (1925, c. 89, s. 7; 1929, c. 100, s. 7; 1957, c. 269, s. 2; 1983, c. 761, s. 19; 1985 (Reg. Sess., 1986), c. 1024, ss. 6, 7.)

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective August 1, 1986, substituted "State Controller" for "Director" and substituted "the Director" for "him" in the first sentence, and deleted a former second paragraph, relating to

exemption of the Office of the Governor, the General Assembly, any of its committees and subcommittees, the Legislative Research Commission, the Legislative Services Commission and any other commission in the legislative branch from § 147-64.6(c)(10).

§ 143-8. Statements of State Controller as to legislative expenditures.

On or before the first day of September, biennially, in the even-numbered years, the State Controller shall furnish the Director a detailed statement of expenditures of the General Assembly for the current fiscal biennium, and an estimate of its financial needs, itemized in accordance with the budget classification adopted by the State Controller and approved and certified by the President pro tempore of the Senate and the Speaker of the House for each year of the ensuing biennium, beginning with the first day of July thereafter; and a detailed statement of expenditures of the judiciary and any other institution or commission that may be requested by the Director for each year of the current fiscal biennium, and upon such request by the Director an estimate of its financial needs as provided by law, itemized in accordance with the budget classification adopted by the State Controller for each year of the ensuing biennium, beginning with the first day of July thereafter. The State Controller shall transmit to the Director with these estimates an explanation of all increases or decreases. These estimates and accompanying explanations shall be included in the budget by the Director with such recommendations as the Director may desire to make in reference thereto. (1925, c. 89, s. 8; 1929, c. 100, s. 8; 1961, c. 1181, s. 1; 1971, c. 1200, s. 7; 1985 (Reg. Sess., 1986), c. 1024, ss. 8, 9.)

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective August 1, 1986, substituted "State Controller" for "State Disbursing Officer" and substituted "adopted by the State Controller" for "adopted by the Director" throughout the section.

§ 143-9. Information to be furnished upon request.

The departments, bureaus, divisions, officers, commissions, institutions, or other State agencies or undertakings of the State, upon request, shall furnish the Director, in such form and at such time as he may direct, any information desired by him in relation to their respective activities or fiscal affairs. The State Auditor and the State Controller shall also furnish the Director any special, periodic, or other financial statements as the Director may request. (1925, c. 89, s. 10; 1929, c. 100, s. 9; 1985 (Reg. Sess., 1986), c. 1024, s. 10.)

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective August 1, 1986, substituted "The State Auditor and the State Controller" for "The State Auditor" in the last sentence.

§ 143-10. Preparation of budget and public hearing.

The members of the Commission shall, at the request of the Director, attend such public hearing and other meeting as may be held in the preparation of the budget. Said Commission shall act at all times in an advisory capacity to the Director on matters relating to the plan of proposed expenditures of the State government and the means of financing the same.

The Director shall provide for public hearings on any and all estimates to be included in the budget, which shall be held during the months of October and/or November and/or such other times as the Director may fix in the even-numbered years, and may require the attendance at these hearings of the heads or responsible representatives of all State departments, bureaus, divisions, officers, boards, commissions, institutions, or other State agencies or

undertakings, and such other persons, corporations and associations, using or receiving or asking for any State funds. Prior to taking any action under this subsection to provide for public hearings, the Governor may consult with the Advisory Budget Commission. (1925, c. 89, s. 11; 1929, c. 100, s. 10; 1985 (Reg. Sess., 1986), c. 955, ss. 60, 61.)

Editor's Note. — Section 1 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "This act may be cited as the Separation of Powers Act of 1986."

Section 127 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "If any part of this act shall be declared invalid by any court, this shall not affect any other part of this act."

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 1, 1986, deleted "together with the Commission" following "The Director" in the first sentence of the second paragraph and added the second sentence of the second paragraph.

§ 143-11. Survey of departments.

On or before the fifteenth day of December, biennially in the even-numbered years, the Director shall make a complete, careful survey of the operation and management of all the departments, bureaus, divisions, officers, boards, commissions, institutions, and agencies and undertakings of the State and all persons or corporations who use or expend funds as hereinbefore defined, in the interest of economy and efficiency, and a working knowledge upon which to base recommendations to the General Assembly as to appropriations for maintenance and special funds and capital expenditures for the succeeding biennium. If the Director and the Commission shall agree in their recommendations for the budget for the next biennial period, he shall prepare their report in the form of a proposed budget, together with such comment and recommendations as they may deem proper to make. If the Director and Commission shall not agree in substantial particulars, the Director shall prepare the proposed budget based on his own conclusions and judgment, and the Commission or any of its members retain the right to submit separately to the General Assembly such statement of disagreement and the particulars thereof as representing their views. The budget report shall contain a complete and itemized plan of all proposed expenditures for each State department, bureau, board, division, institution, commission, State agency or undertaking, person or corporation who receive or may receive for use and expenditure any State funds as hereinbefore defined, in accordance with the classification adopted by the State Controller, and of the estimated revenues and borrowings for each year in the ensuing biennial period beginning with the first day of July thereafter. Opposite each item of the proposed expenditures, the budget shall show in separate parallel columns the amount expended for the last preceding appropriation year, for the current appropriation year, and the increase or decrease. The budget shall clearly differentiate between general fund expenditures for operating and maintenance, special fund expenditures for any purpose, and proposed capital outlays.

The Director shall accompany the budget with:

- (1) A budget message supporting his recommendations and outlining a financial policy and program for the ensuing biennium. The message will include an explanation of increase or decrease over past expenditures, a discussion of proposed changes in existing revenue laws and proposed bond issues, their purpose, the amount, rate of interest, term, the requirements to be attached to their issuance and the effect such issues will have upon the redemption and annual interest charges of the State debt.
- (2) State Controller reports including:

- (a) An itemized and complete financial statement for the State at the close of the last preceding fiscal year ending June 30.
- (b) A statement of special funds.
- (c) A statement showing the itemized estimates of the condition of the State treasury as of the beginning and end of each of the next two appropriation years.

It shall be a compliance with this section by each incoming Governor, at the first session of the General Assembly in his term, to submit the budget report with the message of the outgoing Governor, if he shall deem it proper to prepare such message, together with any comments or recommendations thereon that he may see fit to make, either at the time of the submission of the said report to the General Assembly, or at such other time, or times, as he may elect and fix.

The function of the Advisory Budget Commission under this section applies only if the Director of the Budget consults with the Commission in preparation of the budget. (1925, c. 89, s. 12; 1929, c. 100, s. 11; 1983, c. 717, s. 54; 1985 (Reg. Sess., 1986), c. 955, s. 62; c. 1024, ss. 11-13.)

Editor's Note. —

Section 1 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "This act may be cited as the Separation of Powers Act of 1986."

Section 127 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "If any part of this act shall be declared invalid by any court, this shall not affect any other part of this act."

Effect of Amendments. —

Session Laws 1985 (Reg. Sess., 1986), c. 955, s. 62, effective July 1, 1986, added the last paragraph.

Session Laws 1985 (Reg. Sess., 1986), c. 1024, ss. 11-13, effective August 1, 1986, substituted "State Controller" for "Director" in the fourth sentence of the first paragraph, redesignated subdivisions (2), (3) and (4) of the second paragraph as paragraphs (2) (a), (2) (b), and (2) (c) thereof, respectively, and added the introductory language of subdivision (2) of the second paragraph.

§ 143-12. Bills containing proposed appropriations.

The Director shall cause to be prepared and submitted to the General Assembly the following bills:

- (1) A bill containing all proposed current operations appropriations of the budget for each year in the ensuing biennium, which shall be known as the "Current Operations Appropriations Bill", and a bill containing all proposed capital appropriations of the budget for each year in the ensuing biennium, which shall be known as the "Capital Improvement Appropriations Bill".
- (2) If necessary, a bill containing the Director of the Budget's views on revenue for the ensuing biennium, which shall be known as the "Budget Revenue Bill", and shall provide an amount of revenue for the ensuing biennium sufficient, in the opinion of the Director and the Commission, to meet the appropriations contained in the Current Operations Appropriations Bill and the Capital Improvement Appropriations Bill.

- (3) Repealed by Session Law 1983 (Regular Session, 1984), c. 1034, s. 153.

To the end that all expenses of the State may be brought and kept within the budget, the Current Operations Appropriations Bill shall contain a specific sum as a contingent or emergency appropriation. The manner of the allocation of such contingent or emergency appropriation shall be as follows: Any institution, department, commission, or other agency or activity of the State, or other activity in which the State is interested, desiring an allotment out of such contingent or emergency appropriation, shall upon forms prescribed and furnished by the Director of the Budget, present such request in

writing to the Director of the Budget, with such information as he may require, and if the Director of the Budget shall approve such request, in whole or in part, he shall forthwith present the same to the Governor and Council of State, and upon their order only shall such allotment be made. If the Director shall disapprove the request of such an allotment out of the emergency or contingent appropriation, he shall transmit his refusal and his reason therefor to the Governor and Council of State for their information.

Funds allocated from the contingent or emergency appropriation may be used only for the purpose for which they were allocated and may not be reallocated for another purpose by the Governor and the Council of State. If the funds are not spent or encumbered for the purpose for which they were allocated by the end of the fiscal biennium and if the Governor and the Council of State do not reallocate them for that same purpose, the funds shall revert to the fund from which the contingent or emergency appropriation was made. Also, if the funds are not needed for the purpose for which they were allocated, the funds shall revert to the fund from which the contingent or emergency appropriation was made.

The Director of the Budget may, in preparation of the Appropriations and Revenue Bills, seek the advice of the Advisory Budget Commission. If the Director and the Commission shall not agree as to the Appropriations and Revenue Bills in substantial particulars, the Director shall prepare the same, based on his conclusions and judgment, and the Commission or any of its members retain the right to submit separately to the General Assembly such statement of disagreement and the particulars thereof as they shall find proper to submit as representing their own views. (1925, c. 89, s. 13; 1929, c. 100, ss. 12, 13, 14; 1957, c. 269, s. 2; 1983 (Reg. Sess., 1984), c. 1034, ss. 150, 151, 153, 154; 1985, c. 290, s. 7; 1985 (Reg. Sess., 1986), c. 955, ss. 63, 64; c. 1014, s. 179.)

Editor's Note. —

Section 1 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "This act may be cited as the Separation of Powers Act of 1986."

Section 127 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "If any part of this act shall be declared invalid by any court, this shall not affect any other part of this act."

Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 243, contains a severability clause.

Effect of Amendments. —

Session Laws 1985 (Reg. Sess., 1986), c. 955, ss. 63 and 64, effective July 1, 1986, deleted "by and with the advice of the Commission" following "The Director" in the introductory language of the first paragraph and added the first sentence of the last paragraph.

Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 179, effective July 1, 1986, added the next-to-last paragraph.

§ 143-13. Printing copies of budget report and bills and rules for the introduction of the same.

The Director shall cause to be printed one thousand copies each of the budget report, the Current Operations Appropriations Bill, Capital Improvement Appropriations Bill, and the Budget Revenue Bill. The Governor shall present copies thereof to the General Assembly, together with the biennial message, except incoming Governors may, at the first session of the General Assembly in their respective terms, submit the same after the biennial message has been presented to the General Assembly. The Current Operations Appropriations Bill and the Capital Improvement Appropriations Bill shall be introduced by the chairman of the committee on appropriations in each house of the General Assembly, and the Budget Revenue Bill shall be introduced by the chairmen of the finance committees in each branch of the General Assembly: Provided, that for the years in which the Governor is elected, other than

when a Governor is elected for a second successive term the Director shall deliver the budget report and the Current Operations Appropriations Bill and the Capital Improvement Appropriations Bill and the Budget Revenue Bill to the Governor-elect, on or before the fifteenth day of December, and the said budget report, Appropriations, and Revenue Bills, shall be presented by the Governor to the General Assembly with such recommendations in the way of amendments, or other modifications, together with such criticism as he may determine. The provisions herein contained as to the introduction of the bills mentioned in this section shall be considered and treated as a rule of procedure in the Senate and House of Representatives until otherwise expressly provided for by a rule in either, or both, of said branches of the General Assembly. (1925, c. 89, s. 14; 1929, c. 100, s. 15; 1983 (Reg. Sess., 1984), c. 1034, ss. 152, 155-158; 1985, c. 61, s. 4; 1985 (Reg. Sess., 1986), c. 1010.)

Editor's Note. —

Session Laws 1985 (Reg. Sess., 1986), c. 1010, s. 1, effective July 15, 1986, repealed Session Laws 1985, c. 61, which would have amended this section, effective July 1, 1992, contingent upon approval of the amendment to N.C. Const., Art. III, § 2, proposed by Session

Laws 1985, c. 61. The 1985 amendment would have deleted "other than when a Governor is elected for a second successive term" following "the years in which the Governor is elected" in the proviso to the third sentence.

The section is set out above as it read prior to the amendment by Session Laws 1985, c. 61.

§ 143-16.1. Federal funds.

All federal funds shall be expended and reported in accordance with provisions of the Executive Budget Act, except as otherwise provided by law. Proposed budgets recommended to the General Assembly by the Governor and Advisory Budget Commission shall include information concerning the federal expenditures in State agencies, departments and institutions in the same manner as State funds. The Director of the Budget may adopt rules and regulations establishing uniform planning, budgeting and fiscal procedures, not inconsistent with federal law, that ensure that all federal funds shall be expended in a standardized manner. The function of the Advisory Budget Commission under this section applies only if the Director of the Budget consults with the Commission in preparation of the budget. (1977, 2nd Sess., c. 1219, s. 45; 1983, c. 717, s. 56; c. 761, s. 57; 1985 (Reg. Sess., 1986), c. 955, s. 65.)

Editor's Note. —

Section 1 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "This act may be cited as the Separation of Powers Act of 1986."

Section 127 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "If any part of this act

shall be declared invalid by any court, this shall not affect any other part of this act."

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective July 1, 1986, added the last sentence.

§ 143-16.2. Reports.

Whenever the Governor or any other executive officer, agency, board, or commission is authorized by law to consult with the Advisory Budget Commission prior to taking some action, if there has been no consultation such action should be reported in writing to the Speaker of the House of Representatives, the President of the Senate, and the Director of the Fiscal Research Division as soon as practicable after the action is taken. This section does not apply to preparation of the budget. (1985 (Reg. Sess., 1986), c. 955, s. 126.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 955, s. 126, makes this section effective July 1, 1986.

Section 1 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "This act may be cited as the Separation of Powers Act of 1986."

Section 127 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "If any part of this act shall be declared invalid by any court, this shall not affect any other part of this act."

§ 143-16.3. No expenditures for purposes for which the General Assembly has considered but not enacted an appropriation.

No funds from any source, except for gifts and grants, may be expended for any purpose for which the General Assembly has considered but not enacted an appropriation of funds for the current fiscal period. For the purpose of this section, the General Assembly has considered a purpose when that purpose is included in a bill or petition or when any committee of the Senate or the House of Representatives deliberates on that purpose. (1985 (Reg. Sess., 1986), c. 1014, s. 177.)

Editor's Note. — Section 177(b) of Session Laws 1985 (Reg. Sess., 1986), c. 1014, makes this section effective July 15, 1986.

Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 243, contains a severability clause.

§ 143-17. Requisition for allotment.

Before an appropriation of any spending agency shall become available, such agency shall submit to the Director, not less than 20 days before the beginning of each quarter of each fiscal year a requisition for an allotment of the amount estimated to be required to carry on the work of the agency during the ensuing quarter and such requisition shall contain such details of proposed expenditures as may be required by the Director. The Director shall approve such allotments, or modifications of them, as he may deem necessary to make, and he shall submit the same to the State Controller who in the course of his operations shall check for compliance with such allotments. No allotment shall be changed nor shall transfers be made except upon the written request of the responsible head of the spending agency and by approval of the Director of the Budget in writing: Provided, that quarterly allotments made to the State Auditor's office, State Treasurer's office, and Administrative Office of the Courts shall be in such amounts as may be designated by the Advisory Budget Commission, and shall be made available in accordance with procedures determined by the Advisory Budget Commission. (1925, c. 89, s. 18; 1929, c. 100, s. 19; 1955, c. 578, s. 4; 1981, c. 859, s. 47.1; 1985 (Reg. Sess., 1986), c. 1024, s. 14.)

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective August 1, 1986, substituted "State Con-

troller who in the course of his operations" for "State Auditor who in the course of his audit" in the second sentence.

§ 143-18. Unencumbered balances to revert to treasury; capital appropriations excepted.

Editor's Note. —

Session Laws 1985, c. 479, s. 161, was amended by Session Laws 1985 (Reg. Sess., 1986), c. 851, s. 2, and c. 1014, s. 175, so as to change the date in the first paragraph of c. 479, s. 161, as set out in the 1985 Cumulative Supplement, from June 30, 1986, to June 30, 1987.

The first paragraph of Session Laws 1985, c. 479, s. 161, as amended by Session Laws 1985 (Reg. Sess., 1986), c. 851, s. 2 and c. 1014, s. 175, now provides:

"Sections 156 through 160 of this act shall become effective July 1, 1985; provided, however, from July 1, 1985, through June 30, 1987, these sections do not apply to the extent that the Director of the Budget finds that compliance is impossible and that deviation is necessary because of complications in the budget process that were not contemplated in these sections."

§ 143-18.1. Decrease of projects within capital improvement appropriations; requesting authorization of capital projects not specifically provided for.

(a) Upon the request of the administration of a State agency or institution, the Director of the Budget may decrease the scope of a capital improvement project. Prior to taking any action under this subsection, the Director of the Budget may consult with the Advisory Budget Commission.

(b) Upon the request of the administration of a State agency or institution, the Director of the Budget may when, in his opinion, it is in the best interest of the State to do so, increase the cost of a capital improvement project within the appropriation made to that State agency or institution within the capital improvement appropriation to that agency or institution for that biennium, provided that the project may not be increased in scope under the authority of this subsection. Prior to taking any action under this subsection, the Director of the Budget may consult with the Advisory Budget Commission.

(c) Upon the request of the administration of any State agency or institution, the Director of the Budget may accept funds by gift or grant for the construction of a capital improvement project not specifically provided for or authorized by the General Assembly. These funds shall be placed in a special reserve account to be held by the State Treasurer until the end of the biennium in which the account was established or until the capital improvement project is authorized by the Director of the Budget, whichever occurs first. These funds shall be invested and the interest thereon shall be added to the reserve. If the project is not authorized by the end of that biennium, the State Treasurer shall pay the funds accumulated in the special reserve account to the grantor or donor. Upon the establishment of a special reserve account under this section, the Director of the Budget shall notify the Speaker of the House and President of the Senate of the receipt of the funds and the existence of the reserve account. Upon the request of the administration of any State agency or institution, the Governor, may authorize the construction of a capital improvement project not specifically authorized by the General Assembly if such project is to be funded by receipts, special funds, self-liquidating indebtedness, other funds, or any combination of funds, but not including funds appropriated from the General Fund. All expenditures under this authorization shall be handled in full compliance with the provisions of the Executive Budget Act.

The agency shall support its request for such capital improvement project, or projects, with the following information: the estimated annual operating costs for (i) utilities; (ii) maintenance; (iii) repairs; (iv) additional personnel; (v) any and all other expenses to the State resulting from the addition of this

facility to the plant of the institution. Prior to taking any action under this section to authorize a project, the Governor or the Director of the Budget may consult with the Advisory Budget Commission and the Capital Planning Commission. (1965, c. 841, s. 1; 1983, c. 717, s. 57; 1985 (Reg. Sess., 1986), c. 955, ss. 66-71.)

Editor's Note. —

Section 1 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "This act may be cited as the Separation of Powers Act of 1986."

Section 127 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "If any part of this act shall be declared invalid by any court, this shall not affect any other part of this act."

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective July 1, 1986, deleted "after consultation with the Advisory Budget Commission and" at

the beginning of the first sentence of subsection (a), added the second sentence of subsection (a), deleted "After consultation with the Advisory Budget Commission and" at the beginning of the first sentence of subsection (b), added the second sentence of subsection (b), deleted "after consultation with the Advisory Budget Commission and the Capital Building Authority" in two places in subsection (c), and added the last sentence of the second paragraph of subsection (c).

§ 143-19. Help for Director.

The Director is hereby authorized to secure such special help, expert accountants, draftsmen and clerical help as he may deem necessary to carry out his duties under this Article; and shall fix the compensation of all persons employed under this Article; which shall be paid by the State Treasurer upon the warrant of the State Controller. A statement in detail of all persons employed, time employed, compensation paid, and itemized statement of all other expenditures made under the terms of this Article, shall be reported to the General Assembly by the Director, and all payments made under this Article shall be charged against and paid out of the emergency contingent fund and/or such appropriations as may be made for the use of the Office of State Budget and Management. (1925, c. 89, s. 20; 1929, c. 100, s. 21; 1957, c. 269, s. 2; 1961, c. 1181, s. 2; 1979, 2nd Sess., c. 1137, s. 37; 1985 (Reg. Sess., 1986), c. 1024, s. 15.)

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective August 1, 1986, substituted "State Controller" for "State Disbursing Officer" in the first sentence.

§ 143-20. Accounting records.

The State Controller shall be responsible for keeping a record of the appropriations, allotments, expenditures, and revenues of each State department, institution, board, commission, officer, or other agency in any manner handling State funds. These records shall be kept in summary form, or in as much detail as the State Controller may deem advisable. (1925, c. 89, s. 22; 1929, c. 100, s. 22; 1955, c. 578, s. 5; 1957, c. 269, s. 2; 1979, 2nd Sess., c. 1137, s. 37; 1983, c. 913, s. 31; 1985 (Reg. Sess., 1986), c. 1024, s. 16.)

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, ef-

fective August 1, 1986, substituted "State Controller" for "Director" in two places.

§ 143-20.1. Annual financial statements.

Beginning with fiscal years ending in 1984 and each and every year thereafter, all State agencies shall prepare annual financial statements on all funds administered by them no later than 60 days subsequent to the close of the fiscal year then ended in accordance with generally accepted accounting principles as described in authoritative pronouncements and interpreted and/or prescribed by the State Controller, and in such form as he may require. The State Controller shall publish guidelines specifying the procedures to implement the necessary records, procedures, and accounting systems to reflect these statements on the proper basis of accounting.

Accordingly, the State Controller shall combine the financial statements for the various agencies into a Comprehensive Annual Financial Report for the State of North Carolina in accordance with generally accepted accounting principles. These statements, along with the opinion of the State Auditor, shall be published as the official financial statements of the State and shall be distributed to the Governor, Office of State Budget and Management, members of the General Assembly, heads of departments, agencies and institutions of the State, and other interested parties. The State Controller shall notify the Director of the Budget of any and all State agencies which have not complied fully with the requirements of this provision within the specified time, and the Director of the Budget shall employ whatever means necessary, including the withholding of allotments, to ensure immediate corrective actions. (1983, c. 913, s. 32; 1985 (Reg. Sess., 1986), c. 1024, ss. 17-19.)

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective August 1, 1986, substituted "State Controller" for "State

Auditor" in the first, second, third and fifth sentences, and rewrote the fourth sentence.

§ 143-23. All maintenance funds for itemized purposes; transfers between objects and items.

(a) All appropriations now or hereafter made for the maintenance of the various departments, institutions and other spending agencies of the State, are for the purposes and/or objects enumerated in the itemized requirements of such departments, institutions and other spending agencies submitted to the General Assembly by the Director of the Budget and the Advisory Budget Commission, and/or as amended by the General Assembly. The function of the Advisory Budget Commission under this subsection applies only if the Director of the Budget consults with the Commission in preparation of the budget.

(1929, c. 100, s. 24; 1981, c. 1127, s. 82; 1985, c. 290, s. 8; c. 479, s. 159; c. 757, s. 183; 1985 (Reg. Sess., 1986), c. 955, s. 72.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. —

Session Laws 1985, c. 479, s. 161, is amended by Session Laws 1985 (Reg. Sess., 1986), c. 851, s. 2, and c. 1014, s. 175, so as to change the date in the first paragraph of c. 479, s. 161, as set out in the 1985 Cumulative Supplement from June 30, 1986, to June 30, 1987.

The first paragraph of Session Laws 1985, c. 479, s. 161, as amended by Session Laws 1985

(Reg. Sess., 1986), c. 851, s. 2 and c. 1014, s. 175, provides:

"Sections 156 through 160 of this act shall become effective July 1, 1985; provided, however, from July 1, 1985, through June 30, 1987, these sections do not apply to the extent that the Director of the Budget finds that compliance is impossible and that deviation is necessary because of complications in the budget process that were not contemplated in these sections."

Section 1 of Session Laws 1985 (Reg. Sess.,

1986), c. 955 provides: "This act may be cited as the Separation of Powers Act of 1986."

Section 127 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "If any part of this act shall be declared invalid by any court, this shall not affect any other part of this act."

Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 237 provides:

"Notwithstanding G.S. 143-23, until June 30, 1987, State agencies may, within their budgeted, filled positions, reorganize among programs approved by the General Assembly to alleviate cutbacks in federal funds that were

not anticipated in the 1986-87 State budget or to carry out special program mandates set by the General Assembly.

Prior to any such reorganization, the State agency and the Office of State Budget and Management shall report the planned reorganization to the Joint Legislative Commission on Governmental Operations and the Fiscal Research Division."

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective July 1, 1986, added the last sentence of subsection (a).

§ 143-25. Maintenance appropriations dependent upon adequacy of revenues to support them.

All maintenance appropriations now or hereafter made are hereby declared to be maximum, conditional and proportionate appropriations, the purpose being to make the appropriations payable in full in the amounts named herein if necessary and then only in the event the aggregate revenues collected and available during each fiscal year of the biennium for which such appropriations are made, are sufficient to pay all of the appropriations in full; otherwise, the said appropriations shall be deemed to be payable in such proportion as the total sum of all appropriations bears to the total amount of revenue available in each of said fiscal years. The Director of the Budget is hereby given full power and authority to examine and survey the progress of the collection of the revenue out of which such appropriations are to be made, and to declare and determine the amounts that can be, during each quarter of each of the fiscal years of the biennium properly allocated to each respective appropriation. In making such examination and survey, he shall receive estimates of the prospective collection of revenues from the Secretary of Revenue and every other revenue collecting agency of the State. The Director of the Budget may reduce all of said appropriations pro rata when necessary to prevent an overdraft or deficit to the fiscal period for which such appropriations are made. The purpose and policy of this Article are to provide and insure that there shall be no overdraft or deficit in the general fund of the State at the end of the fiscal period, growing out of appropriations for maintenance and the Director of the Budget is directed and required to so administer this Article as to prevent any such overdraft or deficit. Prior to taking any action under this section to reduce appropriations pro rata, the Governor may consult with the Advisory Budget Commission. (1929, c. 100, s. 26; 1955, c. 578, s. 7; 1973, c. 476, s. 193; 1981, c. 859, s. 47.1; 1983, c. 717, s. 58; 1985, c. 290, s. 5; 1985 (Reg. Sess., 1986), c. 955, ss. 73, 74.)

Editor's Note. —

Section 1 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "This act may be cited as the Separation of Powers Act of 1986."

Section 127 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "If any part of this act shall be declared invalid by any court, this shall not affect any other part of this act."

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective July 1, 1986, deleted "after consultation with the Advisory Budget Commission" following "The Director of the Budget" in the fourth sentence and added the last sentence.

§ 143-27. Appropriations to educational, charitable and correctional institutions are in addition to receipts by them.

Editor's Note. —

Session Laws 1985, c. 479, s. 161, is amended by Session Laws 1985 (Reg. Sess., 1986), c. 851, s. 2, and c. 1014, s. 175, so as to change the date in the first paragraph of c. 479, s. 161, as set out in the 1985 Cumulative Supplement, from June 30, 1986, to June 30, 1987.

The first paragraph of Session Laws 1985, c. 479, s. 161, as amended by Session Laws 1985 (Reg. Sess., 1986), c. 851, s. 2 and c. 1014, s. 175 provides:

"Sections 156 through 160 of this act shall become effective July 1, 1985; provided, however, from July 1, 1985, through July 30, 1986, these sections do not apply to the extent that the Director of the Budget finds that compliance is impossible and that deviation is necessary because of complications in the budget process that were not contemplated in these sections."

§ 143-27.2. Discontinued service retirement allowance and severance wages for certain State employees.

When the Director of the Budget determines that the closing of a State institution or a reduction in force will accomplish economies in the State Budget, he shall pay either a discontinued service retirement allowance or severance wages to any affected State employee, provided reemployment is not available. In determining whether to pay a discontinued service retirement allowance or severance wages, the Director of the Budget shall consider the recommendation of the department head involved and any recommendation of the State Personnel Director. Severance wages shall not be paid to an employee who chooses a discontinued service retirement. Severance wages shall not be subject to employer or employee retirement contributions. Severance wages shall be paid according to the policies adopted by the State Personnel Commission.

Notwithstanding any other provisions of the State's retirement laws, any employee of the State who is a member of the Teachers' and State Employees' Retirement System or the Law-Enforcement Officers' Retirement System and who has his job involuntarily terminated as a result of economies in the State Budget may be entitled to a discontinued service retirement allowance, subject to the approval of the employing agency and the availability of agency funds. An unreduced discontinued service retirement allowance, not otherwise allowed, may be approved for employees with 25 or more years of creditable retirement service who are at least 55 years of age; or a discontinued service retirement allowance, not otherwise allowed, may be approved for employees with 20 or more years of creditable retirement service who are at least 50 years of age, reduced by one-fourth of one percent ($\frac{1}{4}$ of 1%) for each month that retirement precedes his fifty-fifth birthday. In cases where a discontinued service retirement allowance is approved, the employing agency shall make a lump sum payment to the Administrator of the State Retirement Systems equal to the actuarial present value of the additional liabilities imposed upon the System, to be determined by the System's consulting actuary, as a result of the discontinued service retirement, plus an administrative fee to be determined by the Administrator. (1979, c. 838, s. 22; 1983, c. 761, s. 225; c. 923, s. 217(R); 1983 (Reg. Sess., 1984), c. 1034, s. 251; 1985 (Reg. Sess., 1986), c. 981, s. 1; c. 1024, s. 20.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1024, s. 20, effective August 1, 1986, directed the substitution of "The State Controller, upon written request" for "The Director of the Budget, upon written request" in the first sentence of the first paragraph as it read prior to the amendment by Session Laws 1985 (Reg. Sess., 1986), c. 981. This amendment could not be effectuated because the quoted words no longer appear in the first sentence.

The section is set out above as amended by Session Laws 1985 (Reg. Sess., 1986), c. 981, at the direction of the Revisor of Statutes.

Effect of Amendments. — Session Laws 1985 (Reg. Sess., 1986), effective July 11, 1986, substituted the present first and second sentences of the first paragraph for the former first sentence thereof, and added the last sentence of that paragraph.

§ 143-30. Budget of State institutions.

The several institutions of the State, boards, departments, commissions, agencies, persons or corporations, included with the terms hereof to which appropriations are made now or hereafter for permanent improvements or for maintenance, shall, before any of such appropriations, whether for permanent improvements or for maintenance, are available or paid to them or any one of them, budget their requirements and present the same to the Director of the Budget on or before the first day of June of each odd-numbered year hereafter. There shall be a separate budget presented for permanent improvements and for maintenance. Each of said budgets shall contain the requirements of said institutions, boards, commissions, and agencies, persons and corporations, and undertakings, as hereinbefore defined, for the succeeding two years. Each institution, board, department, commission, agency, person or corporation, in the preparation of such budget, shall follow as nearly as may be the itemized recommendations of the Director of the Budget and Advisory Budget Commission and/or as amended by the General Assembly. The forms, except when modified and changed by authority of the Director of the Budget, shall be the forms used in presenting the requests. The function of the Advisory Budget Commission under this section applies only if the Director of the Budget consults with the Commission in preparation of the budget. (1925, c. 230, s. 2; 1929, c. 100, s. 32; 1985 (Reg. Sess., 1986), c. 955, s. 75.)

Editor's Note. — Section 1 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "This act may be cited as the Separation of Powers Act of 1986."

Section 127 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "If any part of this act

shall be declared invalid by any court, this shall not affect any other part of this act."

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 1, 1986, added the last sentence.

§ 143-31. Building and permanent improvement funds spent in accordance with budget.

All buildings and other permanent improvements, which shall be erected and/or constructed, shall be erected and/or constructed, and carried on and the money spent therefor in strict accordance with the budget requests of such institution, board, commission, agency, person, or corporation filed with the Director of the Budget. The expenditure of appropriations for maintenance shall be in strict accordance with the budget recommendations for such institution, board, commission, agency, person or corporation and/or as amended or changed by the General Assembly. It shall be the duty of the Director of the Budget to see that all money appropriated for either permanent improvements or maintenance shall be expended in strict accordance with the budget recommendations and/or as amended by the General Assembly, for each de-

partment, institution, board, commission, agency, person or corporation. If the Director of the Budget shall ascertain that any department, institution, board, commission, agency, person or corporation has used any of the moneys appropriated to it for any purpose other than that for which it was appropriated and budgeted, as herein required, and not in strict accordance with the terms of this Article, the Director of the Budget shall have the power and he is hereby authorized to notify such institution, board, commission, agency, person or corporation that no further sums from any appropriation made to it will be available to such department, institution, board, commission, agency, person or corporation until and after the persons responsible for the diversion of the said funds shall have replaced the same, and the Director of the Budget shall have the power and he is hereby authorized to notify the State Controller not to approve or issue any further warrants for such department, institution, board, commission, agency, person or corporation for any unexpended appropriation and the State Controller is hereby prohibited from approving or issuing any further warrants for such department, institution, board, commission, agency, person or corporation until he shall have been otherwise directed by the Director of the Budget. (1925, c. 230, s. 3; 1929, c. 100, s. 33; 1961, c. 1181, s. 3; 1985 (Reg. Sess., 1986), c. 1024, s. 21.)

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective August 1, 1986, substituted "State Controller" for "State

Disbursing Officer" in two places in the last sentence.

§ 143-31.2. Appropriation, allotment, and expenditure of funds for historic and archeological property.

The Department of Cultural Resources may not expend any State funds for the acquisition, preservation, restoration, or operation of historic or archeological real and personal property, and the Director of the Budget may not allot any appropriations to the Department of Cultural Resources for a particular historic site until (i) the property or properties shall have been approved for such purpose by the Department of Cultural Resources according to criteria adopted by the North Carolina Historical Commission, (ii) the report and recommendation of the North Carolina Historical Commission has been received and considered by the Department of Cultural Resources, and (iii) the Department of Cultural Resources has found that there is a feasible and practical method of providing funds for the acquisition, restoration and/or operation of such property. (1963, c. 210, s. 3; 1973, c. 476, s. 48; 1985 (Reg. Sess; 1986), c. 1014, s. 171(e).)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 171(g) provides:

"(g) Notwithstanding any other provision of law, the following statutes do not apply to appropriations which the General Assembly has directed the Department of Cultural Resources to allocate to specific units of local government or private nonprofit agencies: G.S. 121-11;

121-12(c), (c1), and (d); 121-12.1; 121-12.2; 143-31.2; and 143B-62(2)(f) and (f1)."

Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 243, contains a severability clause.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 1, 1986, rewrote the part of the section preceding the designation "(i)."

§ 143-31.3. Grants to nonstate health and welfare agencies.

Nonstate health and welfare agencies shall submit their appropriation requests for grants-in-aid through the Secretary of the Department of Human Resources for recommendations to the Director of the Budget and the Advisory Budget Commission and the General Assembly, and agencies receiving these grants, at the request of the Secretary of the Department of Human Resources, shall provide a postaudit of their operations that has been done by a certified public accountant. The function of the Advisory Budget Commission under this section applies only if the Director of the Budget consults with the Commission in preparation of the budget. (1979, c. 838, s. 35; 1985 (Reg. Sess., 1986), c. 955, s. 76.)

Editor's Note. —

Section 1 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "This act may be cited as the Separation of Powers Act of 1986."

Section 127 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "If any part of this act

shall be declared invalid by any court, this shall not affect any other part of this act."

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 1, 1986, added the last sentence.

§ 143-31.5. Repayment of certain unexpended and unencumbered sums; reports.

(a) Whenever funds have been appropriated by an act ratified before January 1, 1985, directly by the provisions of that act to a specific non-state agency, but those funds are not expended or encumbered by that agency by June 30, 1987, the agency shall no later than July 31, 1987, repay to the State all sums not so expended or encumbered. For the purposes of this section, agency includes any corporation, association, board, commission, city, county, local school administrative unit or board of education, or local commission, but does not include a community college, technical college, or technical institute.

(b) Any such agency so appropriated funds for fiscal year 1980-81, 1981-82, 1982-83, 1983-84 or 1984-85 shall report to the State Budget Office no later than December 31, 1986, the amount of any such funds not yet expended or encumbered. The State Budget Office shall monthly transmit a copy of such reports to the Joint Legislative Commission on Governmental Operations and the Fiscal Research Division. (1985 (Reg. Sess., 1986), c. 1014, s. 180.)

Editor's Note. — Section 244 of Session Laws 1985 (Reg. Sess., 1986), c. 1014, makes this section effective July 1, 1986.

Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 243, contains a severability clause.

§ 143-33. Intent.

It is an intent and purpose of this Article that all departments, institutions, boards, commissions, agencies, persons or corporations to which appropriations for permanent improvements and/or maintenance are made, shall submit to the Director of the Budget their requests for the payment of such appropriations in the form of a budget, following the recommendations made by the Director of the Budget and the Advisory Budget Commission and/or as amended by the General Assembly. The function of the Advisory Budget Commission under this section applies only if the Director of the Budget consults with the Commission in preparation of the budget. (1925, c. 230, s. 5; 1929, c. 100, s. 35; 1985 (Reg. Sess., 1986), c. 955, s. 77.)

Editor's Note. — Section 1 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "This act may be cited as the Separation of Powers Act of 1986."

Section 127 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "If any part of this act

shall be declared invalid by any court, this shall not affect any other part of this act."

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 1, 1986, added the last sentence.

§ 143-34.1. Payrolls submitted to the Director of the Budget; approval of payment of vouchers; payment of required employer salary-related contributions for retirement benefits, death benefits, disability salary continuation and Social Security; support of hospital and medical insurance programs for retired members of certain associations, organizations, boards, etc.

All payrolls of all departments, institutions, and agencies of the State government shall, prior to the issuance of vouchers in payment therefor, be submitted to the Director of the Budget, who shall check the same against the appropriations to such departments, institutions and agencies for such purposes, and if found to be within said appropriations, he shall approve the same and return one to the department, institution or agency submitting same and transmit one copy to the State Controller, and no voucher in payment of said payroll or any item thereon shall be honored or paid except and to the extent that the same has been approved by the Director of the Budget.

Required employer salary-related contributions for retirement benefits, death benefits, disability salary continuation and Social Security for employees whose salaries are paid from general fund or highway fund revenues, or from department, office, institutional or agency receipts, or from nonstate funds, shall be paid from the same source as the source of the employees' salaries. In those instances in which an employee's salary is paid in part from the general fund, or the highway fund, and in part from the department, office, institutional or agency receipts, or from nonstate funds, the required salary-related contributions shall be paid from the general fund, or the highway fund, only to the extent of the proportionate part paid from the general fund, or highway fund, in support of the salary of such employee, and the remainder of the employer's contribution requirements shall be paid from the same source which supplies the remainder of such employee's salary. The requirements of this section as to the source of payment are also applicable to payments on behalf of the employee for hospital-medical insurance, longevity payments, salary increments, and legislative salary increases. The State Controller shall approve the method of payment by State departments, offices, institutions and agencies for employer salary-related requirements of this section, and determine the applicability of the section to an employer's salary-related contribution or payment in behalf of an employee. (1949, c. 718, s. 5; 1957, c. 269, s. 2; 1961, c. 1181, s. 4; 1979, 2nd Sess., c. 1137, s. 44; 1983 (Reg. Sess., 1984), c. 1034, s. 162; 1985 (Reg. Sess., 1986), c. 1024, ss. 22, 23.)

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective August 1, 1986, substituted "State Con-

troller" for "State Disbursing Officer" in the first sentence and for "Director of the Budget" in the fifth sentence.

§ 143-34.2. Information as to requests for nonstate funds for projects imposing obligation on State; state-ment of participation in contracts, etc., for non-state funds; limiting clause required in certain contracts or grants.

All State agencies, funds, or state-supported institutions shall submit to the Office of State Budget and Management, as of the original date thereof, copies of all applications and requests for nonstate funds, (including federal funds), to be used for any purpose to which this section is applicable. This section shall be applicable to all projects and programs which do or may impose upon the State of North Carolina any substantial financial obligation at the time of or subsequent to the acceptance of any funds received upon any such application or request. Every State agency, fund or state-supported institution seeking nonstate funds for any such project or program shall furnish to the Office of State Budget and Management and the Advisory Budget Commission with each such copy of application or request, a statement of the purposes for which any such project or program is desired or advocated, the source and amount of funds to be granted or provided therefor, and a statement of the conditions, if any, upon which such funds are to be provided.

It shall be required of all State agencies, funds, or state-supported institutions, commissions or regional planning and development bodies to submit to the Office of State Budget and Management a statement of participation in any contract, agreement, plan or request for nonstate funds (including federal funds).

Any contract or grant entered into by a State board, commission, agency, department or institution for the operation of a new program by such State board, commission, agency, department or institution or for the enrichment of an ongoing program of such State board, commission, agency, department or institution shall include a limiting clause which specifically states that continuation of the contract or grant program with State appropriations beyond the current State fiscal year is subject to State funds being appropriated by the General Assembly specifically for that program.

The function of the Advisory Budget Commission under this section applies only if the Director of the Budget consults with the Commission in preparation of the budget. (1965, c. 1181; 1969, c. 1210; 1977, c. 802, s. 15.25; 1979, 2nd Sess., c. 1137, ss. 37, 45; 1985 (Reg. Sess., 1986), c. 955, s. 78.)

Editor's Note. —

Section 1 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "This act may be cited as the Separation of Powers Act of 1986."

Section 127 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "If any part of this act

shall be declared invalid by any court, this shall not affect any other part of this act."

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 1, 1986, added the last paragraph.

§ 143-34.5: Repealed by Session Laws 1985, c. 479, s. 160, effective July 1, 1985.

Editor's Note. —

Session Laws 1985, c. 479, s. 161, is amended by Session Laws 1985 (Reg. Sess., 1986), c. 851, s. 2, and c. 1014, s. 175, so as to change the date in the first paragraph of c. 479, s. 161, as

set out in the 1985 Cumulative Supplement, from June 30, 1986, to June 30, 1987.

The first paragraph of Session Laws 1985, c. 479, s. 161, as amended by Session Laws 1985 (Reg. Sess., 1986), c. 851, s. 2 and c. 1014, s. 175 provides:

"Sections 156 through 160 of this act shall become effective July 1, 1985; provided, however, from July 1, 1985, through June 30, 1987, these sections do not apply to the extent that the Director of the Budget finds that compli-

ance is impossible and that deviation is necessary because of complications in the budget process that were not contemplated in these sections."

ARTICLE 2D.

North Carolina Board for Need-Based Student Loans.

§ 143-47.21. (Effective July 1, 1987) Creation of Board.

The North Carolina Board for Need-Based Student Loans, hereinafter referred to as the Board, is established in the Office of State Budget and Management to provide financial assistance on the basis of demonstrated need as determined by the Board to students who are residents of North Carolina and who are accepted in an accredited degree-granting program or in an accredited program granting a diploma or an approved certificate, in any school, college or university, leading to graduation as physicians, dentists, optometrists, pharmacists, nurses, nurse instructors, nurse anesthetists, medical technicians, social workers, psychologists or other health professionals as so determined by the Board. (1981 (Reg. Sess., 1982), c. 1388, s. 4; 1983, c. 761, ss. 176, 177; 1983 (Reg. Sess., 1984), c. 1116, s. 104; 1985 (Reg. Sess., 1986), c. 1014, s. 63(c).)

For this section as in effect until July 1, 1987, see the 1985 Cumulative Supplement.

Editor's Note. —

Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 243, contains a severability clause.

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, ef-

fective July 1, 1987, and not applicable to individuals who received commitments for loans prior to July 1, 1987, and who have not completed the program, deleted "or leading to graduation as mathematicians or scientists" following "health professionals."

ARTICLE 3.

Purchases and Contracts.

§ 143-49. Powers and duties of Secretary.

The Secretary of Administration shall have power and authority, and it shall be his duty, subject to the provisions of this Article:

- (4) To have general supervision of all storerooms and stores operated by the State government, or any of its departments, institutions or agencies; to provide for transfer or exchange to or between all State departments, institutions and agencies, or to sell all supplies, materials and equipment which are surplus, obsolete or unused; and to have supervision of inventories of all tangible personal property belonging to the State government, or any of its departments, institutions or agencies. All receipts from the transfer or sale of such surplus, obsolete or unused equipment of State departments, institutions and agencies which are supported by appropriations from the general fund, except where such receipts have been anticipated for, or budgeted against the cost of replacements, shall be placed by the Secre-

tary in an equipment reserve fund from which expenditures may be made only with prior approval of the Director of the Budget. The duties imposed by this subdivision shall not relieve any department, institution or agency of the State government from accountability for equipment, materials, supplies and tangible personal property under its control. Prior to taking any action under this subdivision concerning expenditures from the equipment reserve fund, the Secretary may consult with the Advisory Budget Commission.

- (6) To make available to nonprofit corporations operating charitable hospitals, to local nonprofit community sheltered workshops or centers that meet standards established by the Division of Vocational Rehabilitation of the Department of Human Resources, and to counties, cities, towns, governmental entities and other subdivisions of the State and public agencies thereof in the expenditure of public funds, the services of the Department of Administration in the purchase of materials, supplies and equipment under such rules, regulations and procedures as the Secretary of Administration may adopt. In adopting rules and regulations any or all provisions of this Article may be made applicable to such purchases and contracts made through the Department of Administration, and in addition the rules and regulations shall contain a requirement that payment for all such purchases be made in accordance with the terms of the contract. Prior to adopting rules and regulations under this subdivision, the Secretary of Administration may consult with the Advisory Budget Commission. (1931, c. 261, s. 2; 1951, c. 3, s. 1; c. 1127, s. 1; 1957, c. 269, s. 3; 1961, c. 310; 1971, c. 587, s. 1; 1975, c. 580; c. 879, s. 46; 1977, c. 733; 1979, c. 759, s. 1; 1983, c. 717, ss. 60, 62; 1985 (Reg. Sess., 1986), c. 955, ss. 79-82.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. —

Section 1 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "This act may be cited as the Separation of Powers Act of 1986."

Section 127 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "If any part of this act shall be declared invalid by any court, this shall not affect any other part of this act."

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective July 1, 1986, deleted "and after consultation with the Advisory Budget Commission" at the end of the second sentence of subdivision (4), added the last sentence of subdivision (4), deleted "after consultation with the Advisory Budget Commission" following "Secretary of Administration" in the first sentence of subdivision (6), and added the last sentence of subdivision (6).

§ 143-52. Competitive bidding procedure; consolidation of estimates by Secretary; bids; awarding of contracts.

As feasible, the Secretary of Administration will compile and consolidate all such estimates of supplies, materials, equipment and contractual services needed and required by State departments, institutions and agencies to determine the total requirements of any given commodity. Where such total requirements will involve an expenditure in excess of five thousand dollars (\$5,000) and where the competitive bidding procedure is employed as herein-after provided, sealed bids shall be solicited by advertisement in a newspaper of statewide circulation at least once and at least 10 days prior to the date designated for opening of the bids and awarding of the contract: Provided,

other methods of advertisement may be adopted by the Secretary of Administration when such other method is deemed more advantageous for certain items or commodities. Regardless of the amount of the expenditure, under the competitive bidding procedure it shall be the duty of the Secretary of Administration to solicit bids direct by mail from qualified sources of supply. Except as otherwise provided under this Article, contracts for the purchase of supplies, materials or equipment shall be based on competitive bids and acceptance made of the lowest and best bid(s) most advantageous to the State as determined upon consideration of the following criteria: prices offered; the quality of the articles offered; the general reputation and performance capabilities of the bidders; the substantial conformity with the specifications and other conditions set forth in the request for bids; the suitability of the articles for the intended use; the personal or related services needed; the transportation charges; the date or dates of delivery and performance; and such other factor(s) deemed pertinent or peculiar to the purchase in question, which if controlling shall be made a matter of record. Competitive bids on such contracts shall be received in accordance with rules and regulations to be adopted by the Secretary of Administration, which rules and regulations shall prescribe for the manner, time and place for proper advertisement for such bids, the time and place when bids will be received, the articles for which such bids are to be submitted and the specifications prescribed for such articles, the number of the articles desired or the duration of the proposed contract, and the amount, if any, of bonds or certified checks to accompany the bids. Bids shall be publicly opened. Any and all bids received may be rejected. Each and every bid conforming to the terms of the invitation, together with the name of the bidder, shall be tabulated or otherwise entered as a matter of record, and all such records with the name of the successful bidder indicated thereon shall, after the award of the contract, be open to public inspection. Provided, that trade secrets, test data and similar proprietary information may remain confidential. A bond for the faithful performance of any contract may be required of the successful bidder at bidder's expense and in the discretion of the Secretary of Administration. After contracts have been awarded, the Secretary of Administration shall certify to the departments, institutions and agencies of the State government the sources of supply and the contract price of the supplies, materials and equipment so contracted for. Prior to adopting other methods of advertisement under this section, the Secretary of Administration may consult with the Advisory Budget Commission. Prior to adopting rules and regulations under this section, the Secretary of Administration may consult with the Advisory Budget Commission. (1931, c. 261, s. 5; 1933, c. 441, s. 1; 1957, c. 269, s. 3; 1971, c. 587, s. 1; 1975, c. 879, s. 46; 1981, c. 602, ss. 2, 3; 1983, c. 717, s. 61; 1985 (Reg. Sess., 1986), c. 955, ss. 83-86.)

Editor's Note. — Section 1 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "This act may be cited as the Separation of Powers Act of 1986."

Section 127 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "If any part of this act shall be declared invalid by any court, this shall not affect any other part of this act."

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective July 1, 1986, deleted "after consultation with the Advisory Budget Commission" following "Secretary of Administration" in the second and fifth sentences and added the last two sentences.

§ 143-53. Rules and regulations.

The Secretary of Administration shall have the necessary authority to adopt rules and regulations governing the following:

- (1) Prescribing the routine and procedures to be followed in canvassing bids and awarding contracts, and for reviewing decisions made pursuant thereto, and the decision of the reviewing body shall be the final administrative review.
- (2) Prescribing routine for securing bids on items that do not exceed five thousand dollars (\$5,000) in value.
- (3) Defining contractual services for the purposes of G.S. 143-49 (3).
- (4) Prescribing items and quantities, and conditions and procedures, governing the acquisition of goods and services which may be delegated to departments, institutions and agencies, notwithstanding any other provisions of this Article.
- (5) Prescribing conditions under which purchases and contracts for the purchase, rental or lease of equipment, materials, supplies or services may be entered into by means other than competitive bidding.
- (6) Prescribing conditions under which partial, progressive and multiple awards may be made.
- (7) Prescribing conditions and procedures governing the purchase of used equipment, materials and supplies.
- (8) Providing conditions under which bids may be rejected in whole or in part.
- (9) Prescribing conditions under which information submitted by bidders or suppliers may be considered proprietary or confidential.
- (10) Prescribing procedures for making purchases under programs involving participation by two or more levels or agencies of government, or otherwise with funds other than state-appropriated.
- (11) Prescribing procedures to encourage the purchase of North Carolina farm products, and products of North Carolina manufacturing enterprises.
- (12) Adopting any other rules and regulations to carry out the duties and purpose of this Article.

The purpose of rules and regulations promulgated hereunder shall be to promote sound purchasing management. Such rules and regulations shall become effective in accordance with the provisions of Chapter 150A of the General Statutes.

Prior to adopting rules and regulations under this section, the Secretary of Administration may consult with the Advisory Budget Commission. (1931, c. 261, s. 5; 1933, c. 441, s. 1; 1957, c. 269, s. 3; 1971, c. 587, s. 1; 1975, c. 879, s. 46; 1981, c. 602, s. 4; 1983, c. 717, ss. 63-64.1; 1985, c. 145, s. 3; 1985 (Reg. Sess., 1986), c. 955, ss. 87, 88.)

Editor's Note. —

Section 1 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "This act may be cited as the Separation of Powers Act of 1986."

Section 127 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "If any part of this act shall be declared invalid by any court, this shall not affect any other part of this act."

Chapter 150A, referred to in this section, was rewritten by Session Laws 1985, c. 746, s.

1, effective January 1, 1986, and has been recodified as Chapter 150B.

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective July 1, 1986, deleted "after consultation with the Advisory Budget Commission" following "Secretary of Administration" in the introductory language of the first paragraph and added the last paragraph.

§ 143-60. Rules and regulations covering certain purposes.

The Secretary of Administration, may adopt, modify, or abrogate rules and regulations covering the following purposes, in addition to those authorized elsewhere in this Article:

- (1) Requiring reports by State departments, institutions, or agencies of stocks of supplies and materials and equipment on hand and prescribing the form of such reports.
- (2) Prescribing the manner in which supplies, materials and equipment shall be delivered, stored and distributed.
- (3) Prescribing the manner of inspecting deliveries of supplies, materials and equipment and making chemicals and/or physical tests of samples submitted with bids and samples of deliveries to determine whether deliveries have been made in compliance with specifications.
- (4) Prescribing the manner in which purchases shall be made in emergencies.
- (5) Providing for such other matters as may be necessary to give effect to foregoing rules and provisions of this Article.
- (6) Prescribing the manner in which passenger vehicles shall be purchased.

Further, the Secretary of Administration, may prescribe appropriate procedures necessary to enable the State, its institutions and agencies, to obtain materials surplus or otherwise available from federal, State or local governments or their disposal agencies.

Prior to taking any action under this section, the Secretary of Administration may consult with the Advisory Budget Commission. (1931, c. 261, s. 11; 1945, c. 145; 1957, c. 269, s. 3; 1961, c. 772; 1971, c. 587, s. 1; 1975, c. 879, s. 46; 1981, c. 268, s. 2; 1983, c. 717, ss. 67, 68; 1985 (Reg. Sess., 1986), c. 955, ss. 89, 90.)

Editor's Note. —

Section 1 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "This act may be cited as the Separation of Powers Act of 1986."

Section 127 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "If any part of this act shall be declared invalid by any court, this shall not affect any other part of this act."

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective July 1, 1986, deleted "after consultation with the Advisory Budget Commission" following "Secretary of Administration" in the first and second paragraphs and added the last paragraph.

ARTICLE 6A.

Ordinances and Traffic Regulations for Institutions.

§ 143-116.7. Motor vehicle laws applicable to streets, alleys and driveways on the grounds of Department of Human Resources institutions; traffic regulations; registration and regulation of motor vehicles.

(c) The Secretary may, by regulation, regulate parking and establish parking areas on the grounds of institutions of the Department of Human Resources.

(e) Regulations adopted under this section may provide that violation subjects the offender to a civil penalty, not to exceed fifty dollars (\$50.00). Penalties may be graduated according to the seriousness of the offense or the number of prior offenses by the person charged but shall not exceed fifty dollars (\$50.00). The Secretary may establish procedures for the collection of penalties, and they may be enforced by civil action in the nature of debt.

(g) Any violation under this section or of a provision of Chapter 20 of the General Statutes made applicable to the grounds of State institutions solely by operation of this section shall be considered an infraction and shall be subject to an infraction penalty not to exceed fifty dollars (\$50.00). A regulation adopted under this section may provide that a violation shall not be an infraction, but shall be enforced by other methods available, including the methods authorized by subsection (e).

(h) Any fees or civil penalties collected pursuant to this section shall be deposited in the General Fund Budget Code of the institution where the fees or fines are collected and shall only be used to support the cost of administration of this section. Infraction penalties shall be disbursed as provided in G.S. 14-3.1.(a). (1981, c. 614, s. 5; 1985, c. 672; c. 764, s. 39; 1985 (Reg. Sess., 1986), c. 852, ss. 13, 14.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 852, s. 17 amends Session Laws 1985, c. 764, s. 40, so as to change the effective date of the amendment to this section by c. 764 from July 1, 1986 to September 1, 1986.

Session Laws 1985, c. 764, s. 40, as amended by Session Laws 1985 (Reg. Sess., 1986), c. 852, s. 17, provides: "This act shall become effective September 1, 1986, and shall apply to offenses committed on or after that date. Offenses com-

mitted before the effective date of this act [September 1, 1986] shall be governed by the law in effect at the time of the offense.

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective September 1, 1986, repealed Session Laws 1985, c. 764, s. 39, which had rewritten subsection (c). Subsections (c) and (e) are now set out above as rewritten by Session Laws 1985, c. 672, s. 3. In addition, the amendment rewrote subsection (g) and added the last sentence of subsection (h).

ARTICLE 7.

Persons Admitted to Department of Human Resources Institutions to Pay Costs.

§ 143-127.1. Parental liability for payment of cost of care for long-term patients in Department of Human Resources facilities.

(d) Notwithstanding any other provisions of the law, the income and financial resources of the natural or adoptive parents of persons under the age of 21 who since July 1, 1978, had spent a total of at least 180 days as long-term patients in public or private certified intermediate care facilities, skilled nursing facilities, or hospitals, shall not be taken into account in the determination of whether that child is eligible for medical assistance under Article 2, Part 5 of Chapter 108 of the General Statutes and Title XIX of the Social Security Act. (1971, c. 218, s. 1; 1973, c. 476, s. 133; c. 775; 1975, c. 19, s. 48; 1979, c. 838, ss. 25-27; 1983, c. 12; 1983 (Reg. Sess., 1984), c. 1116, s. 82.)

Only Part of Section Set Out. — As the rest of the section was not affected, it is not set out.

Editor's Note. — The amendment to subsection (d) of this section by Session Laws 1983

(Reg. Sess., 1984), c. 1116, s. 82 expired by its own terms on June 30, 1986. Therefore, subsection (d) is set out above as it read prior to this amendment.

ARTICLE 8.

Public Building Contracts.

§ 143-128. Separate specifications for building contracts; responsible contractors.

Local Modification. — (As to Article 8) Durham: 1985 (Reg. Sess., 1986), c. 908; (as to Article 8) East Duplin High School in Duplin County: 1985 (Reg. Sess., 1986), c. 887, expiring June 30, 1989; (as to Article 8) Capital

Building Authority: 1985 (Reg. Sess., 1986), c. 946; town of Manteo: 1985 (Reg. Sess., 1986), c. 808; University of North Carolina at Chapel Hill: 1985 (Reg. Sess., 1986), c. 865, s. 3.

§ 143-129. Procedure for letting of public contracts; purchases from federal government by State, counties, etc.

Local Modification. — City of Wilson: 1985 (Reg. Sess., 1986), c. 871; cities of Bessemer City, Kings Mountain, Wilson: 1985 (Reg. Sess., 1986), c. 959; town of Manteo: 1985 (Reg.

Sess., 1986), c. 808; University of North Carolina at Chapel Hill: 1985 (Reg. Sess., 1986), c. 865, s. 3.

§ 143-132. Minimum number of bids for public contracts.

Local Modification. — Town of Manteo: 1985 (Reg. Sess., 1986), c. 808.

§ 143-135. Limitation of application of Article.

Local Modification. — Union: 1985 (Reg. Sess., 1986), c. 914, s. 1.

§ 143-135.3. Procedure for settling controversies arising from contracts; civil actions on disallowed claims; appeal to Board.

CASE NOTES

Courts Are Not Powerless to Grant Relief. — This section does not mean that the courts are powerless to grant relief to an aggrieved contractor for breach of the construction contract in the absence of a specific term of the contract allowing such relief. Davidson & Jones, Inc. v. North Carolina Dep't of Admin., 312 N.C. 796, 325 S.E.2d 485 (1985).

This section requires simply that the contractor's claim arise out of a breach of the contract or some provision thereof so as to entitle the contractor to some relief. Davidson & Jones, Inc. v. North Carolina Dep't of Admin., 312 N.C. 796, 325 S.E.2d 485 (1985).

A contractor in a civil action brought

pursuant to this section could recover duration-related costs incurred as the direct result of an unexpected overrun exceeding 400% in the amount of rock to be excavated under a

construction contract with this State, but could not recover extra home office expenses. *Davidson & Jones, Inc. v. North Carolina Dep't of Admin.*, 312 N.C. 796, 325 S.E.2d 485 (1985).

ARTICLE 9A.

Manufactured Housing and Mobile Homes.

Part 1. North Carolina Manufactured Housing Board.

§ 143-143.13. Grounds denying, suspending or revoking license.

(c) In addition to the authority to deny, suspend, or revoke a license under this Part, the Board also has the authority to impose a five hundred dollar (\$500.00) civil penalty upon any person violating the provisions of this Part. (1981, c. 952, s. 2; 1985, c. 487, ss. 3 to 5; c. 666, s. 38; 1985 (Reg. Sess., 1986), c. 1027, s. 51.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1027, s. 57, contains a severability clause.

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective July 16, 1986, added subsection (c).

ARTICLE 12.

Law-Enforcement Officers' Retirement System.

§§ 143-166 to 143-166.04: Repealed by Session Laws 1985, c. 479, s. 196(t), effective January 1, 1986.

Editor's Note. — The repeal line above has been set out to correct an error in the date in the 1985 Cumulative Supplement.

ARTICLE 12D.

Separation Allowances for Law-Enforcement Officers.

§ 143-166.41. Special separation allowance.

(a) Notwithstanding any other provision of law, every sworn law-enforcement officer as defined by G.S. 135-1(11b) or G.S. 143-166.30(a)(4) employed by a State department, agency, or institution who qualifies under this section shall receive, beginning on the last day of the month in which he retires on a basic service retirement under the provisions of G.S. 135-5(a) or G.S. 143-166(y), an annual separation allowance equal to eighty-five hundredths percent (0.85%) of the annual equivalent of the base rate of compensation most recently applicable to him for each year of creditable service. The allow-

ance shall be paid in 12 equal installments on the last day of each month. To qualify for the allowance the officer shall:

- (1) Have (i) completed 30 or more years of creditable service or, (ii) have attained 55 years of age and completed five or more years of creditable service; and
- (2) Not have attained 62 years of age; and
- (3) Have completed at least five years of continuous service as a law enforcement officer as herein defined immediately preceding a service retirement. Any break in the continuous service required by this subsection because of disability retirement or disability salary continuation benefits shall not adversely affect an officer's qualification to receive the allowance, provided the officer returns to service within 45 days after the disability benefits cease and is otherwise qualified to receive the allowance.

(b) As used in this section, "creditable service" means the service for which credit is allowed under the retirement system of which the officer is a member, provided that at least fifty percent (50%) of the service is as a law enforcement officer as herein defined.

(1983 (Reg. Sess., 1984), c. 1034, s. 104; 1985, c. 479, s. 143; 1985 (Reg. Sess., 1986), c. 1014, ss. 51, 52.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. —

Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 243, contains a severability clause.

Section 143-166, referred to in subsection (a) of this section, was repealed by Session Laws

1985, c. 479, s. 196(t), effective January 1, 1986. See now §§ 143-166.50, 143-166.60.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 1, 1986, added the second sentence of subdivision (a)(3) and substituted "fifty percent (50%)" for "seventy-five percent (75%)" in subsection (b).

§ 143-166.42. Special separation allowances for local officers.

On and after January 1, 1987, the provisions of G.S. 143-166.41 shall apply to all eligible law-enforcement officers as defined by G.S. 128-1(11b) or G.S. 143-166.50(a)(3) who are employed by local government employers, except as may be provided by this section. As to the applicability of the provisions of G.S. 143-166.41 to locally employed officers, the governing body for each unit of local government shall be responsible for making determinations of eligibility for their local officers retired under the provisions of G.S. 128-27(a) and for making payments to their eligible officers under the same terms and conditions, other than the source of payment, as apply to each State department, agency, or institution in payments to State officers according to the provisions of G.S. 143-166.41. (1985 (Reg. Sess., 1986), c. 1019, s. 2.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1019, s. 3 makes this section effective July 15, 1986.

ARTICLE 12E.

*Retirement Benefits for Local Governmental Law-Enforcement Officers.***§ 143-166.50. (Effective July 1, 1987) Retirement benefits for local governmental law-enforcement officers.**

(a) Definitions. — The following words and phrases as used in this Article, unless a different meaning is plainly required by the context, have the following meaning:

- (1) "Beneficiary" means any person in receipt of a retirement allowance or other benefit from a Retirement System.
- (2) "Employer" means a county, city, town or other political subdivision of the State.
- (3) "Law-enforcement officer" means a full-time paid employee of an employer, who is actively serving in a position with assigned primary duties and responsibilities for prevention and detection of crime or the general enforcement of the criminal laws of the State or serving civil processes, and who possesses the power of arrest by virtue of an oath administered under the authority of the State.
- (4) "Law-Enforcement Officers' Retirement System" means the system provided for under Article 12 of Chapter 143 of the General Statutes, as it existed prior to January 1, 1986.
- (5) "Local Governmental Employees' Retirement System" means the Local Governmental Employees' Retirement System of North Carolina provided for under Article 3 of Chapter 128 of the General Statutes.
- (6) "Member" means an officer included in the membership of a retirement system, including former officers no longer employed who also elected to leave their accumulated contributions on deposit with a Retirement System.
- (7) "Officer" means a "law-enforcement officer."
- (8) "State" means the State of North Carolina.

(b) Basic Retirement System. — On and after January 1, 1986, law-enforcement officers employed by an employer shall be members of the Local Government Employees' Retirement System, and beneficiaries who were last employed as officers by an employer, or who are surviving beneficiaries of officers last employed by an employer, are beneficiaries of the Local Governmental Employees' Retirement System and paid in benefit amounts then in effect. All members of the Law-Enforcement Officers' Retirement System last employed and paid by an employer are members of the Local Retirement System.

(c) Rights. — Notwithstanding any other provisions of law, any accrued or inchoate rights of a member of the Law-Enforcement Officers' Retirement System as of his transfer to the Local Governmental Employees' Retirement System on January 1, 1986, including the rights to a vested deferred retirement allowance and to commence retirement at certain ages with required years of service as a law-enforcement officer, may in no way be diminished; provided, however, in no event may a member commence retirement and continue membership service with the same Retirement System after January 1, 1986.

(d) Court Cost Receipts. — Of the sum derived from the cost of court provided for in G.S. 7A-304(a)(3), the amount designated for this Article, except for the amount designated for the provisions of G.S. 143-166.50(e), shall be

paid over to the pension accumulation fund of the Local Governmental Employees' Retirement System and shall offset, to the extent of these receipts, the employers' normal contribution rate required in G.S. 128-30(d)(2) as it pertains to law enforcement officers.

(e) Supplemental Retirement Income Plan for Local Governmental Law-Enforcement Officers. — As of January 1, 1986, all law-enforcement officers employed by a local government employer, are participating members of the Supplemental Retirement Income Plan as provided by Article 5 of Chapter 135 of the General Statutes. In addition to the contributions transferred from the Law-Enforcement Officers' Retirement System, participants may make voluntary contributions to the Supplemental Retirement Income Plan to be credited to the designated individual accounts of participants; provided, in no instance shall the total contributions by a participant exceed ten percent (10%) of a participant's compensation within any calendar year. From July 1, 1987, until July 1, 1988, local government employers of law enforcement officers shall contribute an amount equal to at least two percent (2%) of participating local officers' monthly compensation to the Supplemental Retirement Income Plan to be credited to the designated individual accounts of participating local officers; and on and after July 1, 1988, local government employers of law enforcement officers shall contribute an amount equal to five percent (5%) of participating local officers' monthly compensation to the Supplemental Retirement Income Plan to be credited to the designated individual accounts of participating local officers.

Additional contributions shall also be made to the individual accounts of all participants in the Plan, except for Sheriffs, on a per capita equal-share basis from the sum of one dollar and twenty-five cents (\$1.25) for each cost of court collected under G.S. 7A-304. (1985, c. 479, s. 196(t); c. 729, ss. 6, 7; 1985 (Reg. Sess., 1986), c. 1015, s. 2; c. 1019, s. 1.)

For this section as in effect until July 1, 1987, see the 1985 Cumulative Supplement.

Effect of Amendments. —

Session Laws 1985 (Reg. Sess., 1986), c. 1015, s. 2, effective January 1, 1987, reenacted the final sentence of subsection (e) without change.

Session Laws 1985 (Reg. Sess., 1986), c. 1019, s. 1, effective July 1, 1987, added the last sentence of the first paragraph of subsection (e).

ARTICLE 12H.

Sheriffs' Supplemental Pension Fund Act of 1985.

§ 143-166.83. Disbursements.

(a) Immediately following July 1, 1986, the Department of Justice shall divide an amount equal to forty-five percent (45%) of the assets of the Fund at the end of the preceding fiscal year into equal share and disburse the same as monthly pension payments to all eligible retired sheriffs as of July 1, 1986, payable in accordance with the method described in G.S. 143-166.85(a), except that such pension benefit shall be computed for a six-months basis beginning with the month of July, 1986.

(b) Immediately following January 1, 1987, and the first of January of each succeeding calendar year thereafter, the Department of Justice shall divide an amount equal to ninety percent (90%) of the assets of the Fund at the end of the preceding calendar year into equal shares and disburse the same as monthly payments in accordance with the provisions of this Article.

(c) The remaining ten percent (10%) of the Fund's assets as of December 31, 1986, and at the end of each calendar year thereafter, may be used by the Department of Justice in administering the provisions of this Article. For the six-month period commencing July 1, 1986, five percent (5%) of the Fund's assets at the end of the preceding fiscal year may be used for this purpose.

(d) All the Fund's disbursements shall be conducted in the same manner as disbursements are conducted for other special funds of the State.

(e) If, for any reason, the Fund shall be insufficient to pay any pension benefits or other charges, then all benefits or payments shall be reduced pro rata for as long as the deficiency in amount exists. No claim shall accrue with respect to any amount by which a pension payment shall have been reduced.

(f) As of January 1, 1987, and the beginning of each calendar year thereafter, any assets remaining after reserving an amount equal to the disbursements required under subsections (b) and (c) of this section shall be transferred to the Supplemental Retirement Income Plan for Local Governmental Law-Enforcement Officers, except elected Sheriffs, to be disbursed in accordance with the provisions of G.S. 143-166.50(e) as additional contributions made in the same manner as receipts from the cost of court collections. (1985, c. 729, s. 1; 1985 (Reg. Sess., 1986), c. 1030, ss. 1, 2.)

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 1, 1986, rewrote subsection (a), redesignated former subsections (b) and (c) as subsections (d) and (e), and added new subsections (b), (c), and (f).

§ 143-166.84. Eligibility.

(a) Each county sheriff who has retired from the Local Governmental Employees' Retirement System or an equivalent locally sponsored plan on and before June 30, 1986, and who has attained the age of 55 years and who has completed at least 10 years of eligible service as sheriff is entitled to receive a monthly pension under this Article, beginning July 1, 1986.

(b) Each eligible retired Sheriff as defined in subsection (a) of this section on January 1 of each calendar year shall be entitled to receive a monthly pension under this Article beginning with the month of January of the same calendar year. (1985, c. 729, s. 1; 1985 (Reg. Sess., 1986), c. 1030, ss. 3, 5(a).)

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 1, 1986, deleted "elected" preceding "county sheriff" and deleted "an elected" preceding "sheriff is entitled" in subsection (a), deleted a former second sentence of that subsection, which read

"Eligible service shall only mean service for which as sheriff has been elected and shall not include service as an appointed sheriff or any other appointed or elected service" and rewrote subsection (b).

§ 143-166.85. Benefits.

(a) An eligible retired sheriff shall be entitled to and receive an annual pension benefit, payable in equal monthly installments, equal to one share for each full year of eligible service as sheriff multiplied by his total number of years of eligible service. The amount of each share shall be determined by dividing the total number of years of eligible service for all eligible retired sheriffs on December 31 of each calendar year into the amount to be disbursed as monthly pension payments in accordance with the provisions of G.S., 143-166.83(b). In no event however shall a monthly pension under this Article exceed an amount, which when added to a retired allowance from the Local Governmental Employees' Retirement System or an equivalent locally spon-

sored plan, is greater than seventy-five percent (75%) of a sheriff's equivalent annual salary immediately preceding retirement computed on the latest monthly base rate, to a maximum amount of one thousand dollars (\$1,000). (1985, c. 729, s. 1; 1985 (Reg. Sess., 1986), c. 1030, ss. 4, 5(b).)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 1, 1986, deleted "an elected" preceding "sheriff" in the

first sentence of subsection (a) and in the second sentence of that subsection substituted "December 31 of each calendar year" for "June 30 of each fiscal year" and substituted "G.S. 143-166.83(b)" for "G.S. 143-168.3(a)."

ARTICLE 21.

Water and Air Resources.

Part 1. Organization and Powers Generally; Control of Pollution.

§ 143-211. Declaration of public policy.

CASE NOTES

General Assembly's omission of citizen suit provision only bears on citizen enforcement of state regulatory scheme rather than demonstrating any legislative intent to preempt private rights of action at common law. *Biddix v. Henredon Furn. Indus., Inc.*, 76 N.C. App. 30, 331 S.E.2d 717 (1985).

General Assembly Did Not Intend to Act with Respect to Common Law Rights. — Notwithstanding the General Assembly's omission of specific statutory language reserving common law rights, by enacting legislation to seek state administration of the Federal Water Pollution Control Act the General Assembly did not intend to act with respect to common law riparian rights for waste discharges in excess of a National Pollutant Dis-

charge Elimination System permit. *Biddix v. Henredon Furn. Indus., Inc.*, 76 N.C. App. 30, 331 S.E.2d 717 (1985).

Common Law Actions of Nuisance and Continuing Trespass Not Preempted. —

The Clean Water Act does not preempt the common law actions of nuisance and continuing trespass to land for the discharge of industrial waste in violation of an applicable National Pollutant Discharge Elimination System permit. *Biddix v. Henredon Furn. Indus., Inc.*, 76 N.C. App. 30, 331 S.E.2d 717 (1985).

Cited in *State ex rel. Tennessee Dep't of Health & Env't v. Environmental Mgt. Comm'n*, 78 N.C. App. 763, 338 S.E.2d 781 (1986); *In re Environmental Mgt. Comm'n*, — N.C. App. —, 341 S.E.2d 588 (1986).

§ 143-214.1. Water; water quality standards and classifications; duties of Environmental Management Commission.

CASE NOTES

Stated in *Biddix v. Henredon Furn. Indus., Inc.*, 76 N.C. App. 30, 331 S.E.2d 717 (1985).

Cited in *In re Environmental Mgt. Comm'n*, — N.C. App. —, 341 S.E.2d 588 (1986).

§ 143-215. Effluent standards and limitations.**CASE NOTES**

Stated in *Biddix v. Henredon Furn. Indus., Inc.*, 76 N.C. App. 30, 331 S.E.2d 717 (1985).

§ 143-215.1. Control of sources of water pollution; permits required.

(a) **Activities for Which Permits Required.** — No person shall do any of the following things or carry out any of the following activities until or unless such person shall have applied for and shall have received from the Environmental Management Commission a permit therefor and shall have complied with such conditions, if any, as are prescribed by such permit:

- (1) Make any outlets into the waters of the State;
- (2) Construct or operate any sewer system, treatment works, or disposal system within the State;
- (3) Alter, extend, or change the construction or method of operation of any sewer system, treatment works, or disposal system within the State;
- (4) Increase the quantity of waste discharged through any outlet or processed in any treatment works or disposal system to any extent which would result in any violation of the effluent standards or limitations established for any point source or which would adversely affect the condition of the receiving waters to the extent of violating any of the standards applicable to such water;
- (5) Change the nature of the waste discharged through any disposal system in any way which would exceed the effluent standards or limitations established for any point source or which would adversely affect the condition of the receiving waters in relation to any of the standards applicable to such waters;
- (6) Cause or permit any waste, directly or indirectly, to be discharged to or in any manner intermixed with the waters of the State in violation of the water quality standards applicable to the assigned classifications or in violation of any effluent standards or limitations established for any point source, unless allowed as a condition of any permit, special order or other appropriate instrument issued or entered into by the Environmental Management Commission under the provisions of this Article;
- (7) Cause or permit any wastes for which pretreatment is required by pretreatment standards to be discharged, directly or indirectly, from a pretreatment facility to any disposal system or to alter, extend or change the construction or method of operation or increase the quantity or change the nature of the waste discharged from or processed in such facility;
- (8) Enter into a contract for the construction and installation of any outlet, sewer system, treatment works, pretreatment facility or disposal system or for the alteration or extension of any such facilities;
- (9) Dispose of sludge resulting from the operation of a treatment works, including the removal of in-place sewage sludge from one location and its deposit at another location, consistent with the requirement of the Resource Conservation and Recovery Act and regulations promulgated pursuant thereto.

- (10) Cause or permit any pollutant to enter into a defined managed area of the State's waters for the maintenance or production of harvestable freshwater, estuarine, or marine plants or animals.

In the event that both effluent standards or limitations and classifications and water quality standards are applicable to any point source or sources and to the waters to which they discharge, the more stringent among the standards established by the Environmental Management Commission shall be applicable and controlling.

In connection with the above, no such permit shall be granted for the disposal of waste in waters classified as sources of public water supply where the Department of Human Resources, after review of the plans and specifications for the proposed disposal facility, determines and advises the Environmental Management Commission that such disposal is sufficiently close to the intake works or proposed intake works of a public water supply as to have an adverse effect on the public health.

In any case where the Environmental Management Commission denies a permit, it shall state in writing the reason for such denial and shall also state the Environmental Management Commission's estimate of the changes in the applicant's proposed activities or plans which will be required in order that the applicant may obtain a permit.

(c) Applications for Permits and Renewals for Facilities Discharging to the Surface Waters. —

- (1) All applications for permits and for renewal of existing permits for outlets and point sources and for treatment works and disposal systems discharging to the surface waters of the State shall be in writing, and the Environmental Management Commission may prescribe the form of such applications. All applications shall be filed with the Environmental Management Commission at least 180 days in advance of the date on which it is desired to commence the discharge of wastes or the date on which an existing permit expires, as the case may be. The Environmental Management Commission shall act on all applications for permits as rapidly as possible, but it shall have the power to request such information from the applicant and to conduct such inquiry or investigation as it may deem necessary prior to acting on any application. The Environmental Management Commission may adopt such rules as it deems necessary, to be published as a part of its rules of procedure, with respect to the consideration of any application for permit or renewal and to the granting or denial thereof. Such rules may require the submission of plans and specifications and such other information as the Environmental Management Commission deems necessary to the proper evaluation of the application.

- (2) a. The Department of Natural Resources and Community Development, pursuant to appropriate rules of procedure adopted by the Environmental Management Commission, shall refer each application for permit, or renewal of an existing permit, for outlets and point sources and treatment works and disposal systems discharging to the surface waters of the State to its staff for written evaluation and proposed determination with regard to issuance or denial of the permit. If the Environmental Management Commission concurs in the proposed determination, it shall cause notice of the application and of the proposed determination, along with any other data that the Environmental Management Commission may determine appropriate, to be given to the appropriate State, interstate and federal agencies, to interested persons, and to the public. The Environmental Management

Commission through its official rules, shall prescribe the form and content of the notice.

The notice required herein shall be given at least 45 days prior to any proposed final action granting or denying the permit. Public notice shall be given by publication of the notice one time in a newspaper having general circulation within the county.

- b. Permits for discharges to the surface waters of domestic wastes for single family dwellings of 1,000 gallons per day or less shall be issued without the above required notice. The Commission shall by regulation delegate the issuance of such permits to local health departments.
- (3) If any person desires a public meeting on any application for permit or renewal of an existing permit provided for in this subsection, he shall so request in writing to the Environmental Management Commission within 30 days following date of the notice of application. The Environmental Management Commission shall consider all such requests for meeting, and if the Environmental Management Commission determines that there is a significant public interest in holding such meeting, at least 30 days' notice of such meeting shall be given to all persons to whom notice of application was sent and to any other person requesting notice. At least 30 days prior to the date of meeting, the Environmental Management Commission shall also cause a copy of the notice thereof to be published at least one time in a newspaper having general circulation in such county. The Environmental Management Commission, through its official rules, shall prescribe the form and content of the notices.

The Environmental Management Commission shall adopt appropriate rules and regulations governing the procedures to be followed in such meetings. If the meeting is not conducted by the Environmental Management Commission, detailed minutes of the meeting shall be kept and shall be submitted, along with any other written comments, exhibits or documents presented at the meeting, to the Environmental Management Commission for its consideration prior to final action granting or denying the permit.

- (4) Not later than 60 days following notice of application or, if a public hearing is held, within 90 days following consideration of the matters and things presented at such hearing, the Environmental Management Commission shall grant or deny any application for issuance of a new permit or for renewal of an existing permit. All permits or renewals issued by the Environmental Management Commission and all decisions denying application for permit or renewal shall be in writing.
- (5) No permit issued pursuant to this subsection (c) shall be issued or renewed for a term exceeding five years.
- (d) Applications and Permits for Sewer Systems, Sewer System Extensions and Pretreatment Facilities, and for Wastewater Treatment Facilities Not Discharging to the Surface Waters of the State. — All applications for new permits and for renewals of existing permits for sewer systems, sewer system extensions and for disposal systems or treatment works which do not discharge to the surface waters of the State, and all permits or renewals and decisions denying any application for permit or renewal shall be in writing. The Environmental Management Commission shall act on all applications for permits as rapidly as possible, but it shall have power to request such information from an applicant and to conduct such inquiry or investigation as it may deem necessary prior to acting on any application for a permit. Failure of the Environmental Management Commission to take action on an application

for a permit or renewal within 90 days after all data, plans, specifications and other required information have been furnished by the applicant, shall be treated as approval of such application. The Environmental Management Commission shall adopt such rules and regulations as it deems necessary, establishing the form of and procedures for processing applications, permits and renewals. Such regulations may require the submission of plans and specifications and other information as the Environmental Management Commission deems necessary to the proper evaluation of an application. Permits and renewals issued in approving such facilities pursuant to this subsection (d) shall be effective until the date specified therein or until rescinded unless modified or revoked by the Environmental Management Commission. Local governmental units to whom pretreatment program authority has been delegated shall establish, maintain, and provide to the public, upon written request, a list of pretreatment applications received.

(1951, c. 606; 1955, c. 1131, s. 1; 1959, c. 779, s. 8; 1967, c. 892, s. 1; 1971, c. 1167, s. 6; 1973, c. 476, s. 128; c. 821, s. 5; c. 1262, s. 23; 1975, c. 19, s. 51; c. 583, ss. 2-4; c. 655, ss. 1, 2; 1977, c. 771, s. 4; 1979, c. 633, s. 5; 1985 (Reg. Sess., 1986), c. 1023, ss. 1-5.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. —

Session Laws 1985 (Reg. Sess., 1986), c. 1023, s. 6, provides: "The provisions of this bill notwithstanding, any permit for pretreatment facilities previously issued in substantial compliance with the provisions of this bill and of G.S. 143-215.1 as amended thereby, is valid and in full force and effect if such permit has neither expired nor otherwise has been revoked."

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective July 16, 1986, rewrote the third unnumbered paragraph of subsection (a), beginning "In connection with the above," rewrote the subsection catchline for subsection (c), which read "Applications for Permits and Renewals for Pretreatment Facilities and for Other Facilities Discharging to the Surface Waters," deleted "pretreatment facilities" following "permits for" in the first sentence of subdivision (c)(1), deleted "pretreatment facilities" following "existing permit, for" in the first sentence of subdivision (c)(2)a, rewrote the catchline for subsection (d), and added the last sentence of subsection (d).

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CASE NOTES

Right to Appeal from Consent Special Order. — "Procedural injury," whereby petitioner State of Tennessee's right to be heard on certain aspects of a National Pollutant Discharge Elimination System (NPDES) permit was substantially impaired, was sufficient under § 150B-43 to qualify petitioner as an "aggrieved person" for purposes of appeal of issuance of Commission's consent special order with corporation. In addition, where the consent special order contained provisions substantially identical to provisions which petitioner opposed in the proposed NPDES permit, which affected the property rights of the petitioner in the Pigeon River, these allegations also established petitioner's "aggrieved person" status. *State ex rel. Tennessee Dep't of Health & Env't v. Environmental Mgt. Comm'n*, 78 N.C. App. 763, 338 S.E.2d 781 (1986).

stantially identical to provisions which petitioner opposed in the proposed NPDES permit, which affected the property rights of the petitioner in the Pigeon River, these allegations also established petitioner's "aggrieved person" status. *State ex rel. Tennessee Dep't of Health & Env't v. Environmental Mgt. Comm'n*, 78 N.C. App. 763, 338 S.E.2d 781 (1986).

Stated in *Biddix v. Henredon Furn. Indus., Inc.*, 76 N.C. App. 30, 331 S.E.2d 717 (1985).

§ 143-215.2. Special orders.

CASE NOTES

Effect of Consent Special Order. — A consent special order has the same force and effect as a special order issued pursuant to a hearing; thus a consent special order is a final decision by the Commission. State ex rel. Tennessee Dep't of Health & Env't v. Environmental Mgt. Comm'n, 78 N.C. App. 763, 338 S.E.2d 781 (1986).

Right to Appeal from Consent Special Order. — "Procedural injury," whereby petitioner State of Tennessee's right to be heard on certain aspects of a National Pollutant Discharge Elimination System (NPDES) permit was substantially impaired, was sufficient under § 150B-43 to qualify petitioner as an "aggrieved person" for purposes of appeal of issuance of Commission's consent special order with corporation. In addition, where the consent special order contained provisions sub-

stantially identical to provisions which petitioner opposed in the proposed NPDES permit, which affected the property rights of the petitioner in the Pigeon River, these allegations also established petitioner's "aggrieved person" status. State ex rel. Tennessee Dep't of Health & Env't v. Environmental Mgt. Comm'n, 78 N.C. App. 763, 338 S.E.2d 781 (1986).

Case challenging a consent special order entered into by Commission and a corporation, which order was alleged to intrude upon the NPDES permit process (which process requires a hearing), was "contested" for the purposes of § 150B-43. State ex rel. Tennessee Dep't of Health & Env't v. Environmental Mgt. Comm'n, 78 N.C. App. 763, 338 S.E.2d 781 (1986).

§ 143-215.5. Judicial review.

CASE NOTES

Finality of Consent Special Order. — A consent special order has the same force and effect as a special order issued pursuant to a hearing; thus a consent special order is a final decision by the Commission. State ex rel. Tennessee Dep't of Health & Env't v. Environmental Mgt. Comm'n, 78 N.C. App. 763, 338 S.E.2d 781 (1986).

Right to Appeal from Consent Special Order. — "Procedural injury," whereby petitioner State of Tennessee's right to be heard on certain aspects of a National Pollutant Discharge Elimination System (NPDES) permit was substantially impaired, was sufficient un-

der § 150B-43 to qualify petitioner as an "aggrieved person" for purposes of appeal of issuance of Commission's consent special order with corporation. In addition, where the consent special order contained provisions substantially identical to provisions which petitioner opposed in the proposed NPDES permit, which affected the property rights of the petitioner in the Pigeon River, these allegations also established petitioner's "aggrieved person" status. State ex rel. Tennessee Dep't of Health & Env't v. Environmental Mgt. Comm'n, 78 N.C. App. 763, 338 S.E.2d 781 (1986).

§ 143-215.6. Enforcement procedures.

CASE NOTES

Action for Damages for Willful or Negligent Discharge. — Willful or negligent discharges in violation of a National Pollutant Discharge Elimination System permit afford a basis for an action in damages to a riparian

owner. Biddix v. Henredon Furn. Indus., Inc., 76 N.C. App. 30, 331 S.E.2d 717 (1985).

Stated in Biddix v. Henredon Furn. Indus., Inc., 76 N.C. App. 30, 331 S.E.2d 717 (1985).

Part 2. Regulation of Use of Water Resources.

§ 143-215.13. Declaration of capacity use areas.

CASE NOTES

Applied in *Biddix v. Henredon Furn. Indus., Inc.*, 76 N.C. App. 30, 331 S.E.2d 717 (1985).

§ 143-215.22. Law of riparian rights not changed.

CASE NOTES

Applied in *Biddix v. Henredon Furn. Indus., Inc.*, 76 N.C. App. 30, 331 S.E.2d 717 (1985).

Part 4. Federal Water Resources Development Projects.

§ 143-215.40. Resolutions and ordinances assuring local cooperation.

(a) The boards of commissioners of the several counties, in behalf of their respective counties, the governing bodies of the several municipalities, in behalf of their respective municipalities, the governing bodies of any other local government units, in behalf of their units, and the North Carolina Environmental Management Commission, in behalf of the State of North Carolina, subject to the approval of the Governor, are hereby authorized to adopt such resolutions or ordinances as may be required giving assurances to any appropriate agency of the United States government for the fulfillment of the required items of local cooperation as expressed in acts of Congress or congressional documents, as conditions precedent to the accomplishment of river and harbor, flood control or other such civil works projects, when it shall appear, and is determined by such board or governing body that any such project will accrue to the general or special benefit of such county or municipality or to a region of the State. In each case where the subject of such local cooperation requirements comes before a board of county commissioners or the governing body of any municipality or other local unit a copy of its final action, whether it be favorable or unfavorable, shall be sent to the Secretary of Natural Resources and Community Development for the information of the Governor. Prior to taking any action under this section, the Governor may consult with the Advisory Budget Commission.

(1969, cc. 724, 968; 1973, c. 1262, s. 23; 1977, c. 771, s. 4; 1983, c. 717, s. 69; 1985 (Reg. Sess., 1986), c. 955, ss. 91, 92.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. —

Section 1 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "This act may be cited as the Separation of Powers Act of 1986."

Section 127 of Session Laws 1985 (Reg. Sess.,

1986), c. 955 provides: "If any part of this act shall be declared invalid by any court, this shall not affect any other part of this act."

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 1, 1986, deleted "after the Governor consults with the Advisory Budget Commission" following "approval of the Governor" in the first sentence of

subsection (a) and added the last sentence of subsection (a).

Part 8. Grants for Water Resources Development Projects.

§ 143-215.73. Recommendation and disbursal of grants.

After review of grant applications, project funds shall be disbursed and monitored by the Department of Natural Resources and Community Development. After review, but before transfer of funds from the Department's reserve fund into accounts for specific projects, the Secretary may forward the applications to the Advisory Budget Commission for its review of the recommendations. (1979, c. 1046, s. 1; 1983, c. 717, s. 70; 1985 (Reg. Sess., 1986), c. 955, s. 93.)

Editor's Note. —

Section 1 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "This act may be cited as the Separation of Powers Act of 1986."

Section 127 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "If any part of this act

shall be declared invalid by any court, this shall not affect any other part of this act."

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective July 1, 1986, rewrote this section.

Part 9. Nonpoint Source Pollution Control Program.

§ 143-215.74. Agriculture cost share program.

(a) There is created the Agriculture Cost Share Program for Nonpoint Source Pollution Control. The program shall be created, implemented, and supervised by the Soil and Water Conservation Commission.

(b) The program shall be subject to the following requirements and limitations:

- (1) The purpose of the program shall be to reduce the input of agricultural nonpoint source pollution into the water courses of the State.
- (2) The program shall initially include the present 16 nutrient sensitive watershed counties and 17 additional counties.
- (3) Priority designations for inclusions in the program shall be under the authority of the Soil and Water Conservation Commission and the Environmental Management Commission. The Soil and Water Conservation Commission shall retain the authority to allocate the cost share funds.
- (4) Areas shall be included in the program as the funds are appropriated and the technical assistance becomes available from the local Soil and Water Conservation District.
- (5) Funding may be provided to assist practices including conservation tillage, diversions, filter strips, field borders, critical area plantings, sediment control structures, sod-based rotations, grassed waterways, strip-cropping, terraces, cropland conversion to permanent vegetation, grade control structures, water control structures, and animal waste managements systems and application.
- (6) State funding shall be limited to seventy-five percent (75%) of the average cost for each practice with the assisted farmer providing twenty-five percent (25%) of the cost (which may include in-kind support) with a maximum of fifteen thousand dollars (\$15,000) per year to each applicant.

(c) The program shall be reviewed, prior to implementation, by the Committee created by G.S. 143-215.74B. The Technical Review Committee shall meet quarterly to review the progress of this program. (1985 (Reg. Sess., 1986), c. 1014, s. 149(a).)

Editor's Note. — Section 244 of Session Laws 1985 (Reg. Sess., 1986), c. 1014, makes this Part effective July 1, 1986. Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 243, contains a severability clause.

§ 143-215.74A. Program participation.

Participation in the program shall be voluntary.

All participants in the program shall be required to match State funds at the same rate, and assistance from the Agriculture Extension Service at North Carolina State University shall also be used. (1985 (Reg. Sess., 1986), c. 1014, s. 149(a).)

§ 143-215.74B. Committee established.

Detailed plans for implementing the program shall be reviewed and suggested changes and reasons therefor shall be given by a committee consisting of the Master of the North Carolina State Grange, President of the North Carolina Farm Bureau Federation, the North Carolina Commissioner of Agriculture, the Dean of the School of Agriculture and Life Sciences at North Carolina State University, the Chairman of the State Soil and Water Conservation Commission, and the President of the North Carolina Association of Soil and Water Conservation Districts. The committee shall review the program prior to expenditure of any funds for the program. Certification documenting the committee's review of the program shall be made in writing to the Speaker of the House of Representatives, the President of the Senate, and Chairmen of the Appropriations Committees of the Senate and the House of Representatives. (1985 (Reg. Sess., 1986), c. 1014, s. 149(a).)

ARTICLE 21A.

Oil Pollution and Hazardous Substances Control.

Part 2. Oil Discharge Controls.

§ 143-215.83. Discharges.

CASE NOTES

Applied in *Biddix v. Henredon Furn. Indus., Inc.*, 76 N.C. App. 30, 331 S.E.2d 717 (1985).

§ 143-215.93. Liability for damage caused.

CASE NOTES

Applied in *Biddix v. Henredon Furn. Indus., Inc.*, 76 N.C. App. 30, 331 S.E.2d 717 (1985).

ARTICLE 31.

Tort Claims against State Departments and Agencies.

§ 143-291. Industrial Commission constituted a court to hear and determine claims; damages.

CASE NOTES

I. IN GENERAL.

The effect and purpose of the 1977 amendment to this section was to extend the State's liability to include the negligent omissions and failures to act of its employees. *Phillips v. North Carolina Dep't of Transp.*, — N.C. App. —, 341 S.E.2d 339 (1986).

State's tort liability was greatly enlarged by the 1977 amendment to this section and the State is no longer limited to responsibility for the negligent acts of its employees. *Phillips v. North Carolina Dep't of Transp.*, — N.C. App. —, 341 S.E.2d 339 (1986).

Failure to Challenge Public Purpose of Actions. — In consolidated action brought by property owners as a result of the disposal of waste materials from a highway project, where no party challenged the trial court's conclusion

that the acts of the defendants in disposing of the waste materials from the project were not for a public purpose, neither the plaintiffs nor the other defendants could maintain an action against the Department of Transportation arising from those acts. *Clark v. Asheville Contracting Co.*, — N.C. —, 342 S.E.2d 832 (1986).

Cited in *Karp v. UNC*, 78 N.C. App. 214, 336 S.E.2d 640 (1985).

II. PROCEDURE.

Finding of Fact Supported, etc. —

Where the Industrial Commission's finding of fact is supported by the evidence, it is binding upon the Court of Appeals, even though a finding to the contrary could have been made. *Hulcher Bros. & Co. v. North Carolina Dep't of Transp.*, 76 N.C. App. 342, 332 S.E.2d 744 (1985).

§ 143-297. Affidavit of claimant; docketing; venue; notice of hearing; answer, demurrer or other pleading to affidavit.

Cited in *Phillips v. North Carolina Dep't of Transp.*, — N.C. App. —, 341 S.E.2d 339 (1986).

§ 143-300.1. Claims against county and city boards of education for accidents involving school buses or school transportation service vehicles.

Legal Periodicals. — For comment, "Municipal Tort Liability for Negligent Failure to

Provide Adequate Police Protection," see 20 Wake Forest L. Rev. 697 (1984).

ARTICLE 33C.

*Meetings of Public Bodies.***§ 143-318.10. All official meetings of public bodies open to the public.**

(b) As used in this Article, "public body" means any authority, board, commission, committee, council, or other body of the State, or of one or more counties, cities, school administrative units, or other political subdivisions or public corporations in the State that is composed of two or more members; and

- (1) Exercises or is authorized to exercise a legislative, policy-making, quasi-judicial, administrative, or advisory function; and
- (2) Is established by (i) the State Constitution, (ii) an act or resolution of the General Assembly, (iii) a resolution or order of a State agency, pursuant to a statutory procedure under which the agency establishes a political subdivision or public corporation, (iv) an ordinance, resolution, or other action of the governing board of one or more counties, cities, school administrative units, or other political subdivisions or public corporations, or (v) an executive order of the Governor or comparable formal action of the head of a principal State office or department, as defined in G.S. 143A-11 and G.S. 143B-6, or of a division thereof.

In addition, "public body" means (1) the governing board of a "public hospital" as defined in G.S. 159-39 and (2) each committee of a public body, except a committee of the governing board of a public hospital if the committee is not a policy-making body. In addition, for the purposes of this Article "public body" means any nonprofit corporation to which a hospital facility has been sold or conveyed pursuant to G.S. 131E-8, any subsidiary of that nonprofit corporation, and any nonprofit corporation owning the corporation to which the hospital facility has been sold or conveyed.

(1979, c. 655, s. 1; 1985 (Reg. Sess., 1986), c. 932, s. 4.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective October 1, 1986, added the last sentence of subsection (b).

§ 143-318.11. Executive sessions.

(a) **Permitted Purposes.** — A public body may hold an executive session and exclude the public:

- (1) To consider the selection of a site or the acquisition by any means or lease as lessee of interests in real property. At the conclusion of all negotiations with regard to the acquisition or lease of real property, if final authorization to acquire or lease is to be given, it shall be given at an open meeting.
- (2) To consider and authorize the acquisition by gift or bequest of personal property offered to the public body or the government of which it is a part.
- (3) To consider and authorize the acquisition by any means of paintings, sculptures, objects of virtu, artifacts, manuscripts, books and papers, and similar articles and objects that are or will be part of the collections of a museum, library, or archive.

- (4) To consider the validity, settlement, or other disposition of a claim against or on behalf of the public body or an officer or employee of the public body or in which the public body finds that it has a substantial interest; or the commencement, prosecution, defense, settlement, or litigation of a potential or pending judicial action or administrative proceeding in which the public body or an officer or employee of the public body is a party or in which the public body finds that it has a substantial interest. During such an executive session, the public body may give instructions to an attorney or other agent concerning the handling or settlement of a claim, judicial action, or administrative proceeding. If a public body has considered a settlement in executive session, the terms of that settlement shall be reported to the public body and entered into its minutes within a reasonable time after the settlement is concluded.
- (5) To consult with an attorney, to the extent that confidentiality is required in order for the attorney to exercise his ethical duties as a lawyer.
- (6) To discuss matters relating to the location or expansion of industries or other businesses in the area served by the public body.
- (7) To consider matters dealing with specific patients (including but not limited to all aspects of admission, treatment, and discharge; all medical records, reports, and summaries; and all charges, accounts, and credit information pertaining to such a patient).
- (8) To consider the qualifications, competence, performance, character, fitness, conditions of appointment, or conditions of initial employment of a public officer or employee or prospective public officer or employee; or to hear or investigate a complaint, charge or grievance by or against a public officer or employee. A public body may consider the appointment or removal of a member of another body in executive session but may not consider or fill a vacancy among its own membership except in an open meeting.

Final action making an appointment or discharge or removal by a public body having final authority for the appointment or discharge or removal shall be taken in an open meeting. If a public body considers an appointment to another body, except a committee composed of members of the public body, in executive session, it shall, before making that appointment, present at an open meeting a written list of the persons then being considered for the appointment, and that list shall on the same day be made available for public inspection in the office of the clerk or secretary to the public body. The public body may not make the appointment before the seventh day after the day on which the list was presented.

- (9) To consider the employment, performance, or discharge of an independent contractor. Any action employing or authorizing the employment or discharging or directing the discharge of an independent contractor shall be taken at an open meeting.
- (10) To hear, consider, and decide (i) disciplinary cases involving students or pupils and (ii) questions of reassignment of pupils under G.S. 115-178.
- (11) To identify candidates for, assess the candidates' worthiness for, and choose the recipients of honors, awards, honorary degrees, or citations bestowed by the public body.
- (12) To consider information, when State or federal law (i) directs that the information be kept confidential or (ii) makes the confidentiality of the information a condition of State or federal aid.

- (13) To consider and adopt contingency plans for dealing with, and consider and take action relating to, strikes, slowdowns, and other collective employment interruptions.
 - (14) To consider and take action necessary to deal with a riot or civil disorder or with conditions that indicate that a riot or civil disorder is imminent.
 - (15) To plan, conduct, or hear reports concerning investigations of alleged criminal misconduct.
 - (16) To consider and decide matters concerning specific inmates of the correction system or security problems of the correction system.
 - (17) To hear, consider, and decide matters involving admission, discipline, or termination of members of the medical staff of a public hospital. Final action on an admission or termination shall be reported at an open meeting.
 - (18) To consider and give instructions relating to the setting or negotiation of airport landing fees or the negotiation of contracts, including leases, concerning the use of airport facilities. Final action approving landing fees or such a contract shall be taken in an open meeting.
 - (19) To plan investigations and receive investigative reports requested by a board of elections concerning election frauds, irregularities, election contests, or violations of the election laws. Following a public hearing during which it is alleged or apparent that any election official may have committed an act of misconduct, a board of elections may meet in executive session to deliberate, adjudicate, and reach its decision on whether further action shall be ordered or whether no further action shall be ordered against any election official. Each member's vote on the decision shall be a matter of public record.
 - (20) To consider and authorize acquisitions, mergers, joint ventures, or other competitive business activities by or on behalf of: (i) a hospital facility and a nonprofit corporation to which it has been sold or conveyed pursuant to G.S. 131E-8; (ii) any nonprofit corporation owning the corporation to which the hospital facility has been sold or conveyed; or (iii) any subsidiary of either nonprofit corporation.
- (1979, c. 655, s. 1; 1981, c. 831; 1985 (Reg. Sess., 1986), c. 932, s. 5.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Section 115-178, referred to in this section, was repealed by Session Laws 1981, c. 423. See now § 115C-369.

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective October 1, 1986, added subdivision (a)(20).

§ 143-318.16. Injunctive relief against violations of Article.

(c) Repealed by Session Laws 1985 (Reg. Sess., 1986), c. 932, s. 3, effective October 1, 1986. (1979, c. 655, s. 1; 1985 (Reg. Sess., 1986), c. 932, s. 3.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Cross References. — As to the award of attorney's fees to the prevailing party, see now § 143-318.16B.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective October 1, 1986, deleted subsection (c), relating to the taxing of attorney's fees against the defendant or plaintiff in certain circumstances.

§ 143-318.16A. Additional remedies for violations of Article.

(a) Any person may institute a suit in the superior court requesting the entry of a judgment declaring that any action of a public body was taken, considered, discussed, or deliberated in violation of this Article. Upon such a finding, the court may declare any such action null and void. Any person may seek such a declaratory judgment, and the plaintiff need not allege or prove special damage different from that suffered by the public at large. The public body whose action the suit seeks to set aside shall be made a party. The court may order other persons be made parties if they have or claim any right, title, or interest that would be directly affected by a declaratory judgment voiding the action that the suit seeks to set aside.

(b) A suit seeking declaratory relief under this section must be commenced within 45 days following the initial disclosure of the action that the suit seeks to have declared null and void; provided, however, that any suit for declaratory judgment brought pursuant to this section that seeks to set aside a bond order or bond referendum shall be commenced within the limitation periods prescribed by G.S. 159-59 and G.S. 159-62. If the challenged action is recorded in the minutes of the public body, its initial disclosure shall be deemed to have occurred on the date the minutes are first available for public inspection. If the challenged action is not recorded in the minutes of the public body, the date of its initial disclosure shall be determined by the court based on a finding as to when the plaintiff knew or should have known that the challenged action had been taken.

(c) In making the determination whether to declare the challenged action null and void, the court shall consider the following and any other relevant factors:

- (1) The extent to which the violation affected the substance of the challenged action;
- (2) The extent to which the violation thwarted or impaired access to meetings or proceedings that the public had a right to attend;
- (3) The extent to which the violation prevented or impaired public knowledge or understanding of the people's business;
- (4) Whether the violation was an isolated occurrence, or was a part of a continuing pattern of violations of this Article by the public body;
- (5) The extent to which persons relied upon the validity of the challenged action, and the effect on such persons of declaring the challenged action void;
- (6) Whether the violation was committed in bad faith for the purpose of evading or subverting the public policy embodied in this Article.

(d) A declaratory judgment pursuant to this section may be entered as an alternative to, or in combination with, an injunction entered pursuant to G.S. 143-318.16. (1985 (Reg. Sess., 1986), c. 932, s. 1.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 932, s. 6 makes this section effective October 1, 1986.

§ 143-318.16B. Attorney's fees awarded to prevailing party.

In any action brought pursuant to G.S. 143-318.16 or G.S. 143-318.16A, the court shall make written findings specifying the prevailing party or parties, and shall award the prevailing party or parties a reasonable attorney's fee, to be taxed against the losing party or parties as part of the costs. (1985 (Reg. Sess., 1986), c. 932, s. 2.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 932, s. 6 makes this section effective October 1, 1986.

ARTICLE 36.*Department of Administration.***§ 143-341. Powers and duties of Department.**

The Department of Administration has the following powers and duties:

(8) General Services:

- a. To locate, maintain and care for public buildings and grounds; to establish, locate, maintain, and care for walks, driveways, trees, shrubs, flowers, fountains, monuments, memorials, markers, and tablets on public grounds; and to beautify the public grounds.
- b. To provide necessary and adequate cleaning and janitorial service, elevator operation service, and other operation or maintenance services for the public buildings and grounds.
- c. To provide necessary night watchmen for the public buildings and grounds.
- d. To make prompt repair of all public buildings and the equipment, furniture, and fixtures thereof; and to establish and operate shops for that purpose.
- e. To keep in repair, out of funds appropriated for that purpose, the furniture of the halls of the Senate and House of Representatives and the rooms of the Capitol used by the officers, clerks, and other employees of the General Assembly.
- f. Struck out by Session Laws 1959, c. 68, s. 3.
- g. To establish and operate a central mailing system for all State agencies, and in connection therewith and in the discretion of the Secretary, to make application for and procure a post-office substation for that purpose, and to do all things necessary in connection with the maintenance of the central mailing system. The Secretary may allocate and charge against the respective departments and agencies their proportionate parts of the cost of the maintenance of the central mailing system.
- h. To provide necessary and adequate messenger service for the State agencies served by the Department. However, this may not be construed as preventing the employment and control of messengers by any State agency when those messengers are compensated out of the funds of the employing agency.
- i. To establish and operate a central motor pool and such subsidiary related facilities as the Secretary may deem necessary, and to that end:
 1. To establish and operate central facilities for the maintenance, repair, and storage of state-owned passenger motor

vehicles for the use of State agencies; to utilize any available State facilities for that purpose; and to establish such subsidiary facilities as the Secretary may deem necessary.

2. To acquire passenger motor vehicles by transfer from other State agencies and by purchase. All motor vehicles transferred to or purchased by the Department shall become part of a central motor pool.
3. To require on a schedule determined by the Department all State agencies to transfer ownership, custody or control of any or all passenger motor vehicles within the ownership, custody or control of that agency to the Department, except those motor vehicles under the ownership, custody or control of the Highway Patrol or the State Bureau of Investigation which are used primarily for law-enforcement purposes.
4. To maintain, store, repair, dispose of, and replace state-owned motor vehicles under the control of the Department.
5. Upon proper requisition, proper showing of need for use on State business only, and proper showing of proof that all persons who will be driving the motor vehicle have valid driver's licenses, to assign suitable transportation, either on a temporary or permanent basis, to any State employee or agency. An agency assigned a motor vehicle may not allow a person to operate that motor vehicle unless that person displays to the agency and allows the agency to copy that person's valid drivers' license. The agency shall send a copy of the driver's license of each person operating the motor vehicle to the Department of Administration, Division of Motor Fleet Management. Notwithstanding G.S. 20-30(6), persons or agencies requesting assignment of motor vehicles may photostat or otherwise reproduce drivers' licenses for purposes of complying with this subpart.

As used in this subpart, "suitable transportation" means the standard vehicle in the State motor fleet, unless special towing provisions are required by the employee or agency. The Department may not assign any employee or agency a motor vehicle that is not suitable.

6. To allocate and charge against each State agency to which transportation is furnished, on a basis of mileage or of rental, its proportionate part of the cost of maintenance and operation of the motor pool.

The amount allocated and charged by the Department of Administration to State agencies to which transportation is furnished shall be at least twenty cents (20¢) per mile for each motor vehicle.

7. To adopt, with the approval of the Governor, reasonable rules and regulations for the efficient and economical operation, maintenance, repair, and replacement of all state-owned motor vehicles under the control of the Department, and to enforce those rules and regulations; and to adopt, with the approval of the Governor, reasonable rules and regulations regulating the use of private motor vehicles upon State business by the officers and employees of State agencies, and to enforce those rules and regulations. The Department, with the approval of the Governor, may delegate to the respective heads of the agencies to which motor vehicles are permanently assigned by the Department the duty of enforcing the

rules and regulations adopted by the Department pursuant to this paragraph. Any person who violates a rule or regulation adopted by the Department and approved by the Governor is guilty of a misdemeanor, and upon conviction is punishable in the discretion of the court.

- 7a. To adopt with the approval of the Governor and to enforce rules, pursuant to Chapter 150A of the General Statutes, and to coordinate State policy regarding (i) the permanent assignment of state-owned passenger motor vehicles and (ii) the use of and reimbursement for those vehicles for commuting. For the purpose of this subdivision 7a, "state-owned passenger motor vehicle" includes any state-owned passenger motor vehicle, whether or not owned, maintained or controlled by the Department of Administration, and regardless of the source of the funds used to purchase it. Notwithstanding the provisions of G.S. 20-190 or any other provisions of law, all state-owned passenger motor vehicles are subject to the provisions of this subdivision 7a; no permanent assignment shall be made and no one shall be exempt from payment of reimbursement for commuting or from the other provisions of this subdivision 7a except as provided by this subdivision 7a.

A State-owned passenger motor vehicle shall not be permanently assigned to an individual who is likely to drive it on official business at a rate of less than 12,600 miles per year unless (i) the individual's duties are routinely related to public safety or (ii) the individual's duties are likely to expose him routinely to life-threatening situations. A State-owned passenger motor vehicle shall also not be permanently assigned to an agency that is likely to drive it on official business at a rate of less than 12,600 miles per year unless the agency can justify to the Division of Motor Fleet Management the need for permanent assignment because of the unique use of the vehicle. The Department of Administration shall verify, on a quarterly basis, that each motor vehicle has been driven at the minimum allowable rate. If it has not and if the department by whom the individual to which the car is assigned is employed or the agency to which the car is assigned cannot justify the lower mileage for the quarter in view of the minimum annual rate, the permanent assignment shall be revoked immediately.

Every individual who uses a State-owned passenger motor vehicle, pickup truck, or van to drive between his official work station and his home, shall reimburse the State for these trips at a rate computed by the Department. This rate shall approximate the benefit derived from the use of the vehicle as prescribed by federal law. Reimbursement shall be made by payroll deduction. Funds derived from reimbursement on vehicles owned by the Motor Fleet Management Division shall be deposited to the credit of the Division; funds derived from reimbursements on vehicles initially purchased with appropriations from the Highway Fund and not owned by the Division shall be deposited in a Special Depository Account in the Department of Transportation, which shall revert to the Highway Fund; funds derived from reimbursement on all other vehicles shall be deposited in a

Special Depository Account in the Department of Administration which shall revert to the General Fund. Commuting, for purposes of this paragraph, does not include those individuals whose office is in their home, as determined by the Department of Administration, Division of Motor Fleet Management. Also, this paragraph does not apply to the following vehicles: (i) clearly marked police and fire vehicles, (ii) delivery trucks with seating only for the driver, (iii) flatbed trucks, (iv) cargo carriers with over a 14,000 pound capacity, (v) school and passenger buses with over 20 person capacities, (vi) ambulances, (vii) hearses, (viii) bucket trucks, (ix) cranes and derricks, (x) forklifts, (xi) cement mixers, (xii) dump trucks, (xiii) garbage trucks, (xiv) specialized utility repair trucks (except vans and pickup trucks), (xv) tractors, (xvi) unmarked law-enforcement vehicles that are used in undercover work and are operated by full-time, fully sworn law-enforcement officers whose primary duties include carrying a firearm, executing search warrants, and making arrests, and (xvii) any other vehicle exempted under Section 274(d) of the Internal Revenue Code of 1954, and Federal Internal Revenue Services regulations based thereon. The Department of Administration, Division of Motor Fleet Management, shall report quarterly to the Joint Legislative Commission on Governmental Operations and to the Fiscal Research Division of the Legislative Services Office on individuals who use State-owned passenger motor vehicles, pickup trucks, or vans between their official work stations and their homes, who are not required to reimburse the State for these trips.

The Department of Administration shall revoke the assignment or require the Department owning the vehicle to revoke the assignment of a State-owned passenger motor vehicle, pickup truck or van to any individual who:

- I. Uses the vehicle for other than official business except in accordance with the commuting rules;
- II. Fails to supply required reports to the Department of Administration, or supplies incomplete reports, or supplies reports in a form unacceptable to the Department of Administration and does not cure the deficiency within 30 days of receiving a request to do so;
- III. Knowingly and willfully supplies false information to the Department of Administration on applications for permanent assignments, commuting reimbursement forms, or other required reports or forms;
- IV. Does not personally sign all reports on forms submitted for vehicles permanently assigned to him and does not cure the deficiency within 30 days of receiving a request to do so;
- V. Abuses the vehicle; or
- VI. Violates other rule or policy promulgated by the Department of Administration not in conflict with this act.

A new requisition shall not be honored until the Secretary of the Department of Administration is assured that the violation for which a vehicle was previously revoked will not recur.

The Department of Administration, with the approval of the Governor, may delegate, or conditionally delegate, to the respective heads of agencies which own passenger motor vehicles or to which passenger motor vehicles are permanently assigned by the Department, the duty of enforcing all or part of the rules adopted by the Department of Administration pursuant to this subdivision 7a. The Department of Administration, with the approval of the Governor, may revoke this delegation of authority.

Prior to adopting rules under this paragraph, the Secretary of Administration may consult with the Advisory Budget Commission.

8. To adopt and administer rules and regulations for the control of all state-owned passenger motor vehicles and to require State agencies to keep all records and make all reports regarding motor vehicle use as the Secretary deems necessary.
9. To acquire motor vehicle liability insurance on all State-owned motor vehicles under the control of the Department.
10. To contract with the appropriate State prison authorities for the furnishing, upon such conditions as may be agreed upon from time to time between such State prison authorities and the Secretary, of prison labor for use in connection with the operation of a central motor pool and related activities.
11. To report annually to the General Assembly on any rules adopted, amended or repealed under paragraphs 3, 7, or 7a of this subdivision.
- j. To establish and operate a central telephone system, central mimeographing and duplicating services, central stenographical and clerical pools, and other central services, if the Governor after appropriate investigation deems it advisable from the standpoint of efficiency and economy in operation to establish any or all such services. The Secretary may allocate and charge against the respective agencies their proportionate part of the cost of maintenance and operation of the central services which are established, in accordance with the rules and regulations adopted by him and approved by the Governor and Council of State pursuant to paragraph k, below. Upon the establishment of central mimeographing and duplicating services, the Secretary may, with the approval of the Governor, require any State agency to be served by those central services to transfer to the Department ownership, custody, and control of any or all mimeographing and duplicating equipment and supplies within the ownership, custody, or control of such agency.
- k. To require the State agencies and their officers and employees to utilize the central facilities and services which are established; and to adopt, with the approval of the Governor and Council of State, reasonable rules, regulations, and procedures requiring the utilization of such central facilities and services, and governing their operation and the charges to be made for their services.
- l. To provide necessary information service for visitors to the Capitol.
- m. To perform such additional duties and exercise such additional powers as may be assigned to it by statute or by the Governor.

(1957, c. 215, s. 2; c. 269, s. 1; 1959, c. 683, ss. 2-4; c. 1326; 1963, c. 1, s. 5; 1965, c. 1023; 1969, c. 1144, s. 2; 1971, c. 1097, s. 3; 1975, c. 399, ss. 1, 2; c. 879, s. 46; 1979, c. 136, s. 1; c. 544; 1979, 2nd Sess., c. 1137, s. 38; 1981, c. 300; c. 859, ss. 48-51; 1981 (Reg. Sess., 1982), c. 1282, s. 62; 1983, c. 267, s. 1; c. 717, s.

74; c. 761, ss. 58, 151, 173, 174; c. 923, s. 217; 1983 (Reg. Sess., 1984), c. 1034, s. 122; 1985, c. 479, ss. 168, 170, 174; c. 757, ss. 174, 175, 177; c. 791, s. 51; 1985 (Reg. Sess., 1986), c. 955, ss. 94, 94.1.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. —

Section 1 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "This act may be cited as the Separation of Powers Act of 1986."

Section 127 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "If any part of this act shall be declared invalid by any court, this shall not affect any other part of this act."

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective July 1, 1986, deleted "and the advice of the Advisory Budget Commission" following "approval of the Governor" in the first sentence of the first paragraph and in two places in the next-to-last paragraph of subdivision (8)i.7a, and added the last paragraph of subdivision (8)i.7a.

Chapter 143A.
State Government Reorganization.

Article 1.
General Provisions.

Sec.
143A-17. Plans and reports.

Article 6.
Department of Justice.

Sec.
143A-55.3 to 143A-55.7. [Not effectuated.]

ARTICLE 1.
General Provisions.

§ 143A-17. Plans and reports.

Each principal department shall submit an annual plan of work to the Governor and the Advisory Budget Commission prior to the beginning of each fiscal year. Each department which plans to include in its budget request for the ensuing fiscal period a request for (i) the establishment of a new program regardless of the source of the supporting funds, or (ii) the State funding of a program which was previously supported from nonstate sources, shall provide in its annual plan of work measurement criteria for the determination of the success or failure of each such program requested. Each principal department shall submit an annual report covering programs and activities to the Governor and Advisory Budget Commission at the end of each fiscal year. These plans of work and annual reports shall be made available to the General Assembly. These documents will serve as the base for the development of budgets for each principal department of the State government to be submitted to the Governor, Advisory Budget Commission, and to the appropriations committees of the General Assembly for consideration and approval. The function of the Advisory Budget Commission under the preceding sentence applies only if the Director of the Budget consults with the Commission in preparation of the budget. (1971, c. 864, s. 21; 1977, 2nd Sess., c. 1219, s. 44; 1985 (Reg. Sess., 1986), c. 955, s. 96.)

Editor's Note. — Section 1 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "This act may be cited as the Separation of Powers Act of 1986."

Section 127 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "If any part of this act

shall be declared invalid by any court, this shall not affect any other part of this act."

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 1, 1986, added the last sentence.

ARTICLE 6.
Department of Justice.

§ 143A-49.1. Attorney General; powers and duties.

Legal Periodicals. — For survey of 1984 administrative law, "A Declining Role for the Attorney General," see 63 N.C.L. Rev. 1051 (1985).

§§ 143A-55.3 to 143A-55.7: Not effectuated.

Cross References. — As to the Administrative Rules Review Commission, see now § 143B-30 et seq.

Editor's Note. — By letter of October 28, 1985, addressed to the President of the Senate and the Speaker of the House, the Supreme Court declined to issue an advisory opinion as contemplated by Session Laws 1985, c. 746, and referred to in the 1985 Cumulative Supplement in the notes under these sections, on the grounds that to issue such an opinion would be to place the Court directly in the stream of the legislative process, and in view of the preroga-

tive of the General Assembly to first address and determine the constitutionality of its own legislation. See *In re Advisory Opinion*, — N.C. —, 335 S.E.2d 890 (1985).

Session Laws 1985 (Reg. Sess., 1986), c. 1022, s. 7 deleted the word "advisory" preceding "opinion" in the third sentence of Session Laws 1985, c. 746, s. 19, as referred to in the 1985 Cumulative Supplement in the notes under these sections.

At the direction of the Revisor of Statutes, §§ 143A-55.3 to 143A-55.7 are shown as not effectuated.

Chapter 143B.

Executive Organization Act of 1973.

Article 1.

General Provisions.

Part 1. In General.

Sec.

143B-10. Powers and duties of heads of principal departments.

Part 3. Administrative Rules Review Commission.

143B-30. Definitions.

143B-30.1. Administrative Rules Review Commission created.

143B-30.2. Review of rules.

143B-30.3. Hearings.

143B-30.4. Evidence.

143B-31 to 143B-48. [Reserved.]

Article 2.

Department of Cultural Resources.

Part 3. Art Museum Building Commission.

143B-58. Art Museum Building Commission—creation, powers and duties.

143B-61.1. Termination of the Art Museum Building Commission.

Part 4. North Carolina Historical Commission.

143B-62. North Carolina Historical Commission—creation, powers and duties.

Part 5. Archaeological Advisory Committee.

143B-66. [Repealed.]

Part 14. North Carolina Arts Council.

143B-87. North Carolina Arts Council—creation, powers and duties.

Article 3.

Department of Human Resources.

Part 4. Commission for Mental Health, Mental Retardation and Substance Abuse Services.

143B-147. Commission for Mental Health, Mental Retardation and Substance Abuse Services—creation, powers and duties.

Part 14C. Respite Care Program.

143B-181.10. Respite care program established; eligibility; services; administration; payment rates.

Part 16A. North Carolina Arthritis Program Committee.

Sec.

143B-184, 143B-185. [Repealed.]

Article 7.

Department of Natural Resources and Community Development.

Part 1. General Provisions.

143B-279. Department of Natural Resources and Community Development—organization.

Part 19. John H. Kerr Reservoir Committee.

143B-328 to 143B-330. [Repealed.]

Part 24. North Carolina Employment and Training Council.

143B-340, 143B-341. [Repealed.]

Article 9.

Department of Administration.

Part 21. Child and Family Services Interagency Committees.

143B-426.2 to 143B-426.7A. [Repealed.]

Part 22. North Carolina Agency for Public Telecommunications.

143B-426.11. Powers of Agency.

143B-426.32 to 143B-426.34. [Reserved.]

Part 28. Office of the State Controller.

143B-426.35. Definitions.

143B-426.36. Office of the State Controller; creation.

143B-426.37. State Controller.

143B-426.38. Organization and operation of office.

143B-426.39. Powers and duties of the State Controller.

Article 10.

Department of Commerce.

Part 10. North Carolina State Ports Authority.

143B-454. Powers of Authority.

143B-456. Issuance of bonds and notes.

Part 11A. North Carolina Hazardous Waste Treatment Commission.

143B-470.3. Creation of Commission.

143B-470.4. Powers and duties of the Treatment Commission.

Part 12. North Carolina Technological
Development Authority.
Sec.
143B-471.4. Incubator facilities program.

Article 11.

Department of Crime Control and Public Safety.

Part 1. General Provisions.

143B-475.1. Deferred prosecution, community
service restitution, and volunteer
program.
143B-475.2. [Repealed.]
143B-476. Department of Crime Control and
Public Safety—head; powers and
duties as to emergencies and di-
sasters.

Part 5A. North Carolina Center for Missing Persons.

143B-495. North Carolina Center for Missing
Persons established.

Sec.

143B-496. Definitions.
143B-497. Control of the Center.
143B-498. Secretary to adopt rules.
143B-499. Submission of missing person re-
ports to the Center.
143B-499.1. Dissemination of missing persons
data by law-enforcement agen-
cies.
143B-499.2. Responsibilities of Center.
143B-499.3. Duty of individuals to notify Cen-
ter and law-enforcement agency
when missing person has been lo-
cated.
143B-499.4. Release of information by Center.
143B-499.5. Provision of toll-free service; in-
structions to callers; communica-
tion with law-enforcement agen-
cies.
143B-499.6. Improper release of information;
penalty.

ARTICLE 1.

General Provisions.

Part 1. In General.

§ 143B-10. Powers and duties of heads of principal depart- ments.

(d) Appointment of Committees or Councils. — The head of each principal department may create and appoint committees or councils to consult with and advise the department. The General Assembly declares its policy that insofar as feasible, such committees or councils shall consist of no more than 11 members, with not more than one from each congressional district. If any department head desires to vary this policy, he must make a request in writing to the Governor, stating the reasons for the request. The Governor may approve the request, but may only do so in writing. Copies of the request and approval shall be transmitted to the Advisory Budget Commission and to the Joint Legislative Commission on Governmental Operations. The members of any committee or council created by the head of a principal department shall serve at the pleasure of the head of the principal department and may be paid per diem and necessary travel and subsistence expenses within the limits of appropriations and in accordance with the provisions of G.S. 138-5, when approved in advance by the Director of the Budget. Per diem, travel, and subsistence payments to members of the committees or councils created in connection with federal programs shall be paid from federal funds unless otherwise provided by law.

An annual report listing these committees or councils, the total membership on each, the cost in the last 12 months and the source of funding, and the title of the person who made the appointments shall be made to the Advisory Budget Commission and the Joint Legislative Commission on Governmental Operations by March 31 of each year.

Prior to taking any action under this subsection, the Director of the Budget may consult with the Advisory Budget Commission.

(1973, c. 476, s. 10; c. 1416, ss. 1, 2; 1977, 2nd Sess., c. 1219, s. 46; 1983, c. 76, ss. 1, 2; c. 641, s. 8; c. 717, s. 78; 1985 (Reg. Sess., 1986), c. 955, ss. 97, 98.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. —

Section 1 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "This act may be cited as the Separation of Powers Act of 1986."

Section 127 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "If any part of this act shall be declared invalid by any court, this shall not affect any other part of this act."

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective July 1, 1986, substituted "when approved in advance by the Director of the Budget" for "when approved in advance by the Advisory Budget Commission" in the sixth sentence of the first paragraph of subsection (d) and added the last paragraph of subsection (d).

Part 3. Administrative Rules Review Commission.

§ 143B-30. Definitions.

As used in this Part, the following definitions apply:

"Agency" means an agency subject to the provisions of Article 2 of Chapter 150B of the General Statutes.

"Commission" means the Administrative Rules Review Commission.

"Rule" means a "rule", as defined in G.S. 150B-2(8a). (1985 (Reg. Sess., 1986), c. 1028, s. 32.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1028, s. 41 makes this Article effective July 16, 1986.

Session Laws 1985 (Reg. Sess., 1986), c. 1028, s. 38 is a severability clause.

§ 143B-30.1. Administrative Rules Review Commission created.

The Administrative Rules Review Commission is created. The Commission shall consist of eight members to be appointed by the General Assembly, four upon the recommendation of the President of the Senate, and four upon the recommendation of the Speaker of the House of Representatives. These appointments shall be made in accordance with G.S. 120-121, and vacancies in these appointments shall be filled in accordance with G.S. 120-122. All appointees shall serve two-year terms. Any appointment to fill a vacancy on the Commission created by the resignation, dismissal, ineligibility, death, or disability of any member shall be for the balance of the unexpired term. The chairman shall be elected by the Commission, and he shall designate the times and places at which the Commission shall meet. The Commission shall meet at least once a month. A quorum of the Commission shall consist of five members of the Commission.

Members of the Commission who are not officers or employees of the State shall receive compensation of two hundred dollars (\$200.00) for each day or part of a day of service plus reimbursement for travel and subsistence expenses at the rates specified in G.S. 138-5. Members of the Commission who are officers or employees of the State shall receive reimbursement for travel and subsistence at the rate set out in G.S. 138-6.

The Office of Administrative Hearings shall provide administrative and support staff to the Commission to assist it in performing its duties. (1985 (Reg. Sess., 1986), c. 1028, s. 32.)

§ 143B-30.2. Review of rules.

(a) Rules adopted by an agency on or after September 1, 1986, shall be submitted to the Administrative Rules Review Commission, which shall review the rule to determine whether it:

- (1) Is within the authority delegated to the agency by the General Assembly;
- (2) Is clear and unambiguous;
- (3) Is reasonably necessary to enable the administrative agency to perform a function assigned to it by statute or to enable or facilitate the implementation of a program or policy in aid of which the rule was adopted.

The Commission shall review a rule submitted to it not later than the last day of the first calendar month following the month when the rule was submitted. The Commission, by a majority vote of the members present and voting, may extend the time for review of a rule by 60 days to obtain additional information on a rule. The Commission shall file notice of the extension of time for review of a rule with the agency and the Director of the Office of Administrative Hearings. An agency may not present a rule for filing with the Director of the Office of Administrative Hearings under G.S. 150B-59 unless the rule has been reviewed by the Commission as provided in this section.

(b) If the Commission reviews a rule and determines that it is within the authority delegated to the agency, is clear and unambiguous, and is reasonably necessary, the Commission shall note its approval and return the rule to the agency. The agency may then file the rule with the Director of the Office of Administrative Hearings under G.S. 150B-59, and the rule shall become effective as provided in that section.

(c) If the Commission finds that an agency did not act within the authority delegated to it in promulgating a rule or a part of a rule, or that a rule is not clear and unambiguous, or that a rule is unnecessary, the Commission shall object and delay the filing of the rule or part of the rule under G.S. 150B-59 for a period not to exceed 90 days. The Commission shall send to the agency, the Governor, the President of the Senate, the Speaker of the House of Representatives, and the Director of the Office of Administrative Hearings, a written report of the objection and delay of the rule or its part and the reasons for the delay. An agency may not present a rule or part of a rule that has been delayed to the Director of the Office of Administrative Hearings for filing under G.S. 150B-59, and a rule or its part that is delayed is not "effective," as defined in G.S. 150B-2(2a).

(d) Within 30 days after receipt of the Commission's written report, the agency shall either (1) revise the rule to remove the cause of the objections of the Commission and return the revised rule to the Commission or (2) return the rule to the Commission without change with the Commission's objections attached. The Commission shall determine whether a revision removes its objections to the rule.

(e) If the Commission determines that a revision of a rule has removed the Commission's objections, the Commission shall note its approval and return the rule to the agency. The agency may then file the rule with the Director of the Office of Administrative Hearings under G.S. 150B-59, and the rule shall become effective as provided in that section.

(f) Regardless of whether the agency returns the rule to the Commission without change instead of revising the rule to remove the Commission's objections or whether the Commission determines that a revision of a rule has not removed its objections, the Commission shall note its approval of the rule once 90 days have passed since the Commission objected and delayed the filing of

the rule or part of the rule pursuant to G.S. 143B-30.2(c) and shall return the rule to the agency. However, if the agency returns the rule to the Commission without change instead of revising the rule to remove the Commission's objections, or if the Commission determines that a revision of a rule has not removed its objections, the Commission's approval shall be accompanied by a notation of the Commission's objection to the rule. The agency may then file the rule with the Director of the Office of Administrative Hearings under G.S. 150B-59, and the rule shall become effective as provided in that section. If the agency did not remove the Commission's objections to the rule or part of the rule, the Commission may send to the President of the Senate and the Speaker of the House of Representatives a written report of its objections to the rule. Thereafter, if the General Assembly enacts legislation disapproving the rule, the rule shall no longer be effective.

The Legislative Services Officer shall send a copy of any law disapproving a rule to the agency and the Director of the Office of Administrative Hearings as soon as a copy is available.

(g) While the filing of a rule or its part is delayed, the agency that promulgated it may not adopt another rule, including a temporary rule, that has substantially identical provisions to those for which the Commission delayed the filing of the original rule or part of a rule.

(h) The filing of an amendment to a rule places the entire rule before the Commission for its review. (1985 (Reg. Sess., 1986), c. 1028, s. 32.)

§ 143B-30.3. Hearings.

(a) Notwithstanding G.S. 143B-30.2(a), the chairman of the Commission may at any time before the time for review set out in that subsection expires call a public hearing on any rule or part of a rule upon the recommendation of the Commission or on the motion of any member of the Commission. Within 60 days after the public hearing, the Commission may find that the agency did not act within the authority delegated to it in promulgating the rule, or that the rule is not clear and unambiguous, or that the rule is unnecessary, and object to and delay the rule in accordance with G.S. 143B-30.2.

(b) At least 15 days before the public hearing, the Commission shall give notice of the hearing to the rulemaking agency, to any person who requests a copy of the notice, and to any person who may be affected by the rule in the opinion of the chairman of the Commission. (1985 (Reg. Sess., 1986), c. 1028, s. 32.)

§ 143B-30.4. Evidence.

Evidence of the Commission's failure to object to and delay the filing of a rule or its part shall be inadmissible in all civil or criminal trials or other proceedings before courts, administrative agencies, or other tribunals. (1985 (Reg. Sess., 1986), c. 1028, s. 32.)

§§ 143B-31 to 143B-48: Reserved for future codification.

ARTICLE 2.

Department of Cultural Resources.

Part 3. Art Museum Building Commission.

§ 143B-58. Art Museum Building Commission — creation, powers and duties.

There is hereby recreated the Art Museum Building Commission of the Department of Cultural Resources and the State Art Museum Building Commission shall have the following powers and duties:

- (7) To report to the General Assembly and the Governor on November 1 of each year on its activities in the preceding fiscal year, to make any special reports requested by the General Assembly or Governor, and to make a final report as required by G.S. 143B-61.1.
- (9) To defend any suit against it, prosecute any cause of action that it may possess, assert any claim it may have, and defend any claim that might be brought against it. (1973, c. 476, s. 39; 1985 (Reg. Sess., 1986), c. 1028, ss. 18, 19.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1028, s. 39 provides that ss. 1 through 31 of the act shall not affect pending litigation.

Session Laws 1985 (Reg. Sess., 1986), c. 1028, s. 38 is a severability clause.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective thirty days after ratification, rewrote subdivision (7) and added subdivision (9). The act was ratified July 16, 1986.

§ 143B-61.1. Termination of the Art Museum Building Commission.

The Art Museum Building Commission shall expire when it submits its final report. The Commission shall make its final report to the General Assembly and Governor 120 days after the final resolution of all cases or claims in which the Commission is a party or that are brought under G.S. 143-135.3 regarding the State Art Museum. (1979, 2nd Sess., c. 1306, s. 2; 1985 (Reg. Sess., 1986), c. 1028, s. 15.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1028, s. 39 provides that ss. 1 through 31 of the act shall not affect pending litigation.

Session Laws 1985 (Reg. Sess., 1986), c. 1028, s. 38 is a severability clause.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective thirty days after ratification, rewrote this section. The act was ratified July 16, 1986.

Part 4. North Carolina Historical Commission.

§ 143B-62. North Carolina Historical Commission — creation, powers and duties.

There is hereby created the North Carolina Historical Commission of the Department of Cultural Resources to give advice and assistance to the Secretary of Cultural Resources and to promulgate rules and regulations to be followed in the acquisition, disposition, preservation, and use of records, artifacts, real and personal property, and other materials and properties of historical, archaeological, architectural, or other cultural value, and in the extension of State aid to other agencies, counties, municipalities, organizations, and individuals in the interest of historic preservation.

- (1) The Historical Commission shall have the following powers and duties:
 - a. To advise the Secretary of Cultural Resources on the scholarly editing, writing, and publication of historical materials to be issued under the name of the Department;
 - b. To evaluate and approve proposed nominations of historic, archaeological, architectural, or cultural properties for entry on the National Register of Historic Places;
 - c. To evaluate and approve the State plan for historic preservation as provided for in Chapter 121;
 - d. To evaluate and approve historic, archaeological, architectural, or cultural properties proposed to be acquired and administered by the State;
 - e. To evaluate and prepare a report on its findings and recommendations concerning any property not owned by the State for which State aid or appropriations are requested from the Department of Cultural Resources, and to submit its findings and recommendations in accordance with Chapter 121;
 - f. To serve as an advisory and coordinative mechanism in and by which State undertakings of every kind that are potentially harmful to the cause of historic preservation within the State may be discussed, and where possible, resolved, particularly by evaluating and making recommendations concerning any State undertaking which may affect a property that has been entered on the National Register of Historic Places as provided for in Chapter 121 of the General Statutes of North Carolina;
 - g. To exercise any other powers granted to the Commission by provisions of Chapter 121 of the General Statutes of North Carolina;
 - h. To give its professional advice and assistance to the Secretary of Cultural Resources on any matter which the Secretary may refer to it in the performance of the Department's duties and responsibilities provided for in Chapter 121 of the General Statutes of North Carolina;
 - i. To serve as a search committee to seek out, interview, and recommend to the Secretary of Cultural Resources one or more experienced and professionally trained historian(s) for the position of Director of the Division of Archives and History when a vacancy occurs, and to assist and cooperate with the Secretary in periodic reviews of the performance of the Director and the Division; and
 - j. To assist and advise the Secretary of Cultural Resources and the Director of the Division of Archives and History in the development and implementation of plans and priorities for the State's historical programs.

- (2) The Historical Commission shall have the power and duty to establish standards and provide rules and regulations as follows:
- a. For the acquisition and use of historical materials suitable for acceptance in the North Carolina State Archives or the North Carolina Museum of History;
 - b. For the disposition of public records under provisions of Chapter 121 of the General Statutes of North Carolina; and
 - c. For the certification of records in the North Carolina State Archives as provided in Chapter 121 of the General Statutes of North Carolina;
 - d. For the use by the public of historic, architectural, archaeological, or cultural properties as provided in Chapter 121 of the General Statutes of North Carolina;
 - e. For the acquisition of historic, archaeological, architectural, or cultural properties by the State;
 - f. For the extension of State aid or appropriations through the Department of Cultural Resources to counties, municipalities, organizations, or individuals for the purpose of historic preservation or restoration; and
 - fl. For the extension of State aid or appropriations through the Department of Cultural Resources to nonstate-owned nonprofit history museums;
 - g. For qualification for grants-in-aid or other assistance from the federal government for historic preservation or restoration as provided in Chapter 121 of the General Statutes of North Carolina. This section shall be construed liberally in order that the State and its citizens may benefit from such grants-in-aid.

(1973, c. 476, s. 44; 1977, c. 513, s. 2; 1979, c. 861, s. 6; 1985 (Reg. Sess., 1986), c. 1014, s. 171(f).)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 171(g) provides:

"(g) Notwithstanding any other provision of law, the following statutes do not apply to appropriations which the General Assembly has directed the Department of Cultural Resources to allocate to specific units of local government or private nonprofit agencies: G.S. 121-11;

121-12(c), (c1), and (d); 121-12.1; 121-12.2; 143-31.2; and 143B-62(2)(f) and (fl)."

Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 243, contains a severability clause.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 1, 1986, inserted "from the Department of Cultural Resources" in subdivision (1)e and inserted "through the Department of Cultural Resources" in subdivisions (2)f and (2)fl.

Part 5. Archaeological Advisory Committee.

§ 143B-66: Repealed by Session Laws 1985 (Reg. Sess., 1986), c. 1028, s. 10.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), which repeals this section, also provides for the abolition of the Archaeological Advisory Committee.

Session Laws 1985 (Reg. Sess., 1986), c. 1028, s. 41 makes ss. 1 to 31 of the act effective 30 days after ratification. The act was ratified July 16, 1986.

Session Laws 1985 (Reg. Sess., 1986), c. 1028, s. 39 provides that ss. 1 through 31 of the act shall not affect pending litigation.

Session Laws 1985 (Reg. Sess., 1986), c. 1028, s. 38 is a severability clause.

Part 14. North Carolina Arts Council.

§ 143B-87. North Carolina Arts Council — creation, powers and duties.

There is hereby created the North Carolina Arts Council with the following duties and functions:

- (5) To advise the Secretary in regard to bringing the highest obtainable quality in the arts to the State and promoting the maximum opportunity for the people to experience and enjoy those arts;
- (6) To advise the Secretary of the Department upon any matter the Secretary may refer to it; and
- (7) To advise the Secretary concerning the promotion of theater arts in the State. (1973, c. 476, s. 77; 1985 (Reg. Sess., 1986), c. 1028, s. 14.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1028, s. 13 provides: "The Theater Arts Advisory Board, created in 7 North Carolina Administrative Code 3D .0008, is abolished. The North Carolina Arts Council is authorized to perform the functions of the Board."

Session Laws 1985 (Reg. Sess., 1986), c.

1028, s. 39 provides that ss. 1 through 31 of the act shall not affect pending litigation.

Session Laws 1985 (Reg. Sess., 1986), c. 1028, s. 38 is a severability clause.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective 30 days after ratification, deleted "and" at the end of subdivision (5), inserted "and" at the end of subdivision (6), and added subdivision (7). The act was ratified July 16, 1986.

ARTICLE 3.

Department of Human Resources.

Part 3. Commission for Health Services.

§ 143B-142. Commission for Health Services — creation, powers and duties.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1028, s. 28, which abolishes the North Carolina Arthritis Committee, and repeals Part 16A of Article 3 of Chapter 143B,

§§ 143B-184 and 143B-185, provides that the Commission for Health Services is authorized to perform the functions of the Committee.

Part 4. Commission for Mental Health, Mental Retardation and Substance Abuse Services.

§ 143B-147. Commission for Mental Health, Mental Retardation and Substance Abuse Services — creation, powers and duties.

(a) There is hereby created the Commission for Mental Health, Mental Retardation and Substance Abuse Services of the Department of Human Re-

sources with the power and duty to adopt, amend and repeal rules to be followed in the conduct of State and local mental health, mental retardation, alcohol and drug abuse programs including education, prevention, intervention, treatment, rehabilitation and other related services. Such rules shall be designed to promote the amelioration or elimination of the mental health, mental retardation, or alcohol and drug abuse problems of the citizens of this State. The Commission for Mental Health, Mental Retardation and Substance Abuse Services shall have the authority:

- (1) To adopt rules regarding the
 - a. Admission, including the designation of regions, treatment, and professional care of individuals admitted to a facility operated under the authority of G.S. 122C-181(a), that is now or may be established;
 - b. Operation of education, prevention, intervention, treatment, rehabilitation and other related services as provided by area mental health, mental retardation and substance abuse authorities under Part 4 of Article 4 of Chapter 122C of the General Statutes;
 - c. Hearings and appeals of area mental health, mental retardation and substance abuse authorities as provided for in Part 4 of Article 4 of Chapter 122C of the General Statutes;
 - d. Requirements of the federal government for grants-in-aid for mental health, mental retardation, alcohol or drug abuse programs which may be made available to local programs or the State. This section is to be liberally construed in order that the State and its citizens may benefit from such grants-in-aid;
- (2) To adopt rules for the licensing of facilities for the mentally ill, mentally retarded and substance abusers, under Article 2 of Chapter 122C of the General Statutes.
- (3) To advise the Secretary of the Department of Human Resources regarding the need for, provision and coordination of education, prevention, intervention, treatment, rehabilitation and other related services in the areas of:
 - a. Mental illness and mental health,
 - b. Mental retardation,
 - c. Alcohol abuse, and
 - d. Drug abuse;
- (4) To review and advise the Secretary of the Department of Human Resources regarding all State plans required by federal or State law and to recommend to the Secretary any changes it thinks necessary in those plans; provided, however, for the purposes of meeting State plan requirements under federal or State law, the Department of Human Resources is designated as the single State agency responsible for administration of plans involving mental health, mental retardation, alcohol abuse, and drug abuse services;
- (5) To adopt rules relating to the registration and control of the manufacture, distribution, and dispensing of controlled substances as provided by G.S. 90-100;
- (6) To adopt rules to establish the professional requirements for staff of licensed facilities for the mentally ill, mentally retarded and substance abusers. Such rules may require that one or more, but not all staff of a facility be either licensed or certified. If a facility has only one professional staff, such rules may require that that individual be licensed or certified. Such rules may include the recognition of profes-

sional certification boards for those professions not licensed or certified under other provisions of the General Statutes provided that the professional certification board evaluates applicants on a basis which protects the public health, safety or welfare;

- (7) Except where rule making authority is assigned under that Article to the Secretary of Human Resources, to adopt rules to implement Article 3 of Chapter 122C of the General Statutes;
- (8) To adopt rules specifying procedures for waiver of rules adopted by the Commission.

(1973, ch. 476, s. 129; 1977, c. 568, ss. 2, 3; c. 679, s. 1; 1981, c. 51, s. 1; 1983, c. 718, s. 5; 1983 (Reg. Sess., 1984), c. 1110, s. 6; 1985, c. 589, ss. 47-54; 1985 (Reg. Sess., 1986), c. 863, s. 33.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, ef-

fective August 1, 1986, substituted "a facility operated under the authority of G.S. 122C-181(a)" for "any State facility as defined in G.S. 122C-3" in paragraph (a)(1)a.

Part 6. Social Services Commission.

§ 143B-153. Social Services Commission — creation, powers and duties.

Editor's Note. —

Session Laws 1985, c. 479, s. 97, as amended by Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 130, effective July 1, 1986, provides:

"Sec. 97. (a) Rules for the monthly schedule of payments for the purchase of day care services for low income children shall be established by the Social Services Commission pursuant to G.S. 143B-153(8)a., in accordance with the following requirements:

"(1) Effective July 1, 1986, for facilities in which fewer than fifty percent (50%) of the enrollees are subsidized by State or federal funds, the State shall continue to pay the same fee paid by private paying parents for a child in the same age group in the same facility.

"(2) Effective July 1, 1986, facilities in which fifty percent (50%) or more of the enrollees are subsidized by State or federal funds shall be reimbursed at the facilities' fiscal year 1985-86 payment rate.

"(3) Effective January 1, 1987, facilities in which fifty percent (50%) or more of the enrollees are subsidized by State or federal funds may choose annually one of the following payment options:

- a. The facility's payment rate for fiscal year 1985-86; or
- b. The county market rate, as calculated annually by the Department of Human Resources' Office of Child Day Care Services. A market rate shall be calculated for each county and for each age group of enrollees, and shall be the county average of all fees charged to unsubsidized private paying parents for each age group of enrollees. In fiscal year 1986-87, the county market rates shall be calculated from data collected by the Department of Human Resources' Office of Child Day Care Services in its 1986 Survey of Market Rates. Effective July 1, 1987, the county market rates shall be calculated from facility fee schedules collected by the Office of Child Day Care Services during its annual inspection visits.

"(b) Facilities licensed pursuant to Article 7 of Chapter 110 of the General Statutes may participate in the program that provides for the purchase of slots in day care facilities, for

minor children of needy families. No separate licensing requirements may be used to select facilities to participate.

"Effective July 1, 1986, day care plans from which the State purchases day care services shall meet the standards established by the Child Day Care Commission pursuant to G.S. 110-101 and G.S. 110-105.1. Until it can demonstrate that it meets the standards adopted by the Child Day Care Commission, a day care plan from which the State purchases day care services for minor children of needy families shall meet all certification standards adopted by the Department of Human Resources' Office of Child Day Care Services. The fee for the purchase of care from a day care plan is one hundred fifty dollars (\$150.00) per month. The fee for the purchase of care from individual Child Caring Providers is one hundred dollars (\$100.00) per month.

"(c) Effective January 1, 1986, providers whose programs exceed licensing standards may modify their programs to standards consistent with licensing standards.

"(d) Any savings that result by reason of this schedule shall be used by the Department to provide for payment of the costs of necessary day care for more minor children of needy families.

"(e) County departments of social services shall continue to negotiate with day care providers for day care services below those rates prescribed by subsection (a) of this section. County departments are directed to purchase day care services so as to serve the greatest number of children possible with existing resources."

Part 14C. Respite Care Program.

§ 143B-181.10. Respite care program established; eligibility; services; administration; payment rates.

(a) A respite care program is established to provide needy relief to caregivers of patients who cannot be left alone because of mental or physical problems and whose incomes preclude coverage under North Carolina's Medicaid eligibility standards.

(b) Those eligible for respite care under the program established by this section are limited to those unpaid caregivers who are caring for patients who require constant supervision and who cannot be left alone either (i) because of memory impairment or other problems that make them subject to wandering, or make them dangerous to themselves or others, or (ii) because of physical immobility, regardless of etiology, that renders them unsafe alone.

(c) Respite care services provided by the programs established by this section shall include:

- (1) Attendance and companion services for the patient in order to provide released time to the caregiver;
- (2) Personal care services, including meal preparation, to the patient of the caregiver;
- (3) Patient assessment and care planning for the patient of the caregiver;
- (4) Counseling and training in the caregiving role, including coping mechanisms and behavior modification techniques;
- (5) Counseling in accessing available local, regional, and State services;
- (6) Adult Day Care where cost effective; and
- (7) Temporarily institutionalizing the patient of the caregivers to provide the caregiver total respite, when the mental or physical stress on the caregiver necessitates this respite. This institutionalization may last for no more than a total of 30 days per year per patient. Program funds may provide no more than the current domiciliary care reimbursement rate for this institutionalization. The services described by subdivisions (1) through (5) of this subsection shall be limited to a maximum of 20 hours of service per month per caretaker. Duration of the service period shall be unlimited for as long as the caretaker continues to qualify as a caretaker as defined by subsection (b) of this section.

(d) The program established by this section shall be administered by the Council of Government in each region, which shall contract for service provision with an existing agency to be chosen by the same process as used for federal contracting. The Council in each region shall choose the respite care service provider on the basis of a competitive bidding process open to all existing respite care service providers. Criteria for selection shall include documented capacity to provide care, adequacy of quality assurance, training, supervision, abuse prevention and complaint mechanisms proposed by the provider, and lowest cost.

(e) Eligibility for initial and continued receipt of services shall be determined by review of application forms submitted to the Division of Aging, Department of Human Resources.

(f) Caregivers receiving respite care services through the program established by this section shall pay for some of the services on a sliding scale depending on their ability to pay, but not less than twenty percent (20%) of the cost of these services. The Division of Aging, Department of Human Resources shall specify rates of payment for the services. (1985 (Reg. Sess., 1986), c. 1014, s. 7.1.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 244 makes this section effective July 1, 1986.

Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 7.1(g) provides:

"(g) Up to three hundred thousand dollars (\$300,000) in Social Services Block Grant funds may be expended for this purpose in this section in fiscal year 1986-87. These funds shall be allocated as follows:

"(1) Sufficient funds to establish and maintain a full-time position of Respite Care Services Consultant within the Division of Aging, Department of Human Resources. This consultant shall provide ongoing technical assistance to the Area Agencies on Aging and prepare an annual fiscal report on the program for presentation to the Joint Legislative Commission on Governmental Operations and to the Fiscal Research Division of the Legislative Services Office no later than the first of May each year.

"(2) All other funds to the Area Agencies on Aging, proportionally based on the

number of elderly citizens of 75 years or more in the regions, to fund the respite care program established by this act. Revenues received from clients' payments shall be used by the provider agencies to provide additional respite services, as defined by this section. This funding allocation may be changed by the Secretary of the Department of Human Resources upon the recommendation of the Director of the Division of Aging, the Respite Care Service Consultant in the Division of Aging, and the Area Agencies on Aging, after these entities have considered utilization of services, patient age, marital status, caregiver capacities, dependency, disease and mental status data on clients served by the programs. These data shall be provided annually to the Area Agencies on Aging by all respite care service providers."

Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 243 is a severability clause.

Part 16A. North Carolina Arthritis Program Committee.

§§ 143B-184, 143B-185: Repealed by Session Laws 1985 (Reg. Sess., 1986), c. 1028, s. 28.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1028, s. 41 makes ss. 1 to 31 of the act effective 30 days after ratification. The act was ratified July 16, 1986.

Session Laws 1985 (Reg. Sess., 1986), c. 1028, s. 28 abolishes the North Carolina Ar-

thritis Committee, and authorizes the Commission for Health Services to perform the Committee's functions.

Session Laws 1985 (Reg. Sess., 1986), c. 1028, s. 39 provides that ss. 1 through 31 of the act shall not affect pending litigation.

Session Laws 1985 (Reg. Sess., 1986), c. 1028, s. 38 is a severability clause.

ARTICLE 7.

Department of Natural Resources and Community Development.

Part 1. General Provisions.

§ 143B-279. Department of Natural Resources and Community Development — Organization.

The Department of Natural Resources and Community Development shall be organized initially to include:

- (1) The Board of Natural Resources and Community Development,
- (2) The Wildlife Resources Commission,
- (3) The Environmental Management Commission,
- (4) The Marine Fisheries Commission,
- (5) The North Carolina Mining Commission,
- (6) The State Soil and Water Conservation Commission,
- (7) The Sedimentation Control Commission,
- (8) The Wastewater Treatment Plant Operators Certification Commission,
- (9) Repealed by Session Laws 1983, c. 667, s. 1, effective July 1, 1983.
- (10) The Community Development Council,
- (11) The Forestry Council,
- (12) The Parks and Recreation Council,
- (13) The North Carolina Zoological Park Council,
- (14) Repealed by Session Laws 1983 (Regular Session 1984), c. 995, s. 12, effective June 27, 1984.
- (15) The Air Quality Council,
- (16) Repealed by Session Laws 1983 (Regular Session 1984), c. 995, s. 14, effective June 27, 1984.
- (17) Repealed by Session Laws 1985 (Reg. Sess., 1986), c. 1028, s. 25.
- (18) Repealed by Session Laws 1983 (Regular Session 1984), c. 995, s. 11, effective June 27, 1984.
- (19) Repealed by Session Laws 1985 (Reg. Sess., 1986), c. 1028, s. 30.
- (20) The North Carolina Trails Committee, and

such divisions as may be established under the provisions of Article 1 of this Chapter. (1973, c. 1262, s. 15; 1977, c. 771, s. 3; 1981, c. 881, s. 4; 1983, c. 667, s. 1; 1983 (Reg. Sess., 1984), c. 995, ss. 11, 12, 14; c. 1082, s. 1; 1985 (Reg. Sess., 1986), c. 1028, ss. 25, 30.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1028, s. 30 abolishes the John H. Kerr Reservoir Committee, but provides that the act does not prevent local officials in counties affected by the reservoir from establishing a local advisory group.

Session Laws 1985 (Reg. Sess., 1986), c. 1028, s. 39 provides that ss. 1 through 31 of the act shall not affect pending litigation.

Session Laws 1985 (Reg. Sess., 1986), c. 1028, s. 38 is a severability clause.

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective 30 days after ratification, deleted subdivision (17), relating to the North Carolina Employment and Training Council and deleted subdivision (19), relating to the John H. Kerr Reservoir Committee. The act was ratified July 16, 1986.

Part 4. Environmental Management Commission.

§ 143B-282. Environmental Management Commission — creation; powers and duties.

Cited in *In re Environmental Mgt. Comm'n*,
— N.C. App. —, 341 S.E.2d 588 (1986).

Part 19. John H. Kerr Reservoir Committee.

§§ 143B-328 to 143B-330: Repealed by Session Laws 1985 (Reg. Sess., 1986), c. 1028, s. 30.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1028, s. 41 makes ss. 1 to 31 of the act effective 30 days after ratification. The act was ratified July 16, 1986.

Session Laws 1985 (Reg. Sess., 1986), c. 1028, s. 30 abolishes the John H. Kerr Reservoir Committee, but provides that the act does not prevent local officials in counties affected

by the reservoir from establishing a local advisory group.

Session Laws 1985 (Reg. Sess., 1986), c. 1028, s. 39 provides that ss. 1 through 31 of the act shall not affect pending litigation.

Session Laws 1985 (Reg. Sess., 1986), c. 1028, s. 38 is a severability clause.

Part 24. North Carolina Employment and Training Council.

§§ 143B-340, 143B-341: Repealed by Session Laws 1985, c. 543, s. 6, effective July 1, 1985.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1028, s. 25, effective 30 days

after ratification, also repeals these sections. Chapter 1028 was ratified July 16, 1986.

ARTICLE 8.

Department of Transportation.

Part 1. General Provisions.

§ 143B-346. Department of Transportation — purpose and functions.

Legal Periodicals. — For survey of 1984 administrative law, "A Declining Role for the

Attorney General," see 63 N.C.L. Rev. 1051 (1985).

ARTICLE 9.

Department of Administration.

Part 21. Child and Family Services Interagency Committees.

§§ 143B-426.2 to 143B-426.7A: Repealed by Session Laws 1985 (Reg. Sess., 1986), c. 1028, s. 31.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1028, s. 41 makes ss. 1 to 31 of the act effective 30 days after ratification. The act was ratified July 16, 1986.

Session Laws 1985 (Reg. Sess., 1986), c.

1028, s. 39 provides that ss. 1 through 31 of the act shall not affect pending litigation.

Session Laws 1985 (Reg. Sess., 1986), c. 1028, s. 38 is a severability clause.

Part 22. North Carolina Agency for Public Telecommunications.

§ 143B-426.11. Powers of Agency.

In order to enable it to carry out the purposes of this Part, the Agency:

- (1) Has the powers of a body corporate, including the power to sue and be sued, to make contracts, to hold and own copyrights and to adopt and use a common seal and to alter the same as may be deemed expedient;
- (2) May make all necessary contracts and arrangements with any parties which will serve the purposes and facilitate the business of the North Carolina Agency for Public Telecommunications; except that, the Agency may not contract or enter into any agreement for the production by the Agency of programs or programming materials with any person, group, or organization other than government agencies; principal State departments; public and noncommercial broadcast licensees;
- (3) May rent, lease, buy, own, acquire, mortgage, or otherwise encumber and dispose of such property, real or personal; and construct, maintain, equip and operate any facilities, buildings, studios, equipment, materials, supplies and systems as said Board may deem proper to carry out the purposes and provisions of this Part;
- (4) May establish an office for the transaction of its business at such place or places as the Board deems advisable or necessary in carrying out the purposes of this Part;
- (5) May apply for and accept loans and grants of money from any federal agency or the State of North Carolina or any political subdivision thereof or from any public or private sources for any and all of the purposes authorized in this Part; may extend or distribute the funds in accordance with directions and requirements attached thereto or imposed thereon by the federal agency, the State of North Carolina or any political subdivision thereof, or any public or private lender or donor; and may give such evidences of indebtedness as shall be required, but no indebtedness of any kind incurred or created by the Agency shall constitute an indebtedness of the State of North Carolina or any political subdivision thereof, and no such indebtedness shall involve or be secured by the faith, credit or taxing power of the

State of North Carolina or any political subdivision thereof. At no time may the total outstanding indebtedness of the Agency, excluding bond indebtedness, exceed five hundred thousand dollars (\$500,000) unless the Agency has consulted with the Director of the Budget;

- (6) May pay all necessary costs and expenses involved in and incident to the formation and organization of the Agency and incident to the administration and operation thereof, and may pay all other costs and expenses reasonably necessary or expedient in carrying out and accomplishing the purposes of this Part;
- (7) Under such conditions as the Board may deem appropriate to the accomplishment of the purposes of this Part, may distribute in the form of grants, gifts, or loans any of the revenues and earnings received by the Agency from its operations;
- (8) May adopt, alter or repeal its own bylaws, rules and regulations governing the manner in which its business may be transacted and in which the power granted to it may be exercised, and may provide for the creation of such divisions and for the appointment of such committees, and the functions thereof, as the Board deems necessary or expedient in facilitating the business and purposes of the Agency;
- (9) The Board shall be responsible for all management functions of the Agency. The chairman shall serve as the chief executive officer, and shall have the responsibility of executing the policies of the Board. The Executive Director shall be the chief operating and administrative officer and shall be responsible for carrying out the decisions made by the Board and its chairman. The Executive Director shall be appointed by the Governor upon the recommendation of the Board and shall serve at the pleasure of the Governor. The salary of the Executive Director shall be fixed by the General Assembly in the Current Operations Appropriations Act. Subject to the provisions of the State Personnel Act and with the approval of the Board, the Executive Director may appoint, employ, dismiss and fix the compensation of such professional, administrative, clerical and other employees as the Board deems necessary to carry out the purposes of this Part; but any employee who serves as the director of any division of the Agency which may be established by the Board shall be appointed with the additional approval of the Secretary of Administration. There shall be an executive committee consisting of three of the appointed members and three of the ex officio members elected by the Board and the chairman of the Board, who shall serve as chairman of the executive committee. The executive committee may do all acts which are authorized by the bylaws of the Agency. Members of the executive committee shall serve until their successors are elected;
- (10) May do any and all other acts and things in this Part authorized or required to be done, whether or not included in the general powers in this section; and
- (11) May do any and all things necessary to accomplish the purposes of this Part.

Nothing herein authorizes the Agency to exercise any control over any public noncommercial broadcast licensee, its staff or facilities or over any community antenna television system (Cable TV; CATV), its staff, employees or facilities operating in North Carolina, or the Police Information Network (PIN), its staff, employees or facilities or the Judicial Department.

The property of the Agency shall not be subject to any taxes or assessments.

Prior to taking any action under subdivisions (5) or (7) of this section, the Board may consult with the Advisory Budget Commission. (1979, c. 900, s. 1;

1983, c. 666; c. 717, s. 82; 1983 (Reg. Sess., 1984), c. 1034, s. 164; 1985, c. 122, ss. 3, 4; 1985 (Reg. Sess., 1986), c. 955, ss. 99-101.)

Editor's Note. —

Section 1 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "This act may be cited as the Separation of Powers Act of 1986."

Section 127 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "If any part of this act shall be declared invalid by any court, this shall not affect any other part of this act."

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective July 1, 1986, substituted "Director of the Budget" for "Advisory Budget Commission" at the end of subdivision (5), deleted "Subject to consultation with the Advisory Budget Commission and" at the beginning of subdivision (7), and added the last paragraph of this section.

§§ 143B-426.32 to 143B-426.34: Reserved for future codification purposes.

Part 28. Office of the State Controller.

§ 143B-426.35. Definitions.

As used in this Part, unless the context clearly indicates otherwise:

- (1) "Accounting system" means the total structure of records and procedures which discover, record, classify, and report information on the financial position and operating results of a governmental unit or any of its funds, balanced account groups, and organizational components.
- (2) "Office" means the Office of the State Controller.
- (3) "State agency" means any State agency as defined in G.S. 147-64.4(b)(2).
- (4) "State funds" means any moneys appropriated by the General Assembly, or moneys collected by or for the State, or any agency of the State, pursuant to the authority granted in any State laws. (1985 (Reg. Sess., 1986), c. 1024, s. 1.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1024, s. 27, makes this Part effective August 1, 1986.

§ 143B-426.36. Office of the State Controller; creation.

There is created the Office of the State Controller. This office shall be located administratively within the Department of Administration but shall exercise all of its prescribed statutory powers independently of the Secretary of Administration. (1985 (Reg. Sess., 1986), c. 1024, s. 1.)

§ 143B-426.37. State Controller.

(a) The Office of the State Controller shall be headed by the State Controller who shall maintain the State accounting system and shall administer the State disbursing system.

(b) The State Controller shall be a person qualified by education and experience for the office. He shall be appointed by the Governor subject to confirmation by the General Assembly. The term of office of the State Controller shall be for seven years; the first full term shall begin July 1, 1987.

The Governor shall submit the name of the person to be appointed, for confirmation by the General Assembly, to the President of the Senate and the Speaker of the House of Representatives by May 1 of the year in which the State Controller is to be appointed. If the Governor does not submit the name by that date, the President of the Senate and the Speaker of the House of Representatives shall submit a name to the General Assembly for confirmation.

In case of death, incapacity, resignation, removal by the Governor for cause, or vacancy for any other reason in the Office of State Controller prior to the expiration of his term while the General Assembly is in session, the Governor shall submit the name of his successor to the President of the Senate and the Speaker of the House of Representatives within four weeks after the vacancy occurs. If the Governor does not do so, the President of the Senate and the Speaker of the House of Representatives shall submit a name to the General Assembly for confirmation.

In case of death, incapacity, resignation, removal by the Governor for cause, or vacancy for any other reason in the Office of State Controller prior to the expiration of his term while the General Assembly is not in session, the Governor shall appoint a State Controller to serve on an interim basis pending confirmation by the General Assembly.

Notwithstanding the provisions of this section, the Governor may appoint a State Controller to serve from August 1, 1986, until July 1, 1987, or until the 1987 General Assembly disapproves the appointment.

(c) The salary of the State Controller shall be set by the General Assembly in the Budget Appropriations Act. (1985 (Reg. Sess., 1986), c. 1024, s. 1.)

§ 143B-426.38. Organization and operation of office.

(a) The State Controller may appoint a Chief Deputy State Controller. The salary of the Chief Deputy State Controller shall be set by the State Controller.

(b) The State Controller may appoint all employees necessary to carry out his powers and duties. These employees shall be subject to the State Personnel Act.

(c) All employees of the office shall be under the supervision, direction, and control of the State Controller. Except as otherwise provided by this Part, the State Controller may assign any function vested in him or his office to any subordinate officer or employee of the office.

(d) The State Controller may, subject to the provisions of G.S. 147-64.7(b)(2), obtain the services of independent public accountants, qualified management consultants, and other professional persons or experts to carry out his powers and duties.

(e) The State Controller shall have legal custody of all books, papers, documents, and other records of the office.

(f) The State Controller shall be responsible for the preparation of and the presentation of the office budget request, including all funds requested and all receipts expected for all elements of the budget.

(g) The State Controller may adopt regulations for the administration of the office, the conduct of employees of the office, the distribution and performance of business, the performance of the functions assigned to the State Controller and the office of the State Controller, and the custody, use, and preservation of the records, documents, and property pertaining to the business of the office. (1985 (Reg. Sess., 1986), c. 1024, s. 1.)

§ 143B-426.39. Powers and duties of the State Controller.

The State Controller shall:

- (1) Prescribe, develop, operate, and maintain in accordance with generally accepted principles of governmental accounting, a uniform state accounting system for all state agencies. The system shall be designed to assure compliance with all legal and constitutional requirements including those associated with the receipt and expenditure of, and the accountability for public funds.
- (2) On the recommendation of the State Auditor, prescribe and supervise the installation of any changes in the accounting systems of an agency that, in the judgement of the State Controller, are necessary to secure and maintain internal control and facilitate the recording of accounting data for the purpose of preparing reliable and meaningful statements and reports. The State Controller shall be responsible for seeing that a new system is designed to accumulate information required for the preparation of budget reports and other financial reports.
- (3) Maintain complete, accurate and current financial records that set out all revenues, charges against funds, fund and appropriation balances, interfund transfers, outstanding vouchers, and encumbrances for all State funds and other public funds including trust funds and institutional funds available to, encumbered, or expended by each State agency, in a manner consistent with the uniform State accounting system.
- (4) Prescribe the uniform classifications of accounts to be used by all State agencies including receipts, expenditures, assets, liabilities, fund types, organization codes, and purposes. The State Controller shall also, after consultation with the Office of State Budget and Management, prescribe a form for the periodic reporting of financial accounts, transactions, and other matters that is compatible with systems and reports required by the State Controller under this section. Additional records, accounts, and accounting systems may be maintained by agencies when required for reporting to funding sources provided prior approval is obtained from the State Controller.
- (5) Prescribe the manner in which disbursements of the State agencies shall be made, in accordance with G.S. 143-3.
- (6) Operate a central payroll system, in accordance with G.S. 143-3.2 and 143-34.1.
- (7) Keep a record of the appropriations, allotments, expenditures, and revenues of each State agency, in accordance with G.S. 143-20.
- (8) Make appropriate reconciliations with the balances and accounts kept by the State Treasurer.
- (9) Advise and assist the Director of the Budget with regard to the development and implementation of the State cash management policy, in accordance with G.S. 147-86.11.
- (10) Prepare and submit to the Governor, the State Auditor, the State Treasurer, and the Office of State Budget and Management each month, a report summarizing by State agency and appropriation or other fund source, the results of financial transactions. This report shall be in the form that will most clearly and accurately set out the current fiscal condition of the State. The State Controller shall also furnish each State agency a report of its transactions by appropriation or other fund source in a form that will clearly and accurately present the fiscal activities and condition of the appropriation or fund source.

- (11) Prepare and submit to the Governor, the State Auditor, the State Treasurer, and the Office of State Budget and Management, at the end of each quarter, a report on the financial condition and results of operations of the State entity for the period ended. This report shall clearly and accurately present the condition of all State funds and appropriation balances and shall include comments, recommendations, and concerns regarding the fiscal affairs and condition of the State.
- (12) Prepare on or before October 31 of each year, a Comprehensive Annual Financial Report of the preceding fiscal year, in accordance with G.S. 143-20.1.
- (13) Perform additional functions and duties assigned to the State Controller, within the scope and context of the Executive Budget Act, Chapter 143, Article 1 of the General Statutes. (1985 (Reg. Sess., 1986), c. 1024, s. 1.)

ARTICLE 10.

Department of Commerce.

Part 10. North Carolina State Ports Authority.

§ 143B-454. Powers of Authority.

In order to enable it to carry out the purposes of this Part, the said Authority shall:

- (1) Have the powers of a body corporate, including the power to sue and be sued, to make contracts, and to adopt and use a common seal and to alter the same as may be deemed expedient;
- (2) Have the authority to make all necessary contracts and arrangements with other port authorities of this and other states for the interchange of business, and for such other purposes as will facilitate and increase the business of the North Carolina State Ports Authority;
- (3) Be authorized and empowered to rent, lease, buy, own, acquire, mortgage, otherwise encumber, and dispose of such property, real or person, as said Authority may deem proper to carry out the purposes and provisions of this Part, all or any of them;
- (4) Be authorized and empowered to acquire, construct, maintain, equip and operate any wharves, docks, piers, quays, elevators, compresses, refrigeration storage plants, warehouses and other structures, and any and all facilities needful for the convenient use of the same in the aid of commerce, including the dredging of approaches thereto, and the construction of belt-line roads and highways and bridges and causeways thereon, and other bridges and causeways necessary or useful in connection therewith, and shipyards, shipping facilities, and transportation facilities incident thereto and useful or convenient for the use thereof, excluding terminal railroads;
- (5) The Secretary of Commerce with the approval of the Authority shall appoint such management personnel as he deems necessary to serve at his pleasure. The salary of the Director shall be fixed by the General Assembly in the Current Operations Appropriations Act. The Secretary of Commerce or his designee shall appoint, employ, dismiss and, within the limits of available funding, fix the compensation of such other employees as he deems necessary to carry out the purposes

of this Part. There shall be an executive committee consisting of the chairman of the Authority and two other members elected annually by the Authority. The executive committee shall be vested with authority to do all acts which are authorized by the bylaws of the Authority. Members of the executive committee shall serve until their successors are elected;

- (6) Establish an office for the transaction of its business at such place or places as, in the opinion of the Authority, shall be advisable or necessary in carrying out the purposes of this Part;
- (7) Be authorized and empowered to create and operate such agencies and departments as said board may deem necessary or useful for the furtherance of any of the purposes of this Part;
- (8) Be authorized and empowered to pay all necessary costs and expenses involved in and incident to the formation and organization of said Authority, and incident to the administration and operation thereof, and to pay all other costs and expenses reasonably necessary or expedient in carrying out and accomplishing the purposes of this Part;
- (9) Be authorized and empowered to apply for and accept loans and grants of money from any federal agency or the State of North Carolina or any political subdivision thereof or from any public or private sources available for any and all of the purposes authorized in this Article, and to expend the same in accordance with the directions and requirements attached thereto, or imposed thereon by any such federal agency, the State of North Carolina, or any political subdivision thereof, or any public or private lender or donor, and to give such evidences of indebtedness as shall be required, provided, however, that no indebtedness of any kind incurred or created by the Authority shall constitute an indebtedness of the State of North Carolina, or any political subdivisions thereof, and no such indebtedness shall involve or be secured by the faith, credit or taxing power of the State of North Carolina, or any political subdivision thereof: Provided, however, at no time may the total outstanding indebtedness of the Authority, excluding bond indebtedness exceed a total of five hundred thousand dollars (\$500,000) without approval of the Governor;
- (10) Be authorized and empowered to act as agent for the United States of America, or any agency, department, corporation, or instrumentality thereof, in any matter coming within the purposes or powers of the Authority;
- (11) Have power to adopt, alter or repeal its own bylaws, rules and regulations governing the manner in which its business may be transacted and in which the power granted to it may be enjoyed, and may provide for the appointment of such committees, and the functions thereof, as the Authority may deem necessary or expedient in facilitating its business;
- (12) Be authorized and empowered to do any and all other acts and things in this Part authorized or required to be done, whether or not included in the general powers in this section mentioned; and
- (13) Be authorized and empowered to do any and all things necessary to accomplish the purposes of this Part: Provided, that said Authority shall not engage in shipbuilding.

The property of the Authority shall not be subject to any taxes or assessments thereon.

Prior to taking any action under this subsection, the Authority may consult with the Advisory Budget Commission. (1945, c. 1097, s. 3; 1949, c. 892, s. 2; 1953, c. 191, s. 5; 1959, c. 523, ss. 3-5; 1975, c. 716, s. 2; 1977, c. 65, s. 2; c. 198, ss. 7, 9; c. 802, s. 50.45; 1979, c. 159, s. 3; 1981 (Reg. Sess., 1982), c. 1181, s. 2;

1983, c. 717, s. 84; 1985, c. 479, s. 219; 1985 (Reg. Sess., 1986), c. 955, ss. 102, 103.)

Editor's Note. —

Section 1 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "This act may be cited as the Separation of Powers Act of 1986."

Section 127 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "If any part of this act shall be declared invalid by any court, this shall not affect any other part of this act."

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective July 1, 1986, deleted "after receiving the advice of the Advisory Budget Commission" at the end of subdivision (9) and added the last paragraph of this section.

§ 143B-456. Issuance of bonds and notes.

(b) Prior to the sale and delivery of any bonds or notes by the Authority, the Governor shall approve the general purposes of and the general security provisions for any such bonds or notes. Such bonds or notes may be sold in such manner, either at public or private sale, and for such price as the Authority shall determine. Bonds or notes may be issued under the provisions of this Part without obtaining, except as otherwise expressly provided in this Part, the consent of any department, division, commission, board, body, bureau or agency of the State, and without any other proceedings or the happening of any conditions or things other than those proceedings, conditions or things which are specifically required by this Part and the provisions of the resolution authorizing the issuance of such bonds or notes or the trust agreement securing the same. Prior to taking any action under this subsection, the Governor may consult with the Advisory Budget Commission.

(1945, c. 1097, s. 4; 1975, c. 716, s. 2; 1977, c. 198, s. 9; 1979, c. 159, s. 4; 1981, c. 856, s. 1; 1981 (Reg. Sess., 1982), c. 1181, s. 1; 1985 (Reg. Sess., 1986), c. 955, ss. 104, 105.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. —

Section 1 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "This act may be cited as the Separation of Powers Act of 1986."

Section 127 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "If any part of this act

shall be declared invalid by any court, this shall not affect any other part of this act."

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective July 1, 1986, deleted "after receiving the advice of the Advisory Budget Commission" following "the Governor" in the first sentence of subsection (b) and added the last sentence of subsection (b).

Part 11A. North Carolina Hazardous Waste Treatment Commission.

§ 143B-470.3. Creation of Commission.

Membership, appointment, terms and vacancies, officers, meetings and quorum, compensation.

The North Carolina Hazardous Waste Treatment Commission is created. It shall be governed by a board composed of nine members herein referred to as the Treatment Commission. Members of the General Assembly shall be ineligible for appointment to membership on the Treatment Commission. The Governor shall appoint three members of the Treatment Commission, and the General Assembly shall appoint six members of the Treatment Commission.

The initial appointments by the Governor shall be made on or after January 31, 1985, one term to expire January 31, 1989, and two terms to expire January 31, 1987. Thereafter, at the expiration of each stipulated term of office all appointments made by the Governor shall be for a term of four years. The members of the Treatment Commission appointed by the Governor shall be selected from the State at large and insofar as practicable shall represent each geographic section of the State and the industrial and environmental interests of the State. Any vacancy occurring in the membership of the Treatment Commission appointed by the Governor shall be filled by the Governor for the unexpired term. The Governor shall have the authority to remove any member appointed by the Governor.

The General Assembly shall appoint three persons to serve terms expiring January 31, 1987. The General Assembly shall appoint three persons to serve terms expiring January 31, 1989. Successors shall serve for four-year terms. Of the three persons whose terms are to expire in 1987, two shall be appointed upon the recommendation of the President of the Senate and one shall be appointed upon the recommendation of the Speaker. Of the three persons whose terms are to expire in 1989, two shall be appointed upon the recommendation of the Speaker and one shall be appointed upon the recommendation of the President of the Senate. Appointments by the General Assembly shall be made in accordance with G.S. 120-121, and vacancies in those appointments shall be filled in accordance with G.S. 120-122. The members of the Treatment Commission appointed by the General Assembly shall be selected from the State at large and insofar as practicable shall represent each geographic section of the State and the industrial and environmental interests of the State. The General Assembly shall have the authority to remove any member appointed by the General Assembly. No member shall serve more than two consecutive four-year terms.

The Governor shall appoint from the members of the Treatment Commission the Chairman and Vice-Chairman of the Treatment Commission. The Secretary of Commerce or his designee shall serve as secretary of the Treatment Commission. The members of the Treatment Commission shall appoint a treasurer of the Treatment Commission. The Department of Commerce shall use funds already appropriated to the Department to implement this Part.

Should any one of the appointing authorities fail to make appointments by March 1, 1985, or in the event that the Chairman and Vice-Chairman of the Commission are not appointed by that date, the Treatment Commission shall proceed to elect officers and begin operation.

The Treatment Commission shall meet once in each 60 days at such regular meeting time as the Treatment Commission by rule may provide and at any place within the State as the Treatment Commission may provide, and shall also meet upon the call of its chairman or a majority of its members. A majority of its members shall constitute a quorum for the transaction of business. The members of the Treatment Commission shall be compensated for their services at the rate of one hundred fifty dollars (\$150.00) per day and shall receive travel expenses in accordance with G.S. 138-5; the members may not receive a subsistence allowance. (1983 (Reg. Sess., 1984), c. 973, s. 1; 1985 (Reg. Sess., 1986), c. 1014, s. 165.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 243, contains a severability clause.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 1, 1986, rewrote the last sentence of the last paragraph.

§ 143B-470.4. Powers and duties of the Treatment Commission.

(b) If no permit to operate a hazardous waste treatment facility has been issued to a private operator by January 1, 1986, the Treatment Commission shall actively seek communities interested in hosting hazardous waste treatment facilities and private operators of hazardous waste treatment facilities and shall present appropriate sites, as prescribed in G.S. 130A-294(g), to those operators. If no permit to operate a hazardous waste treatment facility is pending which is likely to be granted to a private operator by April 1, 1987, the Treatment Commission shall, on the basis of the criteria and procedures outlined in G.S. 130A-294(g), select appropriate site(s) and begin proceedings to purchase or if necessary condemn property for such site(s) under the State's power of eminent domain. Condemnation shall be upon the same terms and procedures as set forth in Article 9 of Chapter 136 of the General Statutes of North Carolina, except that the Treatment Commission shall have the same rights, duties, and responsibilities as set forth for the North Carolina Department of Transportation. The purposes for which the power of eminent domain is used in this section are to enable a hazardous waste treatment facility to be built which will manage hazardous waste generated by the public or by private industry in making goods for the benefit of the public, and are, therefore, public purposes for these and related purposes. The Treatment Commission shall then actively seek private operators of hazardous waste treatment facilities and shall contract with at least one operator to purchase the site and construct a hazardous waste treatment facility. If no permit to operate a hazardous waste treatment facility has been issued by September 1, 1987, the Treatment Commission shall submit to the General Assembly plans for construction of a facility on one of the sites and shall proceed to begin construction of a facility within one year and shall seek a private operator to operate the facility. If no private operator can be found, the Treatment Commission shall operate the facility.

(1983 (Reg. Sess., 1984), c. 973, s. 1; 1985, c. 711; 1985 (Reg. Sess., 1986), c. 1014, s. 166.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 243, contains a severability clause.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 1, 1986, substituted "April 1, 1987" for "July 1, 1986" in the second sentence of subsection (b) and substituted "September 1, 1987" for January 1, 1987" in the sixth sentence of subsection (b).

Part 12. North Carolina Technological Development Authority.

§ 143B-471.4. Incubator facilities program.

(e) The incubator facility and any improvements shall be owned by a county, city, political subdivision, nonprofit corporation, or charitable or educational trust, but may be leased to the grant recipient. Small business concern residents of the facility may be provided secretarial and other support facilities and utilities for which the corporation may charge them a part or all of the cost. No small business concern may remain in the facility for more than two years. Notwithstanding any other provision of law, the State shall

not be liable for any act or failure to act of any organization granted funds under this Part, or any small business concern benefiting from the incubator facilities program. (1983, c. 899, s. 2; 1985 (Reg. Sess., 1986), c. 1014, s. 161.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 243, contains a severability clause.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 21, 1983, rewrote the first sentence of subsection (e).

ARTICLE 11.

Department of Crime Control and Public Safety.

Part 1. General Provisions.

§ 143B-475.1. Deferred prosecution, community service restitution, and volunteer program.

(b) Unless a fee is assessed pursuant to G.S. 20-179.4 or G.S. 15A-1371(i), a fee of one hundred dollars (\$100.00) shall be paid by all persons who participate in the program or receive services from the program staff. If the person is convicted in a court in this State, the fee must be paid to the clerk of court in the county in which he is convicted. If the person is participating in the program as a result of a deferred prosecution or similar program, the fee must be paid to the clerk of court in the county in which the agreement is filed. Persons participating in the program for any other reason must pay the fee to the clerk of court in the county in which the services are provided by the program staff. The fee must be paid in full within two weeks from the date the person is ordered to perform the community service, and before he begins his community service, except that:

- (1) A person convicted in a court in this State may be given an extension of time or allowed to begin the community service before he pays the fee by the court in which he is convicted; or
- (2) A person performing community service pursuant to a deferred prosecution or similar agreement may be given an extension of time or allowed to begin his community service before the fee is paid by the official or agency representing the State in the agreement.

Fees collected pursuant to this subsection shall be deposited in the General Fund.

(1983 (Reg. Sess., 1984), c. 1034, s. 102; 1985, c. 451; 1985 (Reg. Sess., 1986), c. 1012, s. 4.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective August 1, 1986, substituted "one hundred dollars (\$100.00)" for "fifty dollars (\$50.00)" in the first sentence of subsection (b).

§ 143B-475.2: Repealed by Session Laws 1985 (Reg. Sess., 1986), c. 1018, s. 13, effective June 30, 1986.

Editor's Note. — As originally enacted by Session Laws 1985, c. 757, s. 164, this section was to become effective July 1, 1986. However, Session Laws 1985 (Reg. Sess., 1986), c. 851, s. 1 changed the effective date of the section to August 1, 1986. Subsequently, Session Laws 1985 (Reg. Sess., 1986), c. 1018, s. 13 repealed Session Laws 1985, c. 757, s. 164, effective June 30, 1986. Therefore, this section never went into effect.

Session Laws 1985 (Reg. Sess., 1986), c. 1018, s. 22 provides that insofar as the provisions of the act are inconsistent with the provisions of any general or special laws or parts thereof, the provisions of the act shall be controlling.

Session Laws 1985 (Reg. Sess., 1986), c. 1018, s. 23 is a severability clause.

§ 143B-476. Department of Crime Control and Public Safety — head; powers and duties as to emergencies and disasters.

(a) The head of the Department of Crime Control and Public Safety is the Secretary of Crime Control and Public Safety, who shall be known as the Secretary. The Secretary shall have such powers and duties as are conferred on him by this Chapter, delegated to him by the Governor, and conferred on him by the Constitution and laws of this State. These powers and duties include:

- (1) Accepting gifts, bequests, devises, grants, matching funds and other considerations from private or governmental sources for use in promoting the work of the Governor's Crime Commission;
- (2) Making grants for use in pursuing the objectives of the Governor's Crime Commission;
- (3) Adopting rules as may be required by the federal government for federal grants-in-aid for criminal justice purposes;
- (4) Ascertaining the State's duties concerning grants to the State by the Law Enforcement Assistance Administration of the United States Department of Justice, and developing and administering a plan to ensure that the State fulfills its duties; and
- (5) Administering the Assistance Program for Victims of Rape and Sex Offenses.

(b) The Secretary, through appropriate subunits of the department, shall, at the request of the Governor, provide assistance to State and local law-enforcement agencies, district attorneys, judges, and the Department of Correction, when called upon by them and so directed.

(c) In the event that the Governor, in the exercise of his constitutional and statutory responsibilities, shall deem it necessary to utilize the services of more than one subunit of State government to provide protection to the people from natural or man-made disasters or emergencies, including but not limited to wars, insurrections, riots, civil disturbances, or accidents, the Secretary, under the direction of the Governor, shall serve as the chief coordinating officer for the State between the respective subunits so utilized.

(d) Whenever the Secretary exercises the authority provided in subsection (c) of this section, he shall be authorized to utilize and allocate all available State resources as are reasonably necessary to cope with the emergency or disaster, including directing of personnel and functions of State agencies or units thereof for the purpose of performing or facilitating the initial response to the disaster or emergency. Following the initial response, the Secretary, in consultation with the heads of the State agencies which have or appear to have the responsibility for dealing with the emergency or disaster, shall des-

ignate one or more lead agencies to be responsible for subsequent phases of the response to the emergency or disaster. Pending an opportunity to consult with the heads of such agencies, the Secretary may make interim lead agencies designations.

(e) Every department of State government is required to report to the Secretary, by the fastest means practicable, all natural or man-made disasters or emergencies, including but not limited to wars, insurrections, riots, civil disturbances, or accidents which appear likely to require the utilization of the services of more than one subunit of State government.

(f) The Secretary is authorized to adopt rules and procedures for the implementation of this section.

(g) Nothing contained in this section shall be construed to supersede or modify those powers granted to the Governor or the Council of State to declare and react to a state of disaster as provided in Chapter 166A of the General Statutes, the Constitution or elsewhere. (1977, c. 70, s. 1; 1979, 2nd Sess., c. 1310, s. 1; 1981 (Reg. Sess., 1982), c. 1191, s. 17; 1985, c. 757, s. 164(c); 1985 (Reg. Sess., 1986), c. 1018, s. 13.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1018, s. 22 provides that insofar as the provisions of the act are inconsistent with the provisions of any general or special laws or parts thereof, the provisions of the act shall be controlling.

Session Laws 1985 (Reg. Sess., 1986), c. 1018, s. 23 is a severability clause.

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective June 30, 1986, repealed Session Laws 1985, c. 757, s. 164, which was to become effective July 1, 1986, and would have added a final sentence of subsection (a) relating to highway safety rules for for-hire motor carrier vehicles and private carrier vehicles. Therefore, the amendment by Session Laws 1985, c. 757, s. 164 never went into effect.

Part 5A. North Carolina Center for Missing Persons.

§ 143B-495. North Carolina Center for Missing Persons established.

There is established within the Department of Crime Control and Public Safety the North Carolina Center for Missing Persons, which shall be organized and staffed in accordance with applicable laws. The purpose of the Center is to serve as a central repository for information regarding missing persons and missing children, with special emphasis on missing children. The Center may utilize the Federal Bureau of Investigation/National Crime Information Center's missing person computerized file (hereinafter referred to as FBI/NCIC) through the use of the Police Information Network in the North Carolina Department of Justice. (1985, c. 765, s. 1; 1985 (Reg. Sess., 1986), c. 1000, s. 1.)

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 12, 1986, rewrote this section, which formerly

related to the North Carolina Center for Missing Children.

§ 143B-496. Definitions.

For the purpose of this Part:

- (1) "Missing child" means a juvenile as defined in G.S. 7A-517(20) whose location has not been determined, who has been reported as missing to a law-enforcement agency, and whose parent's, spouse's, guardian's or legal custodian's temporary or permanent residence is in North Carolina or is believed to be in North Carolina.
- (2) "Missing person" means any individual who is 18 years of age or older, whose temporary or permanent residence is in North Carolina, or is believed to be in North Carolina, whose location has not been determined, and who has been reported as missing to a law-enforcement agency.
- (3) "Missing person report" is a report prepared on a prescribed form for transmitting information about a missing person or a missing child to an appropriate law-enforcement agency. (1985 (Reg. Sess., 1986), c. 1000, s. 1.)

Editor's Note. — Section 2 of Session Laws 1985 (Reg. Sess., 1986), c. 1000, makes this section effective July 12, 1986.

§ 143B-497. Control of the Center.

The Center is under the direction of the Secretary of the Department of Crime Control and Public Safety and may be organized and structured in a manner as the Secretary deems appropriate to ensure that the objectives of the Center are achieved. The Secretary may employ those Center personnel as the General Assembly may authorize and provide funding for. (1985 (Reg. Sess., 1986), c. 1000, s. 1.)

Editor's Note. — Section 2 of Session Laws 1985 (Reg. Sess., 1986), c. 1000, makes this section effective July 12, 1986.

§ 143B-498. Secretary to adopt rules.

The Secretary shall adopt rules prescribing:

- (1) procedures for accepting and disseminating information maintained at the Center;
- (2) the confidentiality of the data and information, including the missing person report, maintained by the Center;
- (3) the proper disposition of all obsolete data, including the missing person report; provided, data for an individual who has reached the age of 18 and remains missing must be preserved;
- (4) procedures allowing a communication link with the Police Information Network and the FBI/NCIC's missing person file to ensure compliance with FBI/NCIC policies; and
- (5) forms, including but not limited to a missing person report, considered necessary for the efficient and proper operation of the Center. (1985 (Reg. Sess., 1986), c. 1000, s. 1.)

Editor's Note. — Section 2 of Session Laws 1985 (Reg. Sess., 1986), c. 1000, makes this section effective July 12, 1986.

§ 143B-499. Submission of missing person reports to the Center.

Any parent, spouse, guardian, or legal custodian may submit a missing person report to the Center of any missing child or missing person, regardless of the circumstances, after having first submitted a missing person report on the individual to the law-enforcement agency having jurisdiction of the area in which the individual became or is believed to have become missing, regardless of the circumstances. (1985 (Reg. Sess., 1986), c. 1000, s. 1.)

Editor's Note. — Section 2 of Session Laws 1985 (Reg. Sess., 1986), c. 1000, makes this section effective July 12, 1986.

§ 143B-499.1. Dissemination of missing persons data by law-enforcement agencies.

A law-enforcement agency, upon receipt of a missing person report by a parent, spouse, guardian, or legal custodian, shall immediately make arrangements for the entry of data about the missing person or missing child into the national missing persons file in accordance with criteria set forth by the FBI/NCIC, immediately inform all of its on-duty law-enforcement officers of the missing person report, initiate a statewide broadcast to all appropriate law-enforcement agencies to be on the lookout for the individual, and transmit a copy of the report to the Center. (1985 (Reg. Sess., 1986), c. 1000, s. 1.)

Editor's Note. — Section 2 of Session Laws 1985 (Reg. Sess., 1986), c. 1000, makes this section effective July 12, 1986.

§ 143B-499.2. Responsibilities of Center.

The Center shall:

- (1) Assist local law-enforcement agencies with entering data about missing persons or missing children into the national missing persons file, ensure that proper entry criteria have been met as set forth by the FBI/NCIC, and confirm entry of the data about the missing persons or missing children;
- (2) Gather and distribute information and data on missing children and missing persons;
- (3) Encourage research and study of missing children and missing persons, including the prevention of child abduction and the prevention of the exploitation of missing children;
- (4) Serve as a statewide resource center to assist local communities in programs and initiatives to prevent child abduction and the exploitation of missing children;
- (5) Continue increasing public awareness of the reasons why children are missing and vulnerability of missing children;
- (6) Achieve maximum cooperation with other agencies of the State, with agencies of other states and the federal government and with the

National Center for Missing and Exploited Children in rendering assistance to missing children and missing persons and their parents, guardians, spouses, or legal custodians; and cooperate with interstate and federal efforts to identify deceased individuals;

- (7) Forward the appropriate information to the Police Information Network to assist it in maintaining and publishing a bulletin of currently missing children and missing persons;
- (8) Maintain a directory of existing public and private agencies, groups, and individuals that provide effective assistance to families in the areas of prevention of child abduction, location of missing children and missing persons, and follow-up services to the child or person and family, as determined by the Secretary of Crime Control and Public Safety;
- (9) Annually compile and publish reports on the actual number of children and persons missing each year, listing the categories and causes, when known, for the disappearances;
- (10) Provide follow-up referrals for services to missing children or persons and their families;
- (11) Maintain a toll-free 1-800 telephone service that will be in service at all times; and
- (12) Perform such other activities that the Secretary of Crime Control and Public Safety considers necessary to carry out the intent of its mandate. (1985 (Reg. Sess., 1986), c. 1000, s. 1.)

Editor's Note. — Section 2 of Session Laws 1985 (Reg. Sess., 1986), c. 1000, makes this section effective July 12, 1986.

§ 143B-499.3. Duty of individuals to notify Center and law-enforcement agency when missing person has been located.

Any parent, spouse, guardian, or legal custodian who submits a missing person report to a law-enforcement agency or to the Center, shall immediately notify the law-enforcement agency and the Center of any individual whose location has been determined. The Center shall confirm the deletion of the individual's records from the FBI/NCIC's missing person file, as long as there are no grounds for criminal prosecution, and follow up with the local law-enforcement agency having jurisdiction of the records. (1985 (Reg. Sess., 1986), c. 1000, s. 1.)

Editor's Note. — Section 2 of Session Laws 1985 (Reg. Sess., 1986), c. 1000, makes this section effective July 12, 1986.

§ 143B-499.4. Release of information by Center.

The following may make inquiries of, and receive data or information from, the Center:

- (1) Any police, law-enforcement, or criminal justice agency investigating a report of a missing or unidentified person or child, whether living or deceased.

- (2) A court, upon a finding by the court that access to the data, information, or records of the Center may be necessary for the determination of an issue before the court.
- (3) Any district attorney of a judicial district in this State or the district attorney's designee or representative.
- (4) Any person engaged in bona fide research when approved by the Secretary; provided, no names or addresses may be supplied to this person.
- (5) Any other person authorized by the Secretary of the Department of Crime Control and Public Safety pursuant to G.S. 243B-498(1) [143B-498(1)]. (1985 (Reg. Sess., 1986), c. 1000, s. 1.)

Editor's Note. — Section 2 of Session Laws 1985 (Reg. Sess., 1986), c. 1000, makes this section effective July 12, 1986.

The reference in subdivision (5) of this section to § 243B-498(1) was apparently intended to refer to § 143B-498(1).

§ 143B-499.5. Provision of toll-free service; instructions to callers; communication with law-enforcement agencies.

The Center shall provide a toll-free telephone line for anyone to report the disappearance of any individual or the sighting of any missing child or missing person. The Center personnel shall instruct the caller, in the case of a report concerning the disappearance of an individual, of the requirements contained in G.S. 143B-499.3 of first having to submit a missing person report on the individual to the law-enforcement agency having jurisdiction of the area in which the individual became or is believed to have become missing. Any law-enforcement agency may retrieve information imparted to the Center by means of this phone line. The Center shall directly communicate any report of a sighting of a missing person or a missing child to the law-enforcement agency having jurisdiction in the area of disappearance or sighting. (1985 (Reg. Sess., 1986), c. 1000, s. 1.)

Editor's Note. — Section 2 of Session Laws 1985 (Reg. Sess., 1986), c. 1000, makes this section effective July 12, 1986.

§ 143B-499.6. Improper release of information; penalty.

Any person working under the supervision of the Director of Victims and Justice Services who knowingly and willfully releases, or authorizes the release of, any data, information, or records maintained or possessed by the Center to any agency, entity, or person other than as specifically permitted by Part 5A or in violation of any rule adopted by the Secretary is guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not less than five hundred dollars (\$500.00) nor more than one thousand dollars (\$1,000), imprisonment of no less than 30 days nor more than 90 days, or both. (1985 (Reg. Sess., 1986), c. 1000, s. 1.)

Editor's Note. — Section 2 of Session Laws 1985 (Reg. Sess., 1986), c. 1000, makes this section effective July 12, 1986.

Chapter 146.

State Lands.

**SUBCHAPTER II. ALLOCATED STATE
LANDS.**

Article 7.

Dispositions.

Sec.

146-29.1. Lease or sale of real property for less
than fair market value.

SUBCHAPTER I. UNALLOCATED STATE LANDS.

ARTICLE 1.

General Provisions.

**§ 146-2. Department of Administration given control of
certain State lands; general powers.**

Legal Periodicals. — For article, "The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislation, Private Claims

to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

ARTICLE 2.

Dispositions.

§ 146-3. What lands may be sold.

Legal Periodicals. —

For comment, "Sunbathers Versus Property

Owners: Public Access to North Carolina Beaches," see 64 N.C.L. Rev. 159 (1985).

§ 146-6. Title to land raised from navigable water.

Legal Periodicals. —

For comment, "Sunbathers Versus Property Owners: Public Access to North Carolina Beaches," see 64 N.C.L. Rev. 159 (1985).

For article, "The Battle to Preserve North

Carolina's Estuarine Marshes: The 1985 Legislation, Private Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

§ 146-13. Erection of piers on State lakes restricted.

CASE NOTES

Applied in *Woodlief v. Johnson*, 75 N.C. App. 49, 330 S.E.2d 265 (1985).

ARTICLE 4.

*Miscellaneous Provisions.***§ 146-20.1. Conveyance of certain marshlands validated; public trust rights reserved.**

Legal Periodicals. — For article, "The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislation, Private Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

SUBCHAPTER II. ALLOCATED STATE LANDS.

ARTICLE 7.

*Dispositions.***§ 146-29.1. Lease or sale of real property for less than fair market value.**

(a) Real property owned by the State or any State agency may not be sold, leased, or rented at less than fair market value to any private entity that operates, or is established to operate for profit.

(b) Real property owned by the State or by any State agency may be sold, leased, or rented at less than fair market value to a public entity. "Public entity" means a county, municipal corporation, local board of education, community college, special district or other political subdivision of the State and the United States or any of its agencies. Any such sale, lease, or rental shall be reported to the Joint Legislative Commission on Governmental Operations and the Fiscal Research Division of the Legislative Services Office, with the details of such transaction.

(c) Real property owned by the State or by any State agency may be sold, leased, or rented at less than market value to a private, nonprofit corporation, association, organization or society upon a determination by the Department of Administration that such transaction is in consideration of public service rendered or to be rendered. The transaction shall be reported in detail to the Joint Legislative Commission on Governmental Operations and the Fiscal Research Division of the Legislative Services Office. In the case of a private, nonprofit corporation, association, organization, or society that engages in some for-profit activities, the amount of the sale, lease, or rent shall be not less than the fair market value of the property times the percentage of the total activities of the corporation, association, organization, or society that are for profit.

(d) Any sale, lease, or rental of real property made in conformity with the provisions of this section is not a violation of G.S. 66-58(a).

(e) All sales, leases, or rentals, prior to July 15, 1986, of real property owned by the State or any State agency are not invalid because of a conflict with G.S. 66-58(a) or with a prior version of this section, but any renewal of any such lease or rental agreement on or after July 15, 1986, shall conform to the requirements of this section. (1985, c. 479, s. 172(a); 1985 (Reg. Sess., 1986), c. 1014, s. 188(a).)

Editor's Note. —

Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 243, contains a severability clause.

Effect of Amendments. — The 1985 (Reg.

Sess., 1986) amendment, effective July 15, 1986, rewrote this section.

SUBCHAPTER III. ENTRIES AND GRANTS.

ARTICLE 12.

Correction of Grants.

§ 146-55. Registration of grants.

CASE NOTES

Registration is not required to pass title under a grant. VEPCO v. Tillett, — N.C. App. —, 343 S.E.2d 188 (1986).

§ 146-60. Further extension of time for registering grants or copies for two years from January 1, 1947.

CASE NOTES

Registration is not required to pass title under a grant. VEPCO v. Tillett, — N.C. App. —, 343 S.E.2d 188 (1986).

§ 146-60.1. Further extension of time for registering grants or copies for four years from January 1, 1977.

CASE NOTES

Registration is not required to pass title under a grant. VEPCO v. Tillett, — N.C. App. —, 343 S.E.2d 188 (1986).

SUBCHAPTER IV. MISCELLANEOUS.

ARTICLE 14.

General Provisions.

§ 146-64. Definitions.

Legal Periodicals. — For article, "The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislation, Private Claims

to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

§ 146-68. Statutes of limitation.

Legal Periodicals. — For article, "The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislation, Private Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

ARTICLE 17.*Title in State.***§ 146-79. Title presumed in the State; tax titles.**

Legal Periodicals. — For article, "The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislation, Private Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

Chapter 147.

State Officers.

Article 3.

The Governor.

Sec.

147-11. Salary and expense allowance of Governor; allowance to person designated to represent Governor's office.

147-12. Powers and duties of Governor.

Article 5A.

Auditor.

Sec.

147-64.6. Duties and responsibilities.

Article 6A.

Cash Management.

147-86.11. Cash management for the State.

ARTICLE 3.

The Governor.

§ 147-11. Salary and expense allowance of Governor; allowance to person designated to represent Governor's office.

The salary of the Governor shall be one hundred thousand dollars (\$100,000) annually, payable monthly. He shall be paid annually the sum of eleven thousand five hundred dollars (\$11,500) as an expense allowance in attending to the business for the State and for expenses out of the State and in the State in representing the interest of the State and people, incident to the duties of his office, the said allowance to be paid monthly. In addition to the foregoing allowance, the actual expenses of the Governor while traveling outside the State on business incident to his office shall be paid by a warrant drawn on the State Treasurer. Whenever a person who is not a State official or employee is designated by the Governor to represent the Governor's office, such person shall be paid actual travel expenses incurred in the performance of such duty; provided that the payment of such travel expense shall conform to the provisions of the biennial appropriation act in effect at the time the payment is made. (1879, c. 240; Code, s. 3720; 1901, c. 8; Rev., s. 2736; 1907, c. 1009; 1911, c. 89; 1917, cc. 11, 235; 1919, c. 320; C.S., s. 3858; 1929, c. 276, s. 1; 1947, c. 994; 1953, c. 1, s. 1; 1961, c. 1157; 1963, c. 1178, s. 1; 1965, c. 1091, s. 1; 1971, c. 1083, s. 1; 1973, c. 600; 1977, 2nd Sess., c. 1136, s. 39; c. 1249, s. 5; 1979, 2nd Sess., c. 1137, s. 31; 1981, c. 1127, s. 7; 1983, c. 761, ss. 194, 195; c. 913, s. 45; 1983 (Reg. Sess., 1984), c. 1034, s. 217; 1985, c. 479, s. 215; 1985 (Reg. Sess., 1986), c. 1014, s. 20.)

Editor's Note. —

Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 243, contains a severability clause.

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective July 1, 1986, increased the salary of the Governor from \$98,196 annually to \$100,000 annually.

§ 147-12. Powers and duties of Governor.

In addition to the powers and duties prescribed by the Constitution, the Governor has the powers and duties prescribed in this and the following sections:

- (3) He is to make the appointments and fill the vacancies not otherwise provided for in all departments.

In every case where the Governor is authorized by statute to make an appointment to fill a State office, he may also appoint to fill any vacancy occurring in that office, and the person he appoints shall serve for the unexpired term of the office and until his successor is appointed and qualified.

In every case where the Governor is authorized by statute to appoint to fill a vacancy in an office in the executive branch of State government, the Governor may appoint an acting officer to serve

- a. During the physical or mental incapacity of the regular holder of the office to discharge the duties of his office,
- b. During the continued absence of the regular holder of the office, or
- c. During a vacancy in an office and pending the selection and qualification, in the manner prescribed by statute, of a person to serve for the unexpired term.

An acting officer appointed in accordance with this subsection may perform any act and exercise any power which a regularly appointed holder of such office could lawfully perform and exercise. All powers granted to an acting officer under this subsection shall expire immediately

- a. Upon the termination of the incapacity of the officer in whose stead he acts,
- b. Upon the return of the officer in whose stead he acts, or
- c. Upon the selection and qualification, in the manner prescribed by statute, of a person to serve for the unexpired term.

The Governor may determine (after such inquiry as he deems appropriate) that any of the officers referred to in this paragraph is physically or mentally incapable of performing the duties of his office. The Governor may also determine that such incapacity has terminated.

The compensation of an acting officer appointed pursuant to the provisions of this subdivision shall be fixed by the Governor. Prior to taking any action under this paragraph, the Governor may consult with the Advisory Budget Commission.

(1868-9, c. 270, s. 27; 1870-1, c. 111; 1883, c. 71; Code, s. 3320; 1895, c. 28, s. 5; 1905, c. 446; Rev., s. 5328; C.S., s. 7636; 1955, c. 910, s. 3; 1959, c. 285; 1967, c. 1253; 1973, c. 1148; 1981 (Reg. Sess., 1982), c. 1191, ss. 3, 4, 68; 1983, c. 913, s. 46; 1985, c. 122, s. 5; c. 757, s. 181(a); 1985 (Reg. Sess., 1986), c. 955, ss. 106, 107.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Section 1 of Session Laws 1985 (Reg. Sess., 1986), c. 955 provides: "This act may be cited as the Separation of Powers Act of 1986."

Section 127 of Session Laws 1985 (Reg. Sess.,

1986), c. 955 provides: "If any part of this act shall be declared invalid by any court, this shall not affect any other part of this act."

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective July 1, 1986, deleted "after consultation with the Advisory Budget Commission" at the end of the first sentence of the last paragraph

of subdivision (3) and added the second sentence of that paragraph.

§ 147-17. May employ counsel in cases wherein State is interested.

Legal Periodicals. —

For survey of 1984 administrative law, "A

Declining Role for the Attorney General," see

63 N.C.L. Rev. 1051 (1985).

ARTICLE 3B.

North Carolina Housing Commission.

§ 147-33.12. Commission established.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 185 amends Session Laws 1985, c. 479, s. 149, which is noted in the Editor's note under this section, by designating

the existing language as subsection (a) and adding a subsection (b) which amends § 122A-11.

ARTICLE 5A.

Auditor.

§ 147-64.6. Duties and responsibilities.

- (c) The Auditor shall be responsible for the following acts and activities:
- (1) Audits made or caused to be made by the Auditor shall be conducted in accordance with generally accepted auditing standards as prescribed by the American Institute of Certified Public Accountants, the United States General Accounting Office, or other professionally recognized accounting standards-setting bodies.
 - (2) Financial and compliance audits may be made at the discretion of the Auditor without advance notice to the organization being audited. Audits of economy and efficiency and program results shall be discussed in advance with the prospective auditee unless an unannounced visit is essential to the audit.
 - (3) The Auditor, on his own initiative and as often as he deems necessary, or as requested by the Governor or the General Assembly, shall, to the extent deemed practicable and consistent with his overall responsibility as contained in this act, make or cause to be made audits of all or any part of the activities of the State agencies.
 - (4) The Auditor, at his own discretion, may, in selecting audit areas and in evaluating current audit activity, consider and utilize, in whole or in part, the relevant audit coverage and applicable reports of the audit staffs of the various State agencies, independent contractors, and federal agencies. He shall coordinate, to the extent deemed practicable, the auditing conducted within the State to meet the needs of all governmental bodies.
 - (5) The Auditor is authorized to contract with federal audit agencies, or any governmental agency, on a cost reimbursable basis, for the Auditor to perform audits of federal grants and programs administered by the State Departments and institutions in accordance with agree-

ments negotiated between the Auditor and the contracting federal audit agencies or any governmental agency. In instances where the grantee State agency shall subgrant these federal funds to local governments, regional councils of government and other local groups or private or semiprivate institutions or agencies, the Auditor shall have the authority to examine the books and records of these subgrantees to the extent necessary to determine eligibility and proper use in accordance with State and federal laws and regulations.

The Auditor shall charge and collect from the contracting federal audit agencies, or any governmental agencies, the actual cost of all the audits of the grants and programs contracted by him to do. Amounts collected under these arrangements shall be deposited in the State Treasury and be budgeted in the Department of State Auditor and shall be available to hire sufficient personnel to perform these contracted audits and to pay for related travel, supplies and other necessary expenses.

- (6) The Auditor is authorized and directed in his reports of audits or reports of special investigations to make any comments, suggestions, or recommendations he deems appropriate concerning any aspect of such agency's activities and operations.
- (7) The Auditor shall charge and collect from each examining and licensing board the actual cost of each audit of such board. Costs collected under this subdivision shall be based on the actual expense incurred by the Auditor's office in making such audit and the affected agency shall be entitled to an itemized statement of such costs. Amounts collected under this subdivision shall be deposited into the general fund as nontax revenue.
- (8) The Auditor shall examine as often as may be deemed necessary the accounts kept by the Treasurer, and if he discovers any irregularity or deficiency therein, unless the same be rectified or explained to his satisfaction, report the same forthwith in writing to the General Assembly, with copy of such report to the Governor and Attorney General. In addition to regular audits, the Auditor shall check the treasury records at the time a Treasurer assumes office (not to succeed himself), and therein charge him with the balance in the treasury, and shall check the Treasurer's records at the time he leaves office to determine that the accounts are in order.
- (9) The Auditor may examine the accounts and records of any bank or financial institution relating to transactions with the State Treasurer, or with any State agency, or he may require banks doing business with the State to furnish him information relating to transactions with the State or State agencies.
- (10) The Auditor may, as often as he deems advisable, conduct a detailed review of the bookkeeping and accounting systems in use in the various State agencies which are supported partially or entirely from State funds. Such examinations will be for the purpose of evaluating the adequacy of systems in use by these agencies and institutions. In instances where the Auditor determines that existing systems are outmoded, inefficient, or otherwise inadequate, he shall recommend changes to the State Controller. The State Controller shall prescribe and supervise the installation of such changes, as provided in G.S. 143B-426.39 (2). Equipment of related software to be used, in whole or in part, to operate the accounting system may be acquired only upon the prior written approval of the Auditor.
- (11) The Auditor shall, through appropriate tests, satisfy himself concerning the propriety of the data presented in the Comprehensive

Annual Financial Report and shall express the appropriate auditor's opinion in accordance with generally accepted auditing standards.

- (12) The Auditor shall provide in a written statement to the Governor and Attorney General, and other appropriate officials, such facts as are in his possession which pertain to the apparent violation of penal statutes or apparent instances of malfeasance, misfeasance, or non-feasance by an officer or employee.
 - (13) At the conclusion of an audit, the Auditor or his designated representative shall discuss the audit with the official whose office is subject to audit and submit necessary underlying facts developed for all findings and recommendations which may be included in the audit report. On audits of economy and efficiency and program results, the auditee's written response shall be included in the final report if received within 30 days from receipt of the draft report.
 - (14) The Auditor shall provide copies of each audit report to the General Assembly, the Governor, the Chief Executive Officer of each agency audited, and other persons as the Auditor deems appropriate. He shall also file a copy of the audit report in the Auditor's office, which will be a permanent public record; Provided, nothing in this subsection shall be construed as authorizing or permitting the publication of information whose disclosure is otherwise prohibited by law.
 - (15) It is not the intent of the audit function, nor shall it be so construed, to infringe upon or deprive the General Assembly and the executive or judicial branches of State government of any rights, powers, or duties vested in or imposed upon them by statute or the Constitution.
- (1983, c. 913, s. 2; 1985 (Reg. Sess., 1986), c. 1024, ss. 24, 25.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1024, s. 25 purported to rewrite "G.S. 147-64.6(11)." At the direction of the Revisor of Statutes, the amendment has been effectuated in subdivision (c)(11).

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective August 1, 1986, substituted the present third and fourth sentences of subdivision (c)(10) for the former third, fourth, fifth, and sixth sentences thereof, and rewrote subdivision (c)(11).

ARTICLE 6A.

Cash Management.

§ 147-86.11. Cash management for the State.

(a) The Director of the Budget, with the advice and assistance of the State Treasurer, State Controller, and the State Auditor, shall develop, implement and amend as necessary a uniform statewide plan to carry out the cash management policy for all State agencies. The State Auditor shall report annually to the Advisory Budget Commission and the General Assembly on the implementation of the plan as shown in the audits completed during the prior fiscal year. The State Treasurer shall recommend periodically to the General Assembly any implementing legislation necessary or desirable in the furtherance of the State policy. When used in this section, "State agency" means any agency, institution, bureau, board, commission or officer of the State; however, except as provided in G.S. 147-86.12, 147-86.13, and 147-86.14, this Article shall not apply to the agencies, institutions, bureaus, boards, commissions and officers of the General Court of Justice as defined in Article IV of

the North Carolina Constitution or to the local school administrative units, community colleges, and technical institutes and their officers and employees. (1985, c. 709, s. 1; 1985 (Reg. Sess., 1986), c. 1024, s. 26.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 (Reg.

Sess., 1986) amendment, effective August 1, 1986, inserted "State Controller" in the first sentence of subsection (a).

Chapter 148.
State Prison System.

Article 1. Organization and Management.	Sec. 148-33.1. Sentencing, quartering, and control of prisoners with work-release privileges.
Sec. 148-2. Prison moneys and earnings. 148-4.1. Release of inmates.	Article 4A. Out-of-State Parolee Supervision.
Article 3. Labor of Prisoners.	148-65.1. Governor to execute compact; form of compact.
148-32.1. Local confinement, costs, alternate facilities, parole, work release.	

ARTICLE 1.
Organization and Management.

§ 148-2. Prison moneys and earnings.

(c) Notwithstanding G.S. 147-77, Article 6A of Chapter 147 of the General Statutes, or any other provision of law, the Department of Correction may deposit revenue from prison canteens in local banks. The profits from prison canteens shall be deposited with the State Treasurer on a monthly basis. (1901, c. 472, s. 7; Rev., s. 5389; C.S., s. 7704; 1923, c. 156; 1925, c. 163; 1933, c. 172, s. 18; 1957, c. 349, s. 2; 1967, c. 996, s. 14; 1973, c. 1262, s. 10; 1985 (Reg. Sess., 1986), c. 1014, s. 203.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 243, contains a severability clause.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 1, 1986, added subsection (c).

§ 148-4. Control and custody of prisoners; authorizing prisoner to leave place of confinement.

CASE NOTES

Cited in *Kandler v. Department of Cor.*, — N.C. App. —, 342 S.E.2d 910 (1986).

§ 148-4.1. Release of inmates.

(c) Persons eligible for parole under Article 85A of Chapter 15A shall be eligible for early parole under this section six months prior to the discharge date otherwise applicable, and three months prior to the date of automatic 90-day parole authorized by G.S. 15A-1380.2; provided, however, when the Secretary of Correction certifies that in his opinion a person eligible for parole under Article 85A of Chapter 15A poses no threat to society, that person shall be eligible for early parole under this section nine months prior to the dis-

charge date otherwise applicable, and six months prior to the date of automatic 90-day parole authorized by G.S. 15A-1380.2. (1983, c. 557, s. 1; 1985 (Reg. Sess., 1986), c. 1014, s. 197(a).)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. —

Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 243, contains a severability clause.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 15, 1986, added the proviso at the end of subsection (c).

ARTICLE 2.

Prison Regulations.

§ 148-13. Regulations as to custody grades, privileges, gain time credit, etc.

CASE NOTES

Trial judge's remarks concerning the effect of "good time" and "gain time", which were not an expression of dissatisfaction with the length of time convicted criminals must serve in prison, but were made in an effort to respond to defense counsel's impassioned argument concerning the fact that the defendant

would be required to serve other sentences totalling four years at the expiration of the sentence at issue, could not be said to indicate that the trial court was using the sentencing process to thwart the Fair Sentencing Act. *State v. Swimm*, — N.C. —, 340 S.E.2d 65 (1985).

ARTICLE 3.

Labor of Prisoners.

§ 148-32.1. Local confinement, costs, alternate facilities, parole, work release.

(a) The Department of Correction shall pay each local confinement facility a standard sum set by the General Assembly in its appropriation acts at a per day, per inmate rate, for the cost of providing food, clothing, personal items, supervision and necessary ordinary medical services to those male inmates committed to the custody of the local confinement facility to serve sentences of 30 days or more. This reimbursement shall not include any period of detention prior to actual commitment by the sentencing court. The Department shall also pay to the local confinement facility extraordinary medical expenses incurred for the inmates, defined as follows:

- (1) Medical expenses incurred as a result of providing health care to an inmate as an inpatient (hospitalized);
- (2) Other medical expenses when the total cost exceeds thirty-five dollars (\$35.00) per occurrence or illness as a result of providing health care to an inmate as an outpatient (nonhospitalized); and
- (3) Cost of replacement of eyeglasses and dental prosthetic devices if those eyeglasses or devices are broken while the inmate is incarcerated, provided the inmate was using the eyeglasses or devices at the time of his commitment and then only if prior written consent of the Department is obtained by the local facility.

(d) When a prisoner serving a sentence of 30 days or more in a local confinement facility is placed on work release pursuant to a recommendation of the sentencing court, the custodian of the facility shall forward the prisoner's work-release earnings to the Department of Correction, which shall disburse the earnings as determined under G.S. 148-33.1(f). When a prisoner serving a sentence of 30 days or more in a local confinement facility is placed on work release pursuant to an order of the sentencing court, the custodian of the facility shall forward the prisoner's work-release earnings to the clerk of the court that sentenced the prisoner or to the Department of Correction, as provided in the prisoner's commitment order. The clerk or the Department, as appropriate, shall disburse the earnings as provided in the prisoner's commitment order. Upon agreement between the Department of Correction and the custodian of the local confinement facility, however, the clerk may disburse to the local confinement facility, however, the clerk may disburse to the local confinement facility the amount of the earnings to be paid for the cost of the prisoner's keep, and that amount shall be set off against the reimbursement to be paid by the Department to the local confinement facility pursuant to G.S. 148-32.1(a).

(1977, c. 450, s. 3; c. 925, s. 2; 1981, c. 859, s. 25; 1985, c. 226, s. 3(1), (2); 1985 (Reg. Sess., 1986), c. 1014, ss. 199, 201(e).)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. —

Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 243, contains a severability clause.

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment by c. 1014, s. 199, effective July 1, 1986, substituted "30 days or more" for "30 to 180 days" in the first sentence of subsection (a).

The 1985 (Reg. Sess., 1986) amendment by c. 1014, s. 201(e), effective July 15, 1986, rewrote subsection (d).

§ 148-33.1. Sentencing, quartering, and control of prisoners with work-release privileges.

(a) Whenever a person is sentenced to imprisonment for a term to be served in the State prison system or a local confinement facility, the Secretary of the Department of Correction may authorize the Director of Prisons or the custodian of the local confinement facility to grant work-release privileges to any inmate who is eligible for work release and who has not been granted work-release privileges by order of the sentencing court. The Secretary of Correction shall authorize immediate work-release privileges for any person serving a sentence not exceeding five years in the State prison system and for whom the presiding judge shall have recommended work-release privileges when (i) it is verified that appropriate employment for the person is available in an area where, in the judgment of the Secretary, the Department of Correction has facilities to which the person may suitably be assigned, and (ii) custodial and correctional considerations would not be adverse to releasing the person without supervision into the free community.

(c) The State Department of Correction shall from time to time, as the need becomes evident, designate and adapt facilities in the State prison system for quartering prisoners with work-release privileges. No State or county prisoner shall be granted work-release privileges by the Director of Prisons or the custodian of a local confinement facility until suitable facilities for quartering him have been provided in the area where the prisoner has employment or the offer of employment.

(f) A prisoner who is convicted of a felony and who is granted work-release privileges shall give his work-release earnings, less standard payroll deduc-

tions required by law, to the Department of Correction. A prisoner who is convicted of a misdemeanor, is committed to a local confinement facility, and is granted work-release privileges by order of the sentencing court shall give his work-release earnings, less standard payroll deductions required by law, to the custodian of the local confinement facility. Other misdemeanants granted work-release privileges shall give their work-release earnings, less standard payroll deductions required by law, to the Department of Correction. The Department of Correction or the sentencing court, as appropriate, shall determine the amount to be deducted from a prisoner's work-release earnings to pay for the cost of the prisoner's keep and to accumulate a reasonable sum to be paid the prisoner when he is paroled or discharged from prison. The Department or sentencing court shall also determine the amount to be disbursed by the Department or clerk of court, as appropriate, for each of the following:

- (1) To pay travel and other expenses of the prisoner made necessary by his employment;
- (2) To provide a reasonable allowance to the prisoner for his incidental personal expenses;
- (3) To make payments for the support of the prisoner's dependents in accordance with an order of a court of competent jurisdiction, or in the absence of a court order, in accordance with a determination of dependency status and need made by the local department of social services in the county of North Carolina in which such dependents reside;
- (3a) To make restitution or reparation as provided in G.S. 148-33.2.
- (4) To comply with an order from any court of competent jurisdiction regarding the payment of an obligation of the prisoner in connection with any judgment rendered by the court.
- (5) To comply with a written request by the prisoner to withhold an amount, when the request has been granted by the Department or the sentencing court, as appropriate.

Any balance of his earnings remaining at the time the prisoner is released from prison shall be paid to him. The Social Services Commission is authorized to promulgate uniform rules and regulations governing the duties of county social services departments under this section.

(1957, c. 540; 1959, c. 126; 1961, c. 420; 1963, c. 469, ss. 1, 2; 1967, c. 684; c. 996, s. 13; 1969, c. 982; 1973, c. 476, s. 138; c. 1262, s. 10; 1975, c. 22, ss. 1-3; c. 679, s. 3; 1977, c. 450, ss. 4, 5; c. 614, s. 6; c. 623, ss. 1, 2; c. 711, s. 29; 1981, c. 541, ss. 1-3; 1985, c. 474, s. 3; 1985 (Reg. Sess., 1986), c. 1014, s. 201(f)-(i).)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. —

Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 243, contains a severability clause.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 15, 1986, substituted the language beginning "inmate who is eligible" for "such inmate as may be eligible for the program as is hereinafter

established" at the end of the first sentence of subsection (a), inserted "by the Director of Prisons or the custodian of a local confinement facility" in the second sentence of subsection (c), rewrote the introductory paragraph of subsection (f), deleted a sentence following subdivision (f)(4), pertaining to the discretion of the Department of Correction to grant a request made in writing by the prisoners for a withdrawal for any other purpose, and added subdivision (f)(5).

CASE NOTES

Applied in State v. Stallings, — N.C. —, 342 S.E.2d 519 (1986).

§ 148-33.2. Restitution by prisoners with work-release privileges.

CASE NOTES

And Court's Order or Recommendation, etc. —

An order of restitution as a condition of work-release must be supported by evidence adduced at trial or at sentencing. *State v. Daye*, 78 N.C. App. 753, 338 S.E.2d 557 (1986).

Amount of Restitution Must Be Supported by Evidence. — Regardless of whether restitution is ordered or recommended by the trial court, the amount must be supported by the evidence. *State v. Daye*, 78 N.C. App. 753, 338 S.E.2d 557 (1986).

There must be something more than a

guess or conjecture as to an appropriate amount of restitution, as restitution is not intended to punish defendants, but to compensate victims. *State v. Daye*, 78 N.C. App. 753, 338 S.E.2d 557 (1986).

A recommendation of restitution as a condition of work-release is not binding on the Parole Commission or Department of Corrections. *State v. Daye*, 78 N.C. App. 753, 338 S.E.2d 557 (1986).

Applied in State v. Stallings, — N.C. —, 342 S.E.2d 519 (1986).

§ 148-46. Degree of protection against violence allowed.

CASE NOTES

The use of force against prisoners may be appropriate, depending upon the existence of certain factors: (1) The need for force; (2) the amount of force needed in relation to the amount used; (3) the extent of injury

inflicted; and (4) whether the force arose out of good faith efforts to maintain discipline as opposed to the malicious infliction of harm. *Stokes v. Galyan*, 618 F. Supp. 1483 (W.D.N.C. 1985).

ARTICLE 4A.

Out-of-State Parolee Supervision.

§ 148-65.1. Governor to execute compact; form of compact.

(a) The Governor of this State is hereby authorized and directed to execute a compact on behalf of the State of North Carolina with any of the United States legally joining therein in the form substantially as follows:

A compact entered into by and among the contracting states, signatories hereto, with the consent of the Congress of the United States of America, granted by an act entitled "An Act granting the consent of Congress to any two or more states to enter into agreements or compacts for cooperative effort and mutual assistance in the prevention of crime and for other purposes."

The contracting states solemnly agree:

- (1) That it shall be competent for the duly constituted judicial and administrative authorities of a state party to this compact (herein called "sending state"), to permit any person convicted of an offense within such state and placed on probation or released on parole to reside in any other state party to this compact (herein called "receiving state"), while on probation or parole, if

- a. Such person is in fact a resident or has his family residing within the receiving state and can obtain employment there;
- b. Though not a resident of the receiving state and not having his family residing there, the receiving state consents to such person being sent there.

Before granting such permission, opportunity shall be granted to the receiving state to investigate the home and prospective employment of such person.

A resident of the receiving state, within the meaning of this section, is one who has been an actual inhabitant of such state continuously for more than one year prior to his coming to the sending state and has not resided within the sending state more than six continuous months immediately preceding the commission of the offense for which he has been convicted.

- (2) That each receiving state will assume the duties of visitation of and supervision over probationers or parolees of any sending state and in the exercise of those duties will be governed by the same standards that prevail for its own probationers and parolees.
 - (3) That duly accredited officers of a sending state may at all times enter a receiving state and there apprehend and retake any person on probation or parole. For that purpose no formalities will be required other than establishing the authority of the officer and the identity of the person to be retaken. All legal requirements to obtain extradition of fugitives from justice are hereby expressly waived on the part of states party hereto, as to such persons. The decision of the sending state to retake a person on probation or parole shall be conclusive upon and not reviewable within the receiving state; provided, however, that if at the time when a state seeks to retake a probationer or parolee there should be pending against him within the receiving state any criminal charge, or he should be suspected of having committed within such state a criminal offense, he shall not be retaken without the consent of the receiving state until discharged from prosecution or from imprisonment for such offense.
 - (4) That the duly accredited officers of the sending state will be permitted to transport prisoners being retaken through any and all states parties to this compact, without interference.
 - (5) That the governor of each state may designate an officer who, acting jointly with like officers of other contracting states, if and when appointed, shall promulgate such rules and regulations as may be deemed necessary to more effectively carry out the terms of this compact.
 - (6) That this compact shall become operative immediately upon its execution by any state as between it and any other state or states so executing. When executed it shall have the full force and effect of law within such state, the form of execution to be in accordance with the laws of the executing state.
 - (7) That this compact shall continue in force and remain binding upon each executing state until renounced by it. The duties and obligations hereunder of a renouncing state shall continue as to parolees or probationers residing therein at the time of withdrawal until retaken or finally discharged by the sending state. Renunciation of this compact shall be by the same authority which executed it, by sending six months' notice in writing of its intention to withdraw from the compact to the other state party hereto.
- (b) Persons supervised in this State pursuant to this compact shall pay the supervision fee specified in G.S. 15A-1374(c). The fee shall be paid to the clerk

of court in the county in which the person initially receives supervision services in this State. (1951, c. 1137, s. 1; 1985 (Reg. Sess., 1986), c. 859, s. 4.)

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective October 1, 1986, and applicable only to offenses committed on or after that date, designated the existing section as subsection (a) and added a new subsection (b).

Chapter 150B.

Administrative Procedure Act.

Article 1.

General Provisions.

Sec.

150B-2. Definitions.

Article 2.

Rule Making.

150B-10. Statements of organization and means of access to be published.

150B-12. Procedure for adoption of rules.

150B-13. Temporary rules.

150B-18 to 150B-21. [Reserved.]

Article 3.

Administrative Hearings.

150B-22. Settlement; contested case.

150B-23. Commencement; assignment of hearing officer; hearing required; notice; intervention.

150B-25. Conduct of hearing; answer.

150B-26. Consolidation.

150B-32. Designation of hearing officer.

150B-36. Final decision.

Article 3A.

Other Administrative Hearings.

150B-38. Scope; hearing required; notice; venue.

Sec.

150B-40. Conduct of hearing; presiding officer; ex parte communication.

Article 4.

Judicial Review.

150B-44. Right to judicial intervention when decision unreasonably delayed.

150B-47. Records filed with clerk of superior court; contents of records; costs.

Article 5.

Publication of Administrative Rules.

150B-59. Filing of rules and executive orders.

150B-60. Form of rules; responsibilities of agencies; assistance to agencies.

150B-61. Authority to revise form.

150B-62. Public inspection and notification of current and replaced rules.

150B-63. Publication of executive orders and rules; the North Carolina Register.

150B-63.1. [Repealed.]

ARTICLE 1.

General Provisions.

§ 150B-1. Policy and scope.

Editor's Note. —

Session Laws 1985 (Reg. Sess., 1986), c. 1022, s. 1(1), effective July 15, 1986, provides

that "Director" is to be substituted for "chief hearing officer" throughout Chapter 150B.

CASE NOTES

Cited in *Gardner v. North Carolina State Bar*, — N.C. —, 341 S.E.2d 517 (1986); *In re*

Environmental Mgt. Comm'n, — N.C. App. —, 341 S.E.2d 588 (1986).

§ 150B-2. Definitions.

As used in this Chapter,

- (2) "Contested case" means an administrative proceeding pursuant to this Chapter to resolve a dispute between an agency and another person that involves the person's rights, duties, or privileges, including licensing or the levy of a monetary penalty. 'Contested case' does not include rulemaking, declaratory rulings, or the award or denial of a scholarship or grant.
- (2a) "Effective" means that a valid rule has been filed as required by G.S. 150B-59 and, if applicable, that the time specified in that section has elapsed. A rule that is effective is enforceable to the extent permitted by law.
- (2b) "Hearing officer" means an administrative law judge appointed under G.S. 7A-753 or an agency employee or person or group of persons designated by an agency to preside in a contested case hearing under this Chapter.
- (9) "Valid" means that the rule has been adopted pursuant to the procedure required by law. A valid rule is unenforceable until it becomes effective. (1973, c. 1331, s. 1; 1975, 2nd Sess., c. 983, ss. 61, 62; 1977, c. 915, s. 5; 1983, c. 641, s. 1; 1985, c. 746, s. 1; 1985 (Reg. Sess., 1986), c. 1022, s. 1(2)-1(5).)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 15, 1986, rewrote subdivision (2), substituted "and, if applicable, that the time specified in that

section has elapsed" for "and either has not been delayed by or has been returned to the Administrative Rules Review Commission as required by G.S. 143A-55.3" in subdivision (2a), added subdivision (2b), and substituted "becomes" for "is made" in the second sentence of subdivision (9).

CASE NOTES

"Contested". — Case challenging a consent special order entered into by Environmental Management Commission and a corporation, which order was alleged to intrude upon the National Pollutant Discharge Elimination System (NPDES) permit process (which process requires a hearing), was "contested" for the purposes of § 150B-43. *State ex rel. Tennessee Dep't of Health & Env't v. Environmental Mgt. Comm'n*, 78 N.C. App. 763, 338 S.E.2d 781 (1986).

"Person Aggrieved." — "Procedural injury," whereby petitioner State of Tennessee's right to be heard on certain aspects of a National Pollutant Discharge Elimination System (NPDES) permit was substantially

impaired, was sufficient under § 150B-43 to qualify petitioner as an "aggrieved person" for purposes of appeal of issuance of environmental management commission's consent special order with corporation. In addition, where the consent special order contained provisions substantially identical to provisions which petitioner opposed in the proposed NPDES permit, which affected the property rights of the petitioner in the Pigeon River, these allegations also established petitioner's "aggrieved person" status. *State ex rel. Tennessee Dep't of Health & Env't v. Environmental Mgt. Comm'n*, 78 N.C. App. 763, 338 S.E.2d 781 (1986).

ARTICLE 2.

*Rule Making.***§ 150B-9. Minimum procedural requirements; limitations on rule-making authority; no criminal sanctions authorized.****Editor's Note. —**

Session Laws 1985 (Reg. Sess., 1986), c. 1028, s. 37 provides: "Each agency subject to Articles 2 and 5 of Chapter 150B of the General Statutes shall, not later than September 1, 1986, review its rules as required by Section 3 of Chapter 746 of the 1985 Session Laws except that the report required therein shall be filed with the Administrative Rules Review Commission and not the General Assembly. An agency that substantially complied with Section 3 of Chapter 746 of the 1985 Session Laws shall not refile the report filed with the General Assembly but shall supplement that re-

port by filing a similar report with the Administrative Rules Review Commission as to any rules that became effective after the preparation of the original report. The Legislative Services Officer shall deliver all reports filed in compliance with Section 3 of Chapter 746 of the 1985 Session Laws to the chairman of the Administrative Rules Review Commission. The chairman may require an agency to file a new report if there is any dispute as to whether one has been filed or whether one that has been filed complies with the requirements set forth in that section."

§ 150B-10. Statements of organization and means of access to be published.

To assist interested persons dealing with it, each agency shall, in a manner prescribed by the Director of the Office of Administrative Hearings, prepare a description of its organization, stating the process whereby the public may obtain information or make submissions or requests. The Director of the Office of Administrative Hearings shall publish these descriptions annually. (1985, c. 746, s. 1; 1985 (Reg. Sess., 1986), c. 1022, s. 1(1), 1(6).)

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 15, 1986, substituted "Director of the Office of Administrative Hearings" for "Administrative

Rules Review Commission" in the first sentence, and substituted "Director" for "chief hearing officer" in the second sentence.

§ 150B-12. Procedure for adoption of rules.

(b) The agency shall transmit copies of the notice to the Director of the Office of Administrative Hearings, the Attorney General, and the Governor.

(g) No rule-making hearing is required if the Director of the Office of Administrative Hearings determines that the amendment to a rule does not change the substance of the rule and that the amendment is:

- (1) A relettering or renumbering instruction; or,
- (2) The substitution of one name for another when an organization or position is renamed; or,
- (3) The correction of a citation to rules or laws which has become inaccurate since the rule was adopted because of repealing or renumbering of the rule or law cited; or
- (4) The correction of a similar formal defect; or
- (5) A change in information that is readily available to the public such as addresses and telephone numbers.

(1973, c. 1331, s. 1; 1975, 2nd Sess., c. 983, s. 63; 1977, c. 915, s. 2; 1983, c. 927, ss. 3, 7; 1985, c. 746, s. 1; 1985 (Reg. Sess., 1986), c. 1022, s. 1(1), 1(7).)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1986, Extra Session, c. 2, s. 1 provides: "Prior to the first publication of the North Carolina Register the notice of publication requirements of G.S. 150B-12(c) are met if an agency publishes in one or more newspapers of general circulation notice which includes:

"(1) A reference to the statutory authority under which the action is proposed.

"(2) The time and place of the public hearing and a statement of the manner in which data, views, and arguments may be submitted to the agency either at the hearing or at other times by any person.

"(3) A statement of the terms or substance of the proposed rule or a description of the subjects and issues involved, and the proposed effective date of the rule."

Session Laws 1986, Extra Session, c. 2, s. 2 provides that Session Laws 1985, c. 746, s. 14, which is noted under this section in the 1985 Cumulative Supplement, is repealed, "except that such repeal shall not affect the validity of any notices published before March 1, 1986, under that section."

Session Laws 1986, Extra Session, c. 2, s. 3 makes the act effective upon ratification. The act was ratified February 18, 1986.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 15, 1986, substituted "Director" for "chief hearing officer" in subsection (b) and substituted "Director of the Office of Administrative Hearings determines" for "Administrative Rules Review Commission certifies" in the introductory language of subsection (g).

§ 150B-13. Temporary rules.

(a) Except as provided in subsection (b) of this section, if an agency which is not exempted from the notice and hearing requirements of this Article by G.S. 150B-1 determines in writing that:

- (1) Adherence to the notice and hearing requirements of this Article would be contrary to the public interest; and that
- (2) The immediate adoption, amendment, or repeal of a rule is necessitated by and related to:
 - a. A threat to public health, safety, or welfare resulting from any natural or man-made disaster or other events that constitute a life threatening emergency;
 - b. The effective date of a recent act of the General Assembly or the United States Congress;
 - c. A federal regulation; or
 - d. A court order,

the agency may adopt, amend, or repeal the rule without prior notice or hearing or upon any abbreviated notice or hearing the agency finds practicable. The agency must accompany its rules filing with the Director of the Office of Administrative Hearings and the Governor with the agency's written certification of the finding of need for the temporary rule, together with the reasons for that finding and a copy of the notice of hearing on the proposed permanent rule.

(a1) The written certification of the finding of need for the temporary rule shall be signed by:

- (1) The member of the Council of State in the case of the Departments of Justice, Insurance, Public Education, Labor, Agriculture, Treasurer, State Auditor, or Secretary of State.
- (2) The chairman of the board in the case of an occupational licensing board or the Director of the Office of Administrative Hearings in the case of that agency.
- (3) The Governor in the case of all other agencies.

(b) If the Department of Crime Control and Public Safety, Transportation, Revenue, or Correction determines in writing that the immediate adoption, amendment, or repeal of a rule is necessitated by:

- (1) The public health, safety, or welfare;
- (2) The effective date of a recent act of the General Assembly or the United States Congress;
- (3) A federal regulation; or
- (4) A court order,

the agency may adopt, amend, or repeal the rule. The agency must accompany its rule filing with the Director of the Office of Administrative Hearings and the Governor with the agency's written certification of the finding of need for the temporary rule signed by the Governor together with the reasons for that finding. In the case of the Department of Correction, in addition to the reasons set forth in subdivisions (1) through (4) of this subsection, the Department may file a temporary rule when necessary for the management and control of persons under the custody or supervision of the Department in extraordinary circumstances as certified by the Secretary. The Department shall file any temporary rule within two working days of its adoption by the Secretary under G.S. 148-11.

(1973, c. 1331, s. 1; 1981, c. 688, s. 12; 1981 (Reg. Sess., 1982), c. 1232, s. 1; 1983, c. 857; c. 927, ss. 4, 8; 1985, c. 746, s. 1; 1985, (Reg. Sess., 1986), c. 1022, s. 1(1), 1(8).)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 15, 1986, substituted "Director" for "chief hearing

officer" in subsections (a) and (b), designated the former third sentence of subsection (a) as subsection (a1), and rewrote subdivision (a1)(2), which read: "The chairman of the board in the case of an occupational licensing board."

§ 150B-17. Declaratory rulings.

CASE NOTES

Trial Court Lacked Jurisdiction Where Declaratory Relief Not Pursued in Agency Proceeding. — Original jurisdiction for a declaratory ruling as to the rights and interest of parties in a pier and boat ramp extending over a state-owned lake rested in the Department of Natural Resources and Community Develop-

ment. As the parties did not pursue such declaratory relief and failed to exhaust their administrative remedies prior to instituting their civil action, the trial court lacked subject matter jurisdiction. *Woodlief v. Johnson*, 75 N.C. App. 49, 330 S.E.2d 265 (1985), decided under former § 150A-17.

§§ 150B-18 to 150B-21: Reserved for future codification purposes.

ARTICLE 3.

Administrative Hearings.

§ 150B-22. Settlement; contested case.

It is the policy of this State that any dispute between an agency and another person that involves the person's rights, duties, or privileges, including licensing or the levy of a monetary penalty, should be settled through informal procedures. In trying to reach a settlement through informal procedures, the agency may not conduct a proceeding at which sworn testimony is taken and witnesses may be cross-examined. Notwithstanding any other provision of

law, if the agency and the other person do not agree to a resolution of the dispute through informal procedures, either the agency or the person may commence an administrative proceeding to determine the person's rights, duties, or privileges, at which time the dispute becomes a "contested case." (1985 (Reg. Sess., 1986, c. 1022, s. 1(11).)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1022, s. 11, makes this section effective July 15, 1986.

§ 150B-23. Commencement; assignment of hearing officer; hearing required; notice; intervention.

(a) All contested cases other than those conducted under Article 3A of this Chapter shall be commenced by the filing of a petition with the Office of Administrative Hearings. The party who files the petition shall also serve a copy of the petition on all other parties and shall file a certificate of service together with the petition. Any petition filed by a party other than an agency shall be verified or supported by affidavit and shall state facts tending to establish that the agency named as the respondent has deprived the petitioner of property, has ordered the petitioner to pay a fine or civil penalty, or has otherwise substantially prejudiced the petitioner's rights and that the agency:

- (1) Exceeded its authority or jurisdiction;
- (2) Acted erroneously;
- (3) Failed to use proper procedure;
- (4) Acted arbitrarily or capriciously; or
- (5) Failed to act as required by law or rule.

The parties in a contested case shall be given an opportunity for a hearing without undue delay.

All contested cases under Chapter 126 of the General Statutes shall be conducted in the Office of Administrative Hearings, and no party may waive the right to have the case conducted in the Office of Administrative Hearings. In other contested cases, if a nonagency party commences the case, that party may waive the right to have the case conducted in the Office of Administrative Hearings in the petition filed to commence the case. If an agency commences the contested case, a nonagency party-respondent may, within 15 days of service of the petition, waive the right to have the contested case conducted in the Office of Administrative Hearings by notifying the Director of the Office of Administrative Hearings in writing. If there is more than one nonagency party-respondent, the waiver shall not be effective unless joined by all of these parties. In the absence of a waiver, a contested case under this Article shall be presided over by the Director of the Office of Administrative Hearings or an administrative law judge assigned by him. In assigning administrative law judges, the Director shall attempt to use personnel having expertise in the subject to be dealt with in the hearing.

A local government employee, applicant for employment, or former employee to whom Chapter 126 of the General Statutes applies may commence a contested case under this Article in the same manner as any other petitioner. The case shall be conducted in the Office of Administrative Hearings in the same manner as other contested cases under this Article, except that the decision of the State Personnel Commission shall be advisory only and not binding on the local appointing authority, unless (1) the employee, applicant, or former employee has been subjected to discrimination prohibited by Article 6 of Chapter 126 of the General Statutes or (2) applicable federal standards require a binding decision. In these two cases, the State Personnel Commission's decision shall be binding.

(a1) Repealed by Session Laws 1985 (Reg. Sess., 1986), c. 1022, s. 1(9), effective July 15, 1986.

(b) The parties shall be given notice not less than 15 days before the hearing by the Office of Administrative Hearings or the agency, which notice shall include:

- (1) A statement of the date, hour, place, and nature of the hearing;
- (2) A reference to the particular sections of the statutes and rules involved; and
- (3) A short and plain statement of the factual allegations.
- (4) Repealed by Session Laws 1985 (Reg. Sess., 1986), c. 1022, s. 1(9), effective July 15, 1986.

(1973, c. 1331, s. 1; 1975, 2nd Sess., c. 983, s. 65; 1985, c. 746, s. 1; 1985), (Reg. Sess., 1986, c. 1022, ss. 1(9), 1(10), 6(2), 6(3).)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 15, 1986, rewrote subsection (a), deleted subsection (a1), relating to opportunity for hearing in a contested case, added "and" at the end of subdivision (b)(2), deleted "and" at the end of sub-

division (b)(3), and deleted subdivision (b)(4), relating to procedure where the agency is the Department of Human Resources. In addition, the amendment substituted references to administrative law judges for references to hearing officers in two places in subsection (a), and substituted "Director" for "chief hearing officer" in two places in that subsection.

§ 150B-25. Conduct of hearing; answer.

(b) A party who has been served with a notice of hearing may file a written response, and a copy must be mailed to all other parties not less than 10 days before the date set for hearing.

(1973, c. 1331, s. 1; 1985, c. 746, s. 1; 1985 (Reg. Sess., 1986), c. 1022, s. 1(13).)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 15, 1986, deleted the former second sentence of

subsection (b), which read: "If the agency is the Department of Human Resources, the response may include a request for a hearing officer in the Office of Administrative Hearings as provided in G.S. 150B-32."

§ 150B-26. Consolidation.

When contested cases involving a common question of law or fact or multiple proceedings involving the same or related parties are pending, the Director of the Office of Administrative Hearings may order a joint hearing of any matters at issue in the cases, order the cases consolidated, or make other orders to reduce costs or delay in the proceedings. (1973, c. 1331, s. 1; 1985, c. 746, s. 1; 1985, (Reg. Sess., 1986), c. 1022, s. 1(1), 1(14).)

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 15, 1986, substituted "Director" for "chief hearing officer" and deleted the second sentence, relat-

ing to hearings in consolidated contested cases in the Department of Human Resources involving multiple aggrieved persons.

§ 150B-32. Designation of hearing officer.

(a) The Director of the Office of Administrative Hearings shall assign himself or a hearing officer in the Office of Administrative Hearings to preside as hearing officer in each contested case. If a party waives the right to have a case conducted in the Office of Administrative Hearings, an agency, one or more members of the agency, a person or group of persons designated by statute, or one or more hearing officers designated by the agency to conduct contested cases shall preside at the contested case.

(a1) Repealed by Sessions Laws 1985 (Reg. Sess., 1986), c. 1022, s. 1(15), effective July 15, 1986.

(b) On the filing in good faith by a party of a timely and sufficient affidavit of personal bias or disqualification of a hearing officer, the hearing officer shall determine the matter as a part of the record in the case, and this determination shall be subject to judicial review at the conclusion of the proceeding.

(1973, c. 1331, s. 1; 1985, c. 746, s. 1; 1985 (Reg. Sess., 1986), c. 1022, s. 1(1), 1(12), 1(15); c. 1028, s. 40.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1028, s. 38 is a severability clause.

Effect of Amendments. — Session Laws 1985 (Reg. Sess., 1986), c. 1022, ss. 1(1), 1(12), and 1(15), effective July 15, 1986, substituted "Director" for "chief hearing officer" in subsection (a), deleted subsection (a1), relating to a request in a contested case in the Department of Human Resources that the case be conducted by a hearing officer in the Office of Adminis-

trative Hearings and substituted "hearing officer shall determine" for "agency shall determine" in subsection (b).

Session Laws 1985 (Reg. Sess., 1986), c. 1028, s. 40, deleted "in the petition to commence the case" following "Office of Administrative Hearings" in the second sentence of subsection (a) and substituted "or one or more hearing officers designated by the agency to conduct contested cases shall preside at the contested case" for "or one or more hearing officers designated and authorized by the agency to conduct contested cases" at the end of the second sentence of subsection (a).

§ 150B-33. Powers of hearing officer.

CASE NOTES

Powers of Hearing Officer Generally. — When an agency of State government determines to use the services of a hearing officer, it is this section that prescribes his powers. The powers are limited to six categories: administering oaths, signing and issuing subpoenas, taking depositions, regulating the course of hearings, providing for pretrial conferences of parties to simplify issues, and making application to the court for a contempt order. State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 61 N.C. App. 262, 300 S.E.2d 586, cert. denied, 308 N.C. 548, 304 S.E.2d 242 (1983), decided under former Chapter 150A.

Proposal for Decision Required of Hearing Officer. — Under the Administrative Procedure Act, when the services of a hearing officer are used, there must be a "proposal for decision" by the hearing officer. State ex rel. Com-

missioner of Ins. v. North Carolina Rate Bureau, 61 N.C. App. 262, 300 S.E.2d 586, cert. denied, 308 N.C. 548, 304 S.E.2d 242 (1983), decided under former Chapter 150A.

For discussion of respective powers and duties of Commissioner of Insurance and his designated hearing officer in the review of filed rates and entry of a final agency decision in a contested insurance rate case, see State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 61 N.C. App. 506, 300 S.E.2d 845 (1983), decided under former Chapter 150A.

Commissioner of Insurance Has No Statutory Power to Issue Restraining Orders or Injunctions. — The statutes creating the Department of Insurance and prescribing the powers and duties of the Commissioner do not purport to grant him the power of issuing re-

straining orders and injunctions. *Charlotte Liberty Mut. Ins. Co. v. State ex rel. Lanier*, 16 N.C. App. 381, 192 S.E.2d 57 (1972).

But He May Apply to the Courts Therefor. — In administering the laws relative to the insurance industry, the Commissioner, if he deems it necessary, may apply to the courts for restraining orders and injunctions. *Charlotte Liberty Mut. Ins. Co. v. State ex rel. Lanier*, 16 N.C. App. 381, 192 S.E.2d 57 (1972).

Attempted grant to the Commissioner of Insurance of judicial power to impose a penalty upon an insurance agent for a violation of the insurance laws, varying in the Commissioner's discretion from a nominal sum to \$25,000, violated Article IV of the North Carolina Constitution, there being no reasonable necessity for conferring such judicial power upon the Commissioner. *State ex rel. Lanier v. Vines*, 274 N.C. 486, 164 S.E.2d 161 (1986).

§ 150B-36. Final decision.

A final decision or order in a contested case shall be made by the agency in writing after review of the official record as defined in G.S. 150B-37(a) and shall include findings of fact and conclusions of law. If the agency does not adopt the hearing officer's recommended decision as its final decision in a contested case conducted by a hearing officer, the agency shall include in its decision or order the specific reasons why the hearing officer's recommended decision is not adopted. The agency may consider only the official record prepared pursuant to G.S. 150B-37 in making a final decision or order, and the final decision or order shall be supported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31. A copy of the decision or order shall be served upon each party personally or by certified mail addressed to the party at the latest address given by the party to the agency, and a copy shall be furnished to his attorney of record and the Office of Administrative Hearings. (1973, c. 1331, s. 1; 1975, 2nd Sess., c. 983, s. 67; 1985, c. 746, s. 1; 1985 (Reg. Sess., 1986) c. 1022, s. 1(16).)

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 15, 1986, rewrote the third sentence and added

"and the Office of Administrative Hearings" at the end of the last sentence.

ARTICLE 3A.

Other Administrative Hearings.

§ 150B-38. Scope; hearing required; notice; venue.

(e) All hearings conducted under this Article shall be open to the public. A hearing conducted by the agency shall be held in the county where the agency maintains its principal office. A hearing conducted for the agency by an administrative law judge requested under G.S. 150B-40 shall be held in a county in this State where any person whose property or rights are the subject matter of the hearing resides. If a different venue would promote the ends of justice or better serve the convenience of witnesses, the agency or the administrative law judge may designate another county. A person whose property or rights are the subject matter of the hearing waives his objection to venue if he proceeds in the hearing.

(1985, c. 746, s. 1; 1985 (Reg. Sess., 1986), c. 1022, s. 6(3).)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 (Reg.

Sess., 1986) amendment, effective July 15, 1986, substituted "administrative law judge" for "hearing officer" throughout subsection (e).

§ 150B-40. Conduct of hearing; presiding officer; ex parte communication.

(e) When a majority of an agency is unable or elects not to hear a contested case, the agency shall apply to the Director of the Office of Administrative Hearings for the designation of an administrative law judge to preside at the hearing of a contested case under this Article. Upon receipt of the application, the Director shall, without undue delay, assign an administrative law judge to hear the case.

The provisions of this Article, rather than the provisions of Article 3, shall govern a contested case in which the agency requests an administrative law judge from the Office of Administrative Hearings.

The administrative law judge assigned to hear a contested case under this Article shall sit in place of the agency and shall have the authority of the presiding officer in a contested case under this Article. The administrative law judge shall make a proposal for decision, which shall contain proposed findings of fact and proposed conclusions of law.

An administrative law judge shall stay any contested case under this Article on motion of an agency which is a party to the contested case, if the agency shows by supporting affidavits that it is engaged in other litigation or administrative proceedings, by whatever name called, with or before a federal agency, and this other litigation or administrative proceedings will determine the position, in whole or in part, of the agency in the contested case. At the conclusion of the other litigation or administrative proceedings, the contested case shall proceed and be determined as expeditiously as possible.

The agency may make its final decision only after the administrative law judge's proposal for decision is served on the parties, and an opportunity is given to each party to file exceptions and proposed findings of fact and to present oral and written arguments to the agency. (1985, c. 746, s. 1; 1985 (Reg. Sess., 1986), c. 1022, ss. 1(1), 6(3), 6(4).)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 15,

1986, substituted "Director" for "chief hearing officer," "an administrative law judge" for "a hearing officer," and "administrative law judge's" for "hearing officer's" throughout subsection (e).

ARTICLE 4.

Judicial Review.

§ 150B-43. Right to judicial review.

Local Modification. — (As to Article 4)
City of Gastonia: 1985 (Reg. Sess., 1986), c. 902, s. 3.

CASE NOTES

There are five requirements under this section: (1) Plaintiff must be an aggrieved person; (2) there must be a final agency decision; (3) the decision must result from a contested case; (4) petitioner must have exhausted administrative remedies; and (5) there must be no other adequate procedure for judicial review. *State ex rel. Tennessee Dep't of Health & Env't v. Environmental Mgt. Comm'n*, 78 N.C. App. 763, 338 S.E.2d 781 (1986).

"Contested" Proceeding. — Case challenging a consent special order entered into by Environmental Management Commission and a corporation, which order was alleged to intrude upon the NPDES permit process (which process requires a hearing), was "contested" for the purposes of this section. *State ex rel. Tennessee Dep't of Health & Env't v. Environmental Mgt. Comm'n*, 78 N.C. App. 763, 338 S.E.2d 781 (1986).

"Person Aggrieved". — "Procedural in-

jury," whereby petitioner State of Tennessee's right to be heard on certain aspects of a National Pollutant Discharge Elimination System (NPDES) permit was substantially impaired, was sufficient under this section to qualify petitioner as an "aggrieved person" for purposes of appeal of issuance of Environmental Management Commission's consent special order with corporation. In addition, where the consent special order contained provisions substantially identical to provisions which petitioner opposed in the proposed NPDES permit, which affected the property rights of the petitioner in the Pigeon River, these allegations also established petitioner's "aggrieved person" status. *State ex rel. Tennessee Dep't of Health & Env't v. Environmental Mgt. Comm'n*, 78 N.C. App. 763, 338 S.E.2d 781 (1986).

Cited in *In re Mason ex rel. Huber*, 78 N.C. App. 16, 337 S.E.2d 99 (1985).

§ 150B-44. Right to judicial intervention when decision unreasonably delayed.

Unreasonable delay on the part of any agency or hearing officer in taking any required action shall be justification for any person whose rights, duties, or privileges are adversely affected by such delay to seek a court order compelling action by the agency or hearing officer.

An agency's failure to make a final decision within 60 days of receiving the official record from the hearing officer constitutes an unreasonable delay; provided that boards and commissions shall make a final decision at their next regularly scheduled meeting, but in any case no later than 120 days after the official record is received. (1973, c. 1331, s. 1; 1985, c. 746, s. 1; 1985 (Reg. Sess., 1986), c. 1022, s. 1(17).)

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 15, 1986, added the second paragraph.

§ 150B-45. Manner of seeking review; time for filing petition; waiver.

Local Modification. — City of Gastonia: 1985 (Reg. Sess., 1986), c. 902, s. 3.

§ 150B-46. Contents of petition; copies served on all parties; intervention.

CASE NOTES

"Explicit" means characterized by full clear expression; being without vagueness or ambiguity; leaving nothing implied. *Vann v. North*

Carolina State Bar, — N.C. App. —, 339 S.E.2d 97 (1986), decided under former § 150A-46.

§ 150B-47. Records filed with clerk of superior court; contents of records; costs.

Within 30 days after receipt of the copy of the petition for review, or within such additional time as the court may allow the Office of Administrative Hearings, or if that office did not conduct the contested case, the agency shall transmit to the reviewing court the original or a certified copy of the official record of the hearing in the contested case under review. With the permission of the court, the record may be shortened by stipulation of all parties to the review proceedings. Any party unreasonably refusing to stipulate to limit the record may be taxed by the court for such additional costs as may be occasioned by the refusal. The court may require or permit subsequent corrections or additions to the record when deemed desirable. (1973, c. 1331, s. 1; 1983, c. 919, s. 3; 1985, c. 746, s. 1; 1985 (Reg. Sess., 1986), c. 1022, s. 1(18).)

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 15, 1986, inserted "Office of Administrative Hear-

ings, or if that office did not conduct the contested case, the" in the first sentence.

§ 150B-51. Scope of review; power of court in disposing of case.

CASE NOTES

I. IN GENERAL.

Review of a decision by the Commission of Motor Vehicles is governed by § 150A-51 (see now this section). *GMC v. Kinlaw*, 78 N.C. App. 521, 338 S.E.2d 114 (1985).

Basis for Review of Personnel Commission Decision. — While respondent's and petitioner's motions for summary judgment in superior court on review of State Personnel Commission's decision were procedurally incorrect, the trial court's order allowing respondent's motion for summary judgment was tantamount to affirming the full Commission's rul-

ing, and sufficiently set forth a reviewable basis for affirming such ruling. *Parks v. Department of Human Resources*, — N.C. App. —, 338 S.E.2d 826 (1986).

Cited in *In re Mason*, ex rel. Huber, 78 N.C. App. 16, 337 S.E.2d 99 (1985).

II. "WHOLE RECORD" TEST.

The Standard of Judicial Review, etc. —

In reviewing an administrative decision to determine whether the decision is supported by substantial evidence, the appellate court must apply the "whole record" test. *Leiphart v. North Carolina School of Arts*, — N.C. App. —,

342 S.E.2d 914 (1986), decided under former § 150A-51.

Court Must Consider All Evidence. — The applicable scope of review of the decision of an administrative agency is the "whole record" test. In applying the whole record test, the court must consider all the evidence, including that which supports the findings and contradictory evidence. *Mount Olive Home Health Care Agency, Inc. v. N.C. Dep't of Human Resources*, 78 N.C. App. 224, 336 S.E.2d 625 (1985), decided under former § 150A-51.

The "whole record" test requires the court to take into account all the evidence, both that which supports the decision of the Commission and that which in fairness detracts from it. *Leiphart v. North Carolina School of Arts*, — N.C. App. —, 342 S.E.2d 914 (1986), decided under former § 150A-51.

Court May Not Replace Agency's Judgment, etc. —

In accord with 1st paragraph in 1985 Cumulative Supplement. See *Crump v. Board of Educ.*, — N.C. App. —, 339 S.E.2d 483 (1986), decided under former § 150A-51.

When, in applying the whole record test, reasonable but conflicting views emerge from the evidence, the Court of Appeals cannot replace the agency's judgment with its own. It must, however, take into account whatever in the record fairly detracts from the weight of the evidence which supports the decision. Ultimately it must determine whether the decision has a rational basis in the evidence. *GMC v. Kinlaw*, 78 N.C. App. 521, 338 S.E.2d 114 (1985), decided under former § 150A-51.

Including Contradictory and Conflicting Evidence. —

In accord with 1985 Cumulative Supplement. See *Crump v. Board of Educ.*, — N.C. App. —, 339 S.E.2d 483 (1986), decided under former § 150A-51.

An agency decision may be reversed or modified if it is unsupported by substantial evidence, in view of the entire record as submitted. This standard of review is known as the "whole record" test. *GMC v. Kinlaw*, 78 N.C. App. 521, 338 S.E.2d 114 (1985), decided under former § 150A-51.

ARTICLE 5.

Publication of Administrative Rules.

§ 150B-58. Short title.

Editor's Note. —

Session Laws 1985 (Reg. Sess., 1986), c. 1028, s. 37 provides: "Each agency subject to Articles 2 and 5 of Chapter 150B of the General Statutes shall, not later than September 1, 1986, review its rules as required by Section 3 of Chapter 746 of the 1985 Session Laws except that the report required therein shall be filed with the Administrative Rules Review Commission and not the General Assembly. An agency that substantially complied with Section 3 of Chapter 746 of the 1985 Session Laws shall not refile the report filed with the General Assembly but shall supplement that re-

port by filing a similar report with the Administrative Rules Review Commission as to any rules that became effective after the preparation of the original report. The Legislative Services Officer shall deliver all reports filed in compliance with Section 3 of Chapter 746 of the 1985 Session Laws to the chairman of the Administrative Rules Review Commission. The chairman may require an agency to file a new report if there is any dispute as to whether one has been filed or whether one that has been filed complies with the requirements set forth in that section."

§ 150B-59. Filing of rules and executive orders.

(a) Rules adopted by an agency and executive orders of the Governor shall be filed with the Director of the Office of Administrative Hearings. No rule, except temporary rules adopted under the provisions of G.S. 150B-13 or rules approved under G.S. 143B-30.2(e) or (f), shall become effective earlier than the first day of the second calendar month after that filing.

(b) The acceptance for filing of a rule by the Director, by his notation on its face, shall constitute prima facie evidence of compliance with this Article.

(c) Rules adopted by an agency subject to the provisions of Article 2 of this Chapter in effect on January 1, 1986, that conflict with or violate the provi-

sions of G.S. 150B-9(c) are repealed. Rules adopted by an agency subject to the provisions of Article 2 of this Chapter in effect on September 1, 1986, that do not conflict with or violate the provisions of G.S. 150B-9(c) shall remain in effect until June 30, 1988. These rules are repealed effective July 1, 1988, unless the Administrative Rules Review Commission determines that a rule complies with G.S. 143B-30.2(a). Review of these rules shall be carried out in the manner prescribed in G.S. 143B-30.2 except that a rule determined to be in compliance shall remain in effect. Rules adopted on or after January 1, 1986, shall become effective as provided in this Chapter. (1973, c. 1331, s. 1; 1975, c. 69, ss. 1, 2, 5, 6; 1979, c. 571, s. 1; 1981, c. 688, s. 13; 1981 (Reg. Sess., 1982), c. 1233, s. 6; 1983, c. 641, s. 5; c. 927, s. 5; 1985, c. 746, s. 1; 1985 (Reg. Sess., 1986), c. 851, ss. 5, 6; c. 1022, s. 1(1); c. 1028, ss. 34, 36.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1028, s. 38 is a severability clause.

Effect of Amendments. — Session Laws 1985 (Reg. Sess., 1986), c. 851, ss. 5, 6, effective June 30, 1986, substituted "July 31, 1986" for "June 30, 1986" in the second and third sentences of subsection (c) and substituted "August 1, 1986" for "July 1, 1986" in the third sentence of subsection (c) as it read prior to amendment by Session Laws 1985 (Reg. Sess., 1986), c. 1028.

Session Laws 1985 (Reg. Sess., 1986), c. 1022, s. 1(1), effective July 15, 1986, substituted "Director" for "chief hearing officer" in subsections (a) and (b).

Session Laws 1985 (Reg. Sess., 1986), c. 1028, ss. 34 and 36 effective July 16, 1986, substituted "or rules approved under G.S.

143B-30.2(e) or (f)" for "or curative rules adopted pursuant to G.S. 143B-29.2(d)" in the second sentence of subsection (a), and rewrote the second, third and fourth sentences of subsection (c), which read, "Rules adopted by an agency subject to the provisions of Article 2 of this Chapter in effect on January 1, 1986, that do not conflict with or violate the provisions of G.S. 150B-9(c) shall remain in effect until June 30, 1986. These rules are repealed effective July 1, 1986, unless approved by the General Assembly on or before June 30, 1986. The approval of rules by the General Assembly shall not be deemed to enact the approved rules or to prohibit their subsequent amendment, repeal or recodification under the provisions of this chapter."

Subsection (c) is set out above as amended by Session Laws 1985 (Reg. Sess., 1986), c. 1028.

§ 150B-60. Form of rules; responsibilities of agencies; assistance to agencies.

- (a) In order to be acceptable for filing, the rule must:
- (1) Cite the statute or other authority pursuant to which the rule is adopted;
 - (2) Bear a certification by the agency of its adoption;
 - (3) Cite any prior rule or rules of the agency or its predecessor in authority which it rescinds, amends, supersedes, or supplements;
 - (4) Be in the physical form specified by the Director of the Office of Administrative Hearings; and
 - (5) Bear a notation from the Administrative Rules Review Commission that it has reviewed and approved the rule in accordance with G.S. 143B-30.2.
- (c) The Director of the Office of Administrative Hearings shall:
- (1) Maintain an agency rule-drafting section in the Office of Administrative Hearings to draft or aid in the drafting of rules or amendments to rules for any agency; and
 - (2) Prepare and publish an agency rule-drafting guide which sets out the form and method for drafting rules and amendments to rules, and to which all rules shall comply. (1973, c. 1331, s. 1; 1979, c. 571, s. 1; 1981, c. 688, s. 14; 1983, c. 927, ss. 6, 9; 1985, c. 746, s. 1; 1985 (Reg. Sess., 1986), c. 1022, s. 1(1); c. 1028, s. 35.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1028, s. 38 is a severability clause.

Effect of Amendments. — Session Laws 1985 (Reg. Sess., 1986), c. 1022, s. 1(1), effective July 15, 1986, substituted "Director" for "chief hearing officer" in subdivision (a)(4) and in subsection (c).

Session Laws 1985 (Reg. Sess., 1986), c. 1028, s. 35, effective July 16, 1986, rewrote subdivision (a)(5) which formerly read: "Bear a notation by the Governor that the rule has been submitted in accordance with G.S. 143A-55.3(c). This subdivision does not apply to rules adopted by the Industrial Commission, or by the Utilities Commission, or to rules adopted by the Department of Transportation relating to traffic sign ordinances or road and bridge weight limits."

§ 150B-61. Authority to revise form.

(a) The Director of the Office of Administrative Hearings shall have the authority, following acceptance of a rule for filing, to revise the form of the rule as follows:

- (1) To rearrange the order of rules, Chapters, Subchapters, Articles, sections, paragraphs, and other divisions or subdivisions;
- (2) To provide or revise titles or catchlines;
- (3) To reletter or renumber the rules and various subdivisions in accordance with a uniform system;
- (4) To rearrange definitions and lists; and
- (5) To make other changes in arrangement or in form that do not alter the substance of the rule and that are necessary or desirable for an accurate, clear, and orderly arrangement of the rules.

Revision of form by the Director shall not alter the effective date of a rule, nor shall revision require the agency to readopt or to refile the rule. No later than the close of the fifth working day after the filing of a rule by an agency, the Director shall return to the agency that filed the rule a copy of the rule in any revised form made by the Director, together with his certification of the date of the rule's filing.

The rule so revised as to form shall be substituted for and shall bear the date of the rule originally filed, and shall be the official rule of the agency.

(b) In determining the drafting form of rules the Director shall:

- (1) Minimize duplication of statutory language;
- (2) Not permit incorporations into the rules by reference to publications or other documents which are not conveniently available to the public; and
- (3) To the extent practicable, use plain language in rules and avoid technical language. (1973, c. 1331, s. 1; 1985, c. 746, s. 1; 1985 (Reg. Sess., 1986), c. 1022, s. 1(1).)

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 15, 1986, substituted "Director" for "chief hearing officer" throughout the section.

§ 150B-62. Public inspection and notification of current and replaced rules.

(a) Immediately upon notation of a filing as specified in G.S. 150B-59(b), the Director of the Office of Administrative Hearings shall make the rule available for public inspection during regular office hours. Superseded, amended, revised, and rescinded rules filed in accordance with the provisions of this Article shall remain available for public inspection. The current and

the prior rules so filed shall be separately arranged in compliance with the provisions of G.S. 150B-61(a).

(b) The Director shall make copies of current and prior rules, filed in accordance with the provisions of this Article, available to the public at a cost to be determined by him.

(c) Within 50 days of the acceptance by the Director of a rule for filing, the agency filing the rule:

- (1) Shall publish the rule as prescribed in any applicable statute; and
- (2) May distribute the rule in a manner selected by the agency as best calculated to give notice to persons likely to be affected by the rule.

The rule so published or distributed shall contain the legend: "The form of this rule may be revised by the Director pursuant to the provisions of G.S. 150B-61." (1973, c. 1331, s. 1; 1985, c. 746, s. 1; 1985 (Reg. Sess., 1986), c. 1022, s. 1(1).)

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 15, 1986, substituted "Director" for "chief hearing officer" throughout the section.

§ 150B-63. Publication of executive orders and rules; the North Carolina Register.

(a) The Director of the Office of Administrative Hearings shall compile, index and publish executive orders of the Governor and all rules filed and effective pursuant to the provisions of this Article.

(c) If the Director determines that publication of any rule would be impracticable, he shall substitute a summary with specific reference to the official rule on file in his office.

(d) As soon as practicable after July 1, 1985, the Director shall publish, in print or other form, a compilation of all rules in force pursuant to the provisions of this Article. Cumulative supplements shall be published annually or more frequently in the discretion of the Director. Recompilations shall be made in the Director's discretion.

(d1) The Director shall also publish at periodic intervals, but not less often than once each month, the North Carolina Register which shall contain information required by law to be published in it, and information relating to agency, executive, legislative or judicial actions that are performed under the authority of, or are required by, or are issued to interpret, or that otherwise affect, this Chapter. The North Carolina Register shall also contain notices under G.S. 120-165(a).

(d2) In publishing proposed amendments to rules, the Director shall show the portion of the rule being amended as it is to the degree necessary to provide adequate notice of the nature of the proposed amendment, with changes shown by striking through portions to be deleted and underlining portions to be added.

(e) Notwithstanding G.S. 147-50, reference copies of the compilation, supplements, and recompilations of the rules, and the North Carolina Register shall be distributed by the Director as soon after publication as practicable, without charge, only to the following officials and departments:

- (1) One copy to each county of the State, which copy may be maintained for public inspection in the county in a place determined by the county commissioners; one copy each to the clerk of the Supreme Court of North Carolina and the clerk of the North Carolina Court of Appeals; one copy each to the libraries of the Supreme Court of North Carolina and the North Carolina Court of Appeals; one copy to the office of the Governor; and five copies to the Legislative Services Commission for the use of the General Assembly;

- (2) One copy to each State official and department to which copies of the appellate division reports are furnished under G.S. 7A-343.1;
- (3) Five copies to the Division of State Library of the Department of Cultural Resources, pursuant to G.S. 147-50.1; and
- (4) One copy of the North Carolina Register to each member of the General Assembly.

(f) The Director shall make available copies of the compilation, supplements and recomputations of the rules and the North Carolina Register to other persons at a price determined by him to cover publication and mailing costs. All moneys received by the Office of Administrative Hearings pursuant to this section from the sale of copies of said publications shall be deposited in the State treasury in a special funds account to be held in trust for the Office of Administrative Hearings to defray the expense of future recompilation, publication, and distribution of such documents. All moneys involved shall be subject to audit by the State Auditor.

(g) Notwithstanding any other provision of law, the Employment Security Commission shall, within 15 days of adoption, file all rules adopted by it with the Director for public inspection and publication purposes only. The Director shall compile, make available for inspection, and publish the rules filed under this subsection in the same manner as is provided for other rules. (1973, c. 1331, s. 1; c. 69, ss. 3, 7; c. 688, s. 1; 1979, c. 541, s. 2; 1979, 2nd Sess., c. 1266, ss. 1-3; 1981 (Reg. Sess., 1982), c. 1359, s. 6; 1983, c. 641, s. 6; 1985, c. 746, s. 1; 1985 (Reg. Sess., 1986), c. 1003, s. 2; c. 1022, ss. 1(1), 1(19); c. 1032, s. 12.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — Session Laws 1985 (Reg. Sess., 1986), c. 1003, s. 2, effective July 14, 1986, added the second sentence of subsection (d1).

Session Laws 1985 (Reg. Sess., 1986), c. 1022, s. 1(1), effective July 1, 1986, substituted references to the Director for references to the chief hearing officer throughout the section.

Session Laws 1985 (Reg. Sess., 1986), c. 1022, s. 1(19), effective July 15, 1986, inserted "Notwithstanding G.S. 147-50" and inserted "only" in the introductory language of subsection (e).

Session Laws 1985 (Reg. Sess., 1986), c. 1032, s. 12, effective July 16, 1986, inserted "required by law to be published in it, and information" near the middle of subsection (d1).

§ 150B-63.1: Repealed by Session Laws 1985 (Reg. Sess., 1986), c. 1022, s. 1(20), effective July 15, 1986.

Chapter 153A.

Counties.

Article 4.

Form of Government.

Part 4. Modification in the Structure of the Board of Commissioners.

Sec.

153A-58. Optional structures.

153A-64. Filing results of election.

153A-65 to 153A-75. [Reserved.]

Article 15.

Public Enterprises.

Part 4. Long Term Contracts for Disposal of Solid Waste.

153A-299.6. Applicability.

Article 16.

County Service Districts; County Research and Production Service Districts.

Part 1. County Service Districts.

Sec.

153A-309.1. [Reserved.]

Article 23.

Miscellaneous Provisions.

153A-435. Liability insurance; damage suits against a county involving governmental functions.

ARTICLE 2.

Corporate Powers.

§ 153A-11. Corporate powers.

CASE NOTES

County and County Commissioners Do Not Have Sovereign Immunity. — These powers and the many others enumerated in this Chapter show that a county and the

county commissioners are not part of the State of North Carolina and they do not enjoy its sovereign immunity. *Meares v. Brunswick County*, 615 F. Supp. 14 (E.D.N.C. 1985).

§ 153A-12. Exercise of corporate power.

CASE NOTES

County and County Commissioners Do Not Have Sovereign Immunity. — These powers and the many others enumerated in this Chapter show that a county and the

county commissioners are not part of the State of North Carolina and they do not enjoy its sovereign immunity. *Meares v. Brunswick County*, 616 F. Supp. 14 (E.D.N.C. 1985).

ARTICLE 4.

Form of Government.

Part 4. Modification in the Structure of the Board of Commissioners.

§ 153A-58. Optional structures.

A county may alter the structure of its board of commissioners by adopting one or any combination of the options prescribed by this section.

(3) Mode of election of the board of commissioners:

- a. The qualified voters of the entire county shall nominate all candidates for and elect all members of the board.

For options b, c, and d, the county shall be divided into electoral districts, and board members shall be apportioned to the districts so that the quotients obtained by dividing the population of each district by the number of commissioners apportioned to the district are as nearly equal as practicable.

- b. The qualified voters of each district shall nominate candidates and elect members who reside in the district for seats apportioned to that district; and the qualified voters of the entire county shall nominate candidates and elect members apportioned to the county at large, if any.
- c. The qualified voters of each district shall nominate candidates who reside in the district for seats apportioned to that district, and the qualified voters of the entire county shall nominate candidates for seats apportioned to the county at large, if any; and the qualified voters of the entire county shall elect all the members of the board.
- d. Members shall reside in and represent the districts according to the apportionment plan adopted, but the qualified voters of the entire county shall nominate all candidates for and elect all members of the board.

If any of options b, c, or d is adopted, the board shall divide the county into the requisite number of electoral districts according to the apportionment plan adopted, and shall cause a delineation of the districts so laid out to be drawn up and filed as required by G.S. 153A-20. No more than half the board may be apportioned to the county at large.

(1927, c. 91, s. 3; 1969, c. 717, s. 1; 1973, c. 822, s. 1.)

Only Part of Section Set Out. — As the rest of the section was not affected, it is not set out.

Editor's Note. — Subdivision (3) of this section is set out above to correct the indentation in the main volume.

§ 153A-64. Filing results of election.

If the proposition is approved under G.S. 153A-61, a certified true copy of the resolution and a copy of the abstract of the election shall be filed with the Secretary of State, Supreme Court Library, and with the Legislative Library. (1985 (Reg. Sess., 1986), c. 935, s. 1.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 935, s. 4 makes this section applicable with respect to resolutions approved,

and amendments and ordinances adopted, on or after September 1, 1986.

§§ 153A-65 to 153A-75: Reserved for future codification purposes.

ARTICLE 5.

Administration.

Part 1. Organization and Reorganization of County Government.

§ 153A-76. Board of commissioners to organize county government.

CASE NOTES

County Department and Board of Social Services Do Not Have Sovereign Immunity. — Because a county department of social services and a county board of social services are extensions of the county, which does not enjoy sovereign immunity, neither do they have sovereign immunity. *Meares v. Brunswick County*, 615 F. Supp. 14 (E.D.N.C. 1985).

These powers and the many others enumerated in this Chapter show that a county and the county commissioners are not part of the State of North Carolina and they do not enjoy its sovereign immunity. *Meares v. Brunswick County*, 615 F. Supp. 14 (E.D.N.C. 1985).

§ 153A-77. Authority of boards of commissioners in certain counties over commissions, boards, agencies, etc.

CASE NOTES

Cited in *Meares v. Brunswick County*, 615 F. Supp. 14 (E.D.N.C. 1985).

ARTICLE 6.

Delegation and Exercise of the General Police Power.

§ 153A-122. Territorial jurisdiction of county ordinances.

Local Modification. — Currituck County: 1985 (Reg. Sess., 1986), c. 875; Davie County: 1985 (Reg. Sess., 1986), c. 830, s. 1.

§ 153A-123. Enforcement of ordinances.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 852, s. 17 amends Session Laws 1985, c. 764, s. 40, so as to change the effective date of the amendment to this section by c. 764 from July 1, 1986 to September 1, 1986.

Session Laws 1985, c. 764, s. 40, as amended by Session Laws 1985 (Reg. Sess., 1986), c. 852,

s. 17, provides: "This act shall become effective September 1, 1986, and shall apply to offenses committed on or after that date. Offenses committed before the effective date of this act [September 1, 1986] shall be governed by the law in effect at the time of the offense.

CASE NOTES

Enforcement of Zoning Ordinances. — This section and § 153A-345 give the superior court the power to enforce zoning ordinances

through the issuance of an injunction. *Mize v. County of Mecklenburg*, — N.C. App. —, 341 S.E.2d 767 (1986).

§ 153A-132.1. To provide for the removal and disposal of trash, garbage, etc.

Local Modification. — Davie County: 1985 (Reg. Sess., 1986), c. 830, s. 1.

ARTICLE 7.

Taxation.

§ 153A-149. Property taxes; authorized purposes; rate limitation.

CASE NOTES

County and County Commissioners Do Not Have Sovereign Immunity. — These powers and the many others enumerated in this Chapter show that a county and the

county commissioners are not part of the State of North Carolina and they do not enjoy its sovereign immunity. *Meares v. Brunswick County*, 615 F. Supp. 14 (E.D.N.C. 1985).

ARTICLE 8.

County Property.

Part 3. Disposition of County Property.

§ 153A-176. Disposition of property.

Local Modification. — County of Durham: 1985 (Reg. Sess., 1986), c. 908.

ARTICLE 9.

Special Assessments.

§ 153A-200. Enforcement of assessments; interest; foreclosure; limitations.

Local Modification. — County of Rockingham: 1985 (Reg. Sess., 1986), c. 817.

ARTICLE 10.

Law Enforcement and Confinement Facilities.

Part 1. Law Enforcement.

§ 153A-211. Training and development programs for law enforcement.

Local Modification. — Onslow County:
1985 (Reg. Sess., 1986), c. 895.

Part 2. Local Confinement Facilities.

§ 153A-224. Supervision of local confinement facilities.

CASE NOTES

City Not Liable for Cost of Treatment Where Persons Arrested Were Confined in County Jail. — A city was not liable to a hospital for the cost of treating a habitual inebriate who was injured when he fell while being assisted by city police officers, where there was no express agreement to pay for such services. Nor was there an implied promise to pay, pursuant to a statutory duty, since persons ar-

rested by city police officers, if confined, were confined in the county jail. Under subsection (b) of this section, the cost of emergency medical services rendered to persons confined in local confinement facilities is imposed on the local governmental unit operating the facility. *Craven County Hosp. Corp. v. Lenoir County*, 75 N.C. App. 453, 331 S.E.2d 690, cert. denied, 314 N.C. 663, 336 S.E.2d 620 (1985).

ARTICLE 12.

Roads and Bridges.

§ 153A-239. Public road defined.

CASE NOTES

Quoted in *Cavin v. Ostwalt*, 76 N.C. App. 309, 332 S.E.2d 509 (1985).

ARTICLE 15.

Public Enterprises.

Part 4. Long Term Contracts for Disposal of Solid Waste.

§ 153A-299.6. Applicability.

This Part shall apply only to Beaufort County, Craven County, Davie

County, Edgecombe County, Gaston County, Hyde County, Lenoir County, Martin County, New Hanover County, Pamlico County, Pitt County, Rowan County, Washington County, Wilson County, and to any and all incorporated cities and towns situated within the foregoing counties. (1979, 2nd Sess., c. 1135, s. 6; 1981, c. 458, s. 4; 1985, c. 63, s. 3; 1985 (Reg. Sess., 1986), c. 830, s. 2; c. 889.)

Effect of Amendments. —

Session Laws 1985 (Reg. Sess., 1986), c. 830, s. 2, effective June 30, 1986, inserted a reference to Davie County in this section.

Session Laws 1985 (Reg. Sess., 1986), c. 889, effective July 3, 1986, inserted a reference to Gaston County in this section.

ARTICLE 16.

County Service Districts; County Research and Production Service Districts.

Part 1. County Service Districts.

§ 153A-309.1: Reserved for future codification purposes.

ARTICLE 18.

Planning and Regulation of Development.

Part 2. Subdivision Regulation.

§ 153A-333. Effect of plat approval on dedications.

CASE NOTES

Quoted in *Cavin v. Ostwalt*, 76 N.C. App. 309, 332 S.E.2d 509 (1985).

Part 3. Zoning.

§ 153A-341. Purposes in view.

CASE NOTES

The language of this section does not require an extensive written plan, such as a master plan based upon a comprehensive study; the ordinance itself may show that the

zoning is comprehensive in nature. *Willis v. Union County*, 77 N.C. App. 407, 335 S.E.2d 76 (1985).

A county's legislative body has authority

to rezone when reasonably necessary to do so in the interests of the public health, safety, morals or general welfare; ordinarily the only limitation upon this authority is that it may not be exercised arbitrarily or capriciously. *Willis v. Union County*, 77 N.C. App. 407, 335 S.E.2d 76 (1985); *Nelson v. City of Burlington*, — N.C. App. —, 341 S.E.2d 739 (1986).

A duly adopted rezoning ordinance is presumed to be valid, and the burden is upon the plaintiff to establish its invalidity. *Nelson*

v. City of Burlington, — N.C. App. —, 341 S.E.2d 739 (1986).

Contract Zoning. — To avoid contract zoning, all the areas in each class must be subject to the same restrictions; if the rezoning is done in consideration of an assurance that a particular tract or parcel will be developed in accordance with a restricted plan, this is contract zoning and is illegal. *Willis v. Union County*, 77 N.C. App. 407, 335 S.E.2d 76 (1985).

§ 153A-343. Method of procedure.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 950 provides that Session Laws 1985, c. 595, which added the last two sentences of this section, as set out in the 1985 Cumulative Supplement, does not apply to the

City of Asheboro or the counties of Scotland, Stanly, Union, and Richmond, and incorporated cities or towns located wholly within those counties.

§ 153A-345. Board of adjustment.

CASE NOTES

Construction of Section. — The purpose of this section is to provide a right of review, and statutes providing for review of administrative decisions should be liberally construed to preserve and effectuate that right. *Mize v. County of Mecklenburg*, — N.C. App. —, 341 S.E.2d 767 (1986).

Enforcement of Zoning Ordinances. — Section 153A-123 and this section give the superior court the power to enforce zoning ordinances through the issuance of an injunction. *Mize v. County of Mecklenburg*, — N.C. App. —, 341 S.E.2d 767 (1986).

The Zoning Board of Adjustment is a necessary party respondent to a petition filed pursuant to subsection (e) of this section. *Mize v. County of Mecklenburg*, — N.C. App. —, 341 S.E.2d 767 (1986).

In addition to the Zoning Board of Adjustment, other parties may in fact be necessary to determine issues raised in a petition under subsection (e) of this section. *Mize v. County of Mecklenburg*, — N.C. App. —, 341 S.E.2d 767 (1986).

Amendment of Petition to Join Party. — Where petitioners complied with all the express requirements of this vague section by filing a petition in Mecklenburg County Superior Court within 30 days of the decision of the board, under the circumstances presented, the court abused its discretion by failing to allow the petitioners to amend the petition to join the

Zoning Board of Adjustment. *Mize v. County of Mecklenburg*, — N.C. App. —, 341 S.E.2d 767 (1986).

Time for Filing Petition for Review. — The language of this section requires only that any petition seeking review by the superior court be filed with the clerk of superior court within 30 days after the decision of the board is filed or after a written copy has been delivered to every aggrieved party. *Mize v. County of Mecklenburg*, — N.C. App. —, 341 S.E.2d 767 (1986).

The scope of review under subsection (e) of this section is: (1) Reviewing the record for errors in law; (2) insuring that procedures specified by law in both statute and ordinance are followed; (3) insuring that appropriate due process rights of a petitioner are protected, including the right to offer evidence, cross-examine witnesses and inspect documents; (4) insuring that the decisions of zoning boards are supported by competent, material and substantial evidence in the whole record; and (5) insuring that decisions are not arbitrary and capricious. *Mize v. County of Mecklenburg*, — N.C. App. —, 341 S.E.2d 767 (1986).

In reviewing zoning decisions, the superior court is not the trier of fact; it sits in the posture of an appellate court. There is no necessity for, or entitlement to, a jury trial. *Mize v. County of Mecklenburg*, — N.C. App. —, 341 S.E.2d 767 (1986).

Part 4. Building Inspection.

§ 153A-350. "Building" defined.

CASE NOTES

Cited in *County of Durham v. Maddry & Co.*, 315 N.C. 296, 337 S.E.2d 576 (1985).

ARTICLE 19.

Regional Planning Commissions.

§ 153A-392. Contents of resolution.

CASE NOTES

Contributions Held Due. — Where, from 1971 through February 1982, defendant county participated as a member in plaintiff regional council's activities, attending meetings and workshops and receiving the benefits of plaintiff's plans and services, and during this time defendant made full payments of its proportionate share of plaintiff's budget as set forth in plaintiff's bylaws, and where, most significantly, defendant indicated in a letter of March 8, 1982, that the county board of commis-

sioners unanimously voted to comply with the obligations incumbent on a withdrawing member, and furthermore, where defendant did not raise any material question of fact pertaining to plaintiff's request that defendant should be estopped from denying its obligation, grant of plaintiff's motion for summary judgment on its complaint seeking contributions due from defendant would be affirmed. *Land-of-Sky Regional Council v. County of Henderson*, 78 N.C. App. 85, 336 S.E.2d 653 (1985).

§ 153A-393. Withdrawal from commission.

CASE NOTES

Contributions Held Due. — Where from 1971 through February 1982, defendant county participated as a member in plaintiff regional council's activities, attending meetings and workshops and receiving the benefits of plaintiff's plans and services, and during this time defendant made full payments of its proportionate share of plaintiff's budget as set forth in plaintiff's bylaws, and where, most significantly, defendant indicated in a letter of March 8, 1982, that the county board of commis-

sioners unanimously voted to comply with the obligations incumbent on a withdrawing member, and furthermore, where defendant did not raise any material question of fact pertaining to plaintiff's request that defendant should be estopped from denying its obligation, grant of plaintiff's motion for summary judgment on its complaint seeking contributions due from defendant would be affirmed. *Land-of-Sky Regional Council v. County of Henderson*, 78 N.C. App. 85, 336 S.E.2d 653 (1985).

ARTICLE 23.

*Miscellaneous Provisions.***§ 153A-435. Liability insurance; damage suits against a county involving governmental functions.**

(a) A county may contract to insure itself and any of its officers, agents, or employees against liability for wrongful death or negligent or intentional damage to person or property or against absolute liability for damage to person or property caused by an act or omission of the county or of any of its officers, agents, or employees when acting within the scope of their authority and the course of their employment. The board of commissioners shall determine what liabilities and what officers, agents, and employees shall be covered by any insurance purchased pursuant to this subsection.

Purchase of insurance pursuant to this subsection waives the county's governmental immunity, to the extent of insurance coverage, for any act or omission occurring in the exercise of a governmental function. Participation in a local government risk pool pursuant to Article 39 of General Statute Chapter 58 shall be deemed to be the purchase of insurance for the purposes of this section. By entering into an insurance contract with the county, an insurer waives any defense based upon the governmental immunity of the county.

(1955, c. 911, s. 1; 1973, c. 822, s. 1; 1985 (Reg. Sess., 1986), c. 1027, s. 27.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1027, s. 57, contains a severability clause.

Effect of Amendments. — The 1985 (Regular Session, 1986) amendment, effective July 16, 1986, added the present second sentence of the second paragraph of subsection (a).

Chapter 157.**Housing Authorities and Projects.****Article 1.****Housing Authorities Law.**

Sec.

157-9.1. Moderate income.

ARTICLE 1.*Housing Authorities Law.***§ 157-9.1. Moderate income.**

(d) Notwithstanding the provisions of subsections (b) and (c), subsection (a) of this section applies to all counties with an area of 250 square miles or less, and a population of more than 100,000 according to the most recent decennial federal census, and applies to all cities within such counties. (1983, c. 769, s. 1; 1985 (Reg. Sess., 1986), c. 1004, s. 1.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 14, 1986, added subsection (d).

Chapter 158.
Local Development.

Article 1.
Local Development Act
of 1925.

Sec.
158-7.1. Local development.

ARTICLE 1.

Local Development Act of 1925.

§ 158-7.1. Local development.

(f) (For applicability see note below) All appropriations and expenditures pursuant to subsections (b) and (c) of this section shall be subject to the following limitations: No county or city shall have an aggregate investment outstanding at any one time which exceeds one-half of one percent (0.5%) of the outstanding assessed property tax valuation for the governing body as of January 1 of each year, beginning January 1, 1986. (1973, c. 803, s. 37; 1985, c. 639, s. 1; 1985 (Reg. Sess., 1986), c. 846, s. 1; c. 848, s. 1; c. 858, s. 1; c. 911, s. 1; c. 921, s. 1.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Applicability of Subsections (b) to (f). — Session Laws 1985, c. 639, s. 4, as amended by Session Laws 1985 (Reg. Sess., 1986), c. 846, s. 2; c. 848, s. 2; c. 849, s. 4; c. 858, s. 2; c. 874; c. 911, s. 2; c. 916; and c. 921, s. 2, makes subsections (b) to (f) applicable only to Stanly, Iredell, Northampton, Montgomery, Anson, Bertie, Duplin, Craven, Gaston, Lincoln, Jones, For-

syth, Hertford, Halifax, Richmond, Gates, Edgecombe, Pitt, and Wilson Counties and municipalities located in those counties, and to the Towns of Elizabethtown and Tarboro.

Effect of Amendments. — The amendments by Session Laws 1985 (Reg. Sess., 1986), cc. 846 and 848, effective June 30, 1986; c. 858, effective July 1, 1986; and cc. 911 and 921, effective July 7, 1986, are identical and substituted "one-half of one percent (0.5%)" for "one-half of one percent (0.05%)" in subsection (f).

ARTICLE 2.

Economic Development Commissions.

§ 158-8. Creation of municipal, county or regional commissions authorized; composition; joining or withdrawing from regional commissions.

CASE NOTES

Contributions Held Due. — Where, from 1971 through February 1982, defendant county participated as a member in plaintiff regional council's activities, attending meetings and workshops and receiving the benefits of plain-

tiff's plans and services, and during this time defendant made full payments of its proportionate share of plaintiff's budget as set forth in plaintiff's bylaws, and where, most significantly, defendant indicated in a letter of March

8, 1982, that the county board of commissioners unanimously voted to comply with the obligations incumbent on a withdrawing member, and furthermore, where defendant did not raise any material question of fact pertaining to plaintiff's request that defendant should be

estopped from denying its obligation, grant of plaintiff's motion for summary judgment on its complaint seeking contributions due from defendant would be affirmed. *Land-of-Sky Regional Council v. County of Henderson*, 78 N.C. App. 65, 336 S.E.2d 653 (1985).

Chapter 159.
Local Government Finance.

**SUBCHAPTER III. BUDGETS AND
FISCAL CONTROL.**

Article 3.

**The Local Government Budget
and Fiscal Control Act.**

Part 3. Fiscal Control.

Sec.
159-34. Annual independent audit; rules and
regulations.

**SUBCHAPTER IV. LONG-TERM
FINANCING.**

Article 5.

Revenue Bonds.

Sec.
159-83. Powers.

SUBCHAPTER III. BUDGETS AND FISCAL CONTROL.

ARTICLE 3.

The Local Government Budget and Fiscal Control Act.

Part 3. Fiscal Control.

§ 159-34. Annual independent audit; rules and regulations.

(a) Each unit of local government and public authority shall have its accounts audited as soon as possible after the close of each fiscal year by a certified public accountant or by an accountant certified by the Commission as qualified to audit local government accounts. The auditor shall be selected by and shall report directly to the governing board. The audit contract or agreement shall (i) be in writing, (ii) include the entire entity in the scope of the audit, except that an audit for purposes other than the annual audit required by this section should include an accurate description of the scope of the audit, (iii) require that a typewritten or printed report on the audit be prepared as set forth herein, (iv) include all of its terms and conditions, and (v) be submitted to the secretary for his approval as to form, terms, conditions, and compliance with the rules of the Commission. As a minimum, the required report shall include the financial statements prepared in accordance with generally accepted accounting principles, all disclosures in the public interest required by law, and the auditor's opinion and comments relating to financial statements. The audit shall be performed in conformity with generally accepted auditing standards. The finance officer shall file a copy of the audit report with the secretary, and shall submit all bills or claims for audit fees and costs to the secretary for his approval. Before giving his approval the secretary shall determine that the audit and audit report substantially conform to the requirements of this section. It shall be unlawful for any unit of local government or public authority to pay or permit the payment of such bills or claims without this approval. Each officer and employee of the local government or local public authority having custody of public money or responsibility for keeping records of public financial or fiscal affairs shall produce all books and records requested by the auditor and shall divulge such information relating to fiscal affairs as he may request. If any member of a governing board or any other public officer or employee shall conceal, falsify, or refuse to deliver or divulge any books, records, or information, with an attempt thereby to mis-

lead the auditor or impede or interfere with the audit, he is guilty of a misdemeanor and upon conviction thereof may be fined not more than one thousand dollars (\$1,000), or imprisoned for not more than one year, or both, in the discretion of the court.

(1971, c. 780, s. 1; 1975, c. 514, s. 15; 1979, c. 402, s. 9; 1981, c. 685, ss. 8, 9.)

Only Part of Section Set Out. — As the rest of the section was not affected, it is not set out.

Editor's Note. — Subsection (a) of this section is set out to correct a typographical error in the main volume.

SUBCHAPTER IV. LONG-TERM FINANCING.

ARTICLE 4.

Local Government Bond Act.

Part 1. Operation of Article.

§ 159-48. For what purposes bonds may be issued.

Applicability of Subdivision (b)(24). — Session Laws 1985, c. 639, s. 4, as amended by Session Laws 1985 (Reg. Sess., 1986), c. 846, s. 2; c. 848, s. 2; c. 849, s. 4; c. 858, s. 2; c. 874; c. 911, s. 2; c. 916; and c. 921, s. 2, makes subdivision (b)(24) applicable only to Stanly, Iredell,

Northampton, Montgomery, Anson, Bertie, Duplin, Craven, Gaston, Lincoln, Jones, Forsyth, Hertford, Halifax, Richmond, Gates, Edgecombe, Pitt, and Wilson Counties and municipalities located in those counties, and to the Towns of Elizabethtown and Tarboro.

ARTICLE 5.

Revenue Bonds.

§ 159-81. Definitions.

Applicability of Paragraph (3)m. — Session Laws 1985, c. 639, s. 4, as amended by Session Laws 1985 (Reg. Sess., 1986), c. 846, s. 2; c. 848, s. 2; c. 849, s. 4; c. 858, s. 2; c. 874; c. 911, s. 2; c. 916; and c. 921, s. 2, makes paragraph (3)m applicable only to Stanly, Iredell,

Northampton, Montgomery, Anson, Bertie, Duplin, Craven, Gaston, Lincoln, Jones, Forsyth, Hertford, Halifax, Richmond, Gates, Edgecombe, Pitt, and Wilson Counties and municipalities located in those counties, and to the Towns of Elizabethtown and Tarboro.

§ 159-83. Powers.

(c) (Effective upon passage of constitutional amendment) In addition to the powers they may now or hereafter have, the State and each municipality shall have the following powers, notwithstanding any provisions of this Article to the contrary, in connection with the development of new and existing seaports and airports:

- (1) To acquire, construct, own, own jointly with public and private parties, lease as lessee, mortgage, sell, lease as lessor, or otherwise dispose of lands and facilities and improvements, including undivided interests therein;
- (2) To finance and refinance for public and private parties seaport and airport facilities and improvements that relate to, develop, or further

waterborn or airborne commerce and cargo and passenger traffic, including commercial, industrial, manufacturing, processing, mining, transportation, distribution, storage, marine, aviation, and environmental facilities and improvements;

- (3) To secure any such financing or refinancing by all or any portion of its revenues, income or assets or other available moneys associated with any of its seaport or airport facilities and with the facilities and improvements to be financed or refinanced, and by foreclosable liens on all or any part of its properties associated with any of its seaport or airport facilities and with the facilities and improvements to be financed or refinanced, but in no event to create a debt secured by a pledge of its faith and credit. (Ex. Sess., 1938, c. 2, s. 3; 1951, c. 703, ss. 2, 3; 1953, c. 922, s. 2; 1969, c. 1118, s. 2; 1971, c. 780, s. 1; 1973, c. 494, s. 17; 1983, c. 554, ss. 3-4; 1985, c. 723, s. 2; 1985 (Reg. Sess., 1986), c. 795, s. 1; c. 733, s. 4.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Cross References. — For proposed constitutional amendment which would permit the General Assembly to grant to the State and other public bodies in the State additional powers to develop new and existing seaports and airports, see the note under N.C. Const., Art. V, § 11.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 795, ss. 2 through 4, provide:

"Sec. 2. This act shall be deemed to provide an additional and alternative method for the doing of the things authorized thereby and shall be regarded as supplemental and additional to powers conferred by other laws, and shall not be regarded as in derogation of any powers now existing.

"Sec. 3. Nothing in this act shall be con-

strued to impair the obligation of any bond, note, or coupon issued under the State and Local Government Revenue Bond Act and outstanding on the effective date of this act.

"Sec. 4. If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of this act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable."

Effect of Amendments. — Session Laws 1985 (Reg. Sess., 1986), c. 795, s. 1, as amended by c. 933, s. 4, effective upon there becoming effective an amendment to the North Carolina Constitution authorizing the General Assembly to enact laws dealing with the subject matter of the act, added subsection (c).

Chapter 159B.**Joint Municipal Electric Power and Energy Act.****ARTICLE 1.***Short Title, Legislative Findings and Definitions.***§ 159B-2. Legislative findings and purposes.****CASE NOTES**

Cited in State ex rel. Utilities Comm'n v. Carolina Util. Customers Ass'n, 314 N.C. 171, 333 S.E.2d 259 (1985).

ARTICLE 2.*Joint Agencies; Municipalities.***§ 159B-8. Authority to contract with respect to exchange, interchange, wheeling, pooling and transmission.****CASE NOTES**

Cited in State ex rel. Utilities Comm'n v. Carolina Util. Customers Ass'n, 314 N.C. 171, 333 S.E.2d 259 (1985).

Chapter 160A.
Cities and Towns.

Article 1.

Definitions and Statutory Construction.

Sec.
160A-1. Application and meaning of terms.

Article 5.

Form of Government.

Part 4. Modification of Form of
Government.

160A-111. Filing certified true copies of charter amendments.

Sec.

160A-112 to 160A-115. [Reserved.]

Article 21.

Miscellaneous.

160A-485. Waiver of immunity through insurance purchase.

160A-496. Incorporation of local acts into charter.

ARTICLE 1.

Definitions and Statutory Construction.

§ 160A-1. Application and meaning of terms.

Unless otherwise specifically provided, or unless otherwise clearly required by the context, the words and phrases defined in this section shall have the meaning indicated when used in this Chapter.

(2) "City" means a municipal corporation organized under the laws of this State for the better government of the people within its jurisdiction and having the powers, duties, privileges, and immunities conferred by law on cities, towns, and villages. The term "city" does not include counties or municipal corporations organized for a special purpose. "City" is interchangeable with the terms "town" and "village," is used throughout this Chapter in preference to those terms, and shall mean any city as defined in this subdivision without regard to the terminology employed in charters, local acts, other portions of the General Statutes, or local customary usage. The terms "city" or "incorporated municipality" do not include a municipal corporation that, without regard to its date of incorporation, would be disqualified from receiving gasoline tax allocations by G.S. 136-41.2(a), except that the end of status as a city under this sentence shall not affect the levy or collection of any tax or assessment, or any criminal or civil liability, and shall not serve to escheat any property until five years after the end of such status as a city, or until September 1, 1991, whichever comes later.

(1971, c. 698, s. 1; 1973, c. 426, s. 3; 1983, c. 636, s. 17.1; 1985 (Reg. Sess., 1986), c. 934, s. 1.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 (Reg.

Sess., 1986) amendment, effective September 1, 1986, added the last sentence of subdivision (2).

ARTICLE 3.

Contracts.

§ 160A-16. Contracts to be in writing; exception.

CASE NOTES

City Not Liable Absent Agreement for Treatment of Inebriate Injured While Being Assisted by Police. — A city was not liable to a hospital for the cost of treating a habitual inebriate who was injured when he fell while being assisted by city police officers, where there was no express agreement to pay for such services. Nor was there an implied promise to pay, pursuant to a statutory duty, since persons arrested by city police officers, if confined, were confined in the county jail. Under § 153A-224(b), the cost of emergency medical services rendered to persons confined in local confinement facilities is imposed on the lo-

cal governmental unit operating the facility. *Craven County Hosp. Corp. v. Lenoir County*, 75 N.C. App. 453, 331 S.E.2d 690, cert. denied, 314 N.C. 663, 336 S.E.2d 620 (1985).

Where no duty was imposed by statute upon city to pay for medical services rendered to persons in custody of its police officers, there was no relationship implied by law which would obligate the city to pay the costs of such treatment. *Craven County Hosp. Corp. v. Lenoir County*, 75 N.C. App. 453, 331 S.E.2d 690, cert. denied, 314 N.C. 663, 336 S.E.2d 620 (1985).

ARTICLE 4.

Corporate Limits.

Part 1. General Provisions.

§ 160A-21. Existing boundaries.

Legal Periodicals. — For 1984 survey, "Competitive Annexation Among Municipali-

ties: North Carolina Adopts the Prior Jurisdiction Rule," see 63 N.C.L. Rev. 1260 (1985).

ARTICLE 4A.

Extension of Corporate Limits.

Part 1. Extension by Petition.

§ 160A-31. Annexation by petition.

Legal Periodicals. —
For 1984 survey, "Competitive Annexation Among Municipalities: North Carolina Adopts

the Prior Jurisdiction Rule," see 63 N.C.L. Rev. 1260 (1985).

Part 2. Annexation by Cities of Less than 5,000.

§ 160A-33. Declaration of policy.

Legal Periodicals. — For 1984 survey, "Competitive Annexation Among Municipalities: North Carolina Adopts

the Prior Jurisdiction Rule," see 63 N.C.L. Rev. 1260 (1985).

§ 160A-34. Authority to annex.

Legal Periodicals. — For 1984 survey, "Competitive Annexation Among Municipalities: North Carolina Adopts the Prior Jurisdiction Rule," see 63 N.C.L. Rev. 1260 (1985).

§ 160A-35. Prerequisites to annexation; ability to serve; report and plans.

Legal Periodicals. — For 1984 survey, "Competitive Annexation Among Municipalities: North Carolina Adopts the Prior Jurisdiction Rule," see 63 N.C.L. Rev. 1260 (1985).

§ 160A-36. Character of area to be annexed.

Legal Periodicals. — For 1984 survey, "Competitive Annexation Among Municipalities: North Carolina Adopts the Prior Jurisdiction Rule," see 63 N.C.L. Rev. 1260 (1985).

CASE NOTES

Section does not specify any particular method of calculation for determination of compliance with statutorily mandated requirements and the reasonableness of the method chosen is to be determined in light of the particular circumstances of the questioned annexation proceedings. *Lowe v. Town of Mebane*, 76 N.C. App. 239, 332 S.E.2d 739 (1985).

Lots in Single Ownership Used for Common Purpose May Be Considered Single Tract. — In appraising an area to be annexed, one of the methods which can be used to determine what is a tract is to consider several lots in single ownership used for a common purpose as being a single tract; these consolidated lots can then be used to determine the percentage of tracts used for urban purposes. *Lowe v. Town of Mebane*, 76 N.C. App. 239, 332 S.E.2d 739 (1985).

Classification of apartment complex as

commercial rather than residential property was a reasonable method of complying with statutorily mandated requirements for the character of an area to be annexed; the general statutory intent is not to exclude areas of urbanized land from annexation on a technicality, but to provide municipalities with a flexible planning tool. *Lowe v. Town of Mebane*, 76 N.C. App. 239, 332 S.E.2d 739 (1985).

Drawing boundary exactly five feet from and parallel to a street for its entire length did not violate subsection (d). *Lowe v. Town of Mebane*, 76 N.C. App. 239, 332 S.E.2d 739 (1985).

Proof of Noncompliance, etc.

In accord with 1985 Cum. Supp. *Lowe v. Town of Mebane*, 76 N.C. App. 239, 332 S.E.2d 739 (1985).

§ 160A-37. Procedure for annexation.

Legal Periodicals. — For 1984 survey, "Competitive Annexation Among Municipalities: North Carolina Adopts the Prior Jurisdiction Rule," see 63 N.C.L. Rev. 1260 (1985).

CASE NOTES

Cited in *Lowe v. Town of Mebane*, 76 N.C. App. 239, 332 S.E.2d 739 (1985).

§ 160A-38. Appeal.

Legal Periodicals. — For 1984 survey, "Competitive Annexation Among Municipalities: North Carolina Adopts the Prior Jurisdiction Rule," see 63 N.C.L. Rev. 1260 (1985).

CASE NOTES

Cited in *Lowe v. Town of Mebane*, 76 N.C. App. 239, 332 S.E.2d 739 (1985).

§ 160A-41. Definitions.

Legal Periodicals. — For 1984 survey, "Competitive Annexation Among Municipalities: North Carolina Adopts the Prior Jurisdiction Rule," see 63 N.C.L. Rev. 1260 (1985).

§ 160A-42. Land estimates.

CASE NOTES

Applied in *Lowe v. Town of Mebane*, 76 N.C. App. 239, 332 S.E.2d 739 (1985).

Part 3. Annexation by Cities of 5,000 or More.

§ 160A-45. Declaration of policy.

Legal Periodicals. — For 1984 survey, "Competitive Annexation Among Municipalities: North Carolina Adopts the Prior Jurisdiction Rule," see 63 N.C.L. Rev. 1260 (1985).

§ 160A-46. Authority to annex.

Legal Periodicals. — For 1984 survey, "Competitive Annexation Among Municipalities: North Carolina Adopts the Prior Jurisdiction Rule," see 63 N.C.L. Rev. 1260 (1985).

§ 160A-47. Prerequisites to annexation; ability to serve; report and plans.

Legal Periodicals. —
For 1984 survey, "Competitive Annexation Among Municipalities: North Carolina Adopts

the Prior Jurisdiction Rule," see 63 N.C.L. Rev. 1260 (1985).

§ 160A-48. Character of area to be annexed.

Legal Periodicals. —
For 1984 survey, "Competitive Annexation Among Municipalities: North Carolina Adopts

the Prior Jurisdiction Rule," see 63 N.C.L. Rev. 1260 (1985).

CASE NOTES

Sub-area under subsection (d) may consist entirely of tracts of five acres or less. Southern Glove Mfg. Co. v. City of Newton, 75 N.C. App. 574, 331 S.E.2d 180, cert. denied, 314 N.C. 669, 336 S.E.2d 401 (1985).

Two lots, 60 percent of external boundaries of which were contiguous to city limits or to a part of other land which the city proposed to annex, qualified as sub-areas under subsection (d)(2), although they allegedly did not constitute "necessary land connections," as mentioned in the unnumbered paragraph at the end of subsection (d). The unnumbered paragraph had to be read as describing the sub-areas specifically allowed by subsection (d). Southern Glove Mfg. Co. v. City

of Newton, 75 N.C. App. 574, 331 S.E.2d 180, cert. denied, 314 N.C. 669, 336 S.E.2d 401 (1985).

Tract Classified as Residential Despite Growing of Grass Thereon for Cattle Feed. — A city could classify a 1.83 acre tract with a rented house located on it as one lot used for residential purposes, despite the fact that on two separate parts of the lot fescue and sudex grass was grown and a person living in the neighborhood had been allowed to mow this grass, bale it and feed it to his cows. Southern Glove Mfg. Co. v. City of Newton, 75 N.C. App. 574, 331 S.E.2d 180, cert. denied, 314 N.C. 669, 336 S.E.2d 401 (1985).

§ 160A-49. Procedure for annexation.

Legal Periodicals. —
For 1984 survey, "Competitive Annexation Among Municipalities: North Carolina Adopts

the Prior Jurisdiction Rule," see 63 N.C.L. Rev. 1260 (1985).

§ 160A-50. Appeal.

CASE NOTES

Effect of Appeal on Effective Date. —
The effective date of annexation ordinance was July 11, 1983, the date the judgment of the Court of Appeals holding the ordinance to be valid was certified, and not December 6, 1983, the date of the Supreme Court's order dismiss-

ing plaintiffs' appeal and denying discretionary review of the judgment of the Court of Appeals, as the final judgment in the annexation case was the judgment of the Court of Appeals. Hunter v. City of Asheville, — N.C. App. —, 341 S.E.2d 743 (1986).

§ 160A-53. Definitions.

CASE NOTES

Tract Classified as Residential Despite Growing of Grass Thereon for Cattle Feed.

— A city could classify a 1.83 acre tract with a rented house located on it as one lot used for residential purposes, despite the fact that on two separate parts of the lot fescue and sudex

grass was grown and a person living in the neighborhood had been allowed to mow this grass, bale it and feed it to his cows. *Southern Glove Mfg. Co. v. City of Newton*, 75 N.C. App. 574, 331 S.E.2d 180, cert. denied, 314 N.C. 669, 336 S.E.2d 401 (1985).

Part 4. Annexation of Noncontiguous Areas.

§ 160A-58. Definitions.

Legal Periodicals. — For 1984 survey "Competitive Annexation Among Municipali-

ties: North Carolina Adopts the Prior Jurisdiction Rule," see 63 N.C.L. Rev. 1260 (1985).

§ 160A-58.1. Petition for annexation; standards.

Local Modification. — Town of Canton: 1985 (Reg. Sess., 1986), c. 979.

Among Municipalities: North Carolina Adopts the Prior Jurisdiction Rule," see 63 N.C.L. Rev. 1260 (1985).

Legal Periodicals. —

For 1984 survey, "Competitive Annexation

Part 5. Property Tax Liability of Newly Annexed Territory.

§ 160A-58.10. Tax of newly annexed territory.

Legal Periodicals. — For 1984 survey, "Competitive Annexation Among Municipali-

ties: North Carolina Adopts the Prior Jurisdiction Rule," see 63 N.C.L. Rev. 1260 (1985).

ARTICLE 5.

Form of Government.

Part 4. Modification of Form of Government.

§ 160A-101. Optional forms.

Local Modification. — (As to Part 4) Town of Edenton: 1985 (Reg. Sess., 1986), c. 815, s. 11.

§ 160A-111. Filing certified true copies of charter amendments.

The city clerk shall file a certified true copy of any charter amendment adopted under this Part with the Secretary of State, Supreme Court Library, and the Legislative Library. (1985 (Reg. Sess., 1986), c. 935, s. 2.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 935, s. 4 makes this section applicable with respect to resolutions approved, and amendments and ordinances adopted, on or after September 1, 1986.

§§ 160A-112 to 160A-115: Reserved for future codification purposes.

ARTICLE 8.

Delegation and Exercise of the General Police Power.

§ 160A-174. General ordinance-making power.

Legal Periodicals. — For comment, "Municipal Tort Liability for Negligent Failure to Provide Adequate Police Protection," see 20 Wake Forest L. Rev. 697 (1984).

§ 160A-175. Enforcement of ordinances.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 852, s. 17 amends Session Laws 1985, c. 764, s. 40, so as to change the effective date of the amendment to this section by c. 764 from July 1, 1986 to September 1, 1986. Session Laws 1985, c. 764, which amended this section, provides in s. 40, as amended by Session Laws 1985 (Reg. Sess., 1986), c. 852, s. 17: "This act shall become effective September 1, 1986, and shall apply to offenses committed on or after that date. Offenses committed before the effective date of this act [September 1, 1986] shall be governed by the law in effect at the time of the offense."

CASE NOTES

Cited in *Town of Nags Head v. Tillett*, 314 N.C. 627, 336 S.E.2d 394 (1985).

ARTICLE 10.

Special Assessments.

§ 160A-216. Authority to make special assessments.

CASE NOTES

Quoted in *Cutting v. Foxfire Village*, 75 N.C. App. 161, 330 S.E.2d 210 (1985).

§ 160A-218. Basis for making assessments.

CASE NOTES

Method used to determine amount of value added to individual lots served by water system construction, calculating the average value of the improvement to all unimproved lots and establishing a nominal percentage thereof as the increase in value to improved lots, was not a method sanctioned by subdivision (3). This subdivision clearly pre-

scribes a before and after improvement appraisal of the property, with the assessment based on a set rate per value added to the land served, an amount which may necessarily vary due to the nature of the individual lots themselves. *Cutting v. Foxfire Village*, 75 N.C. App. 161, 330 S.E.2d 210, cert. denied, 314 N.C. 664, 335 S.E.2d 499 (1985).

§ 160A-228. Hearing on preliminary assessment roll; revision; confirmation; lien.

CASE NOTES

Cited in First Am. Fed. Sav. & Loan Ass'n v. Royall, 77 N.C. App. 131, 334 S.E.2d 792 (1985).

ARTICLE 12.

Sale and Disposition of Property.

§ 160A-265. Use and disposal of property.

Local Modification. — (As to Article 12) Sampson: 1985 (Reg. Sess., 1986), c. 894; c. 943, s. 2; county of Graham and Graham County Industrial Development Authority: 1985 (Reg. Sess., 1986), c. 824; city of Burlington: 1985 (Reg. Sess., 1986), c. 829; city of

Clinton: 1985 (Reg. Sess., 1986), c. 943, s. 2; Clinton-Sampson Agri-Civic Center Commission: 1985 (Reg. Sess., 1986), c. 943, s. 2; New Hanover County Board of Education: 1985 (Reg. Sess., 1986), c. 917.

§ 160A-266. Methods of sale; limitation.

Local Modification. — Durham: 1985 (Reg. Sess., 1986), c. 908; town of Saluda: 1985 (Reg. Sess., 1986), c. 984.

§ 160A-272. Lease or rental of property.

Local Modification. — Sampson: 1985 (Reg. Sess., 1986), c. 943, s. 2; city of Clinton: 1985 (Reg. Sess., 1986), c. 943, s. 2; town of

Manteo: 1985 (Reg. Sess., 1986), c. 808; town of Tarboro: 1985 (Reg. Sess., 1986), c. 963.

ARTICLE 13.

Law Enforcement.

§ 160A-281. Policemen appointed.

Legal Periodicals. — For comment, "Municipal Tort Liability for Negligent Failure to Provide Adequate Police Protection," see 20 Wake Forest L. Rev. 697 (1984).

§ 160A-286. Extraterritorial jurisdiction of policemen.

Local Modification. — Gaston: 1985 (Reg. Sess., 1986), c. 836, s. 2.

§ 160A-287. City lockups.

CASE NOTES

Applied in Craven County Hosp. Corp. v. Lenoir County, 75 N.C. App. 453, 331 S.E.2d 690 (1985).

ARTICLE 16.

Public Enterprises.

Part 1. General Provisions.

§ 160A-311. Public enterprise defined.

CASE NOTES

Airports. — The provisions of Chapter 40A now control cities' eminent domain actions with respect to airports. Smith v. City of Charlotte, — N.C. App. —, 339 S.E.2d 844 (1986).

§ 160A-312. Authority to operate public enterprises.

Legal Periodicals. — For 1984 survey of commercial law, "Utilities—Extension of Electric Service: The Municipalities' Power Play," see 63 N.C.L. Rev. 1095 (1985).

§ 160A-319. Utility franchises.

Legal Periodicals. — For 1984 survey, "North Carolina's Theft of Cable Television Service Statute: Prospects of a Brighter Future for the Cable Television Industry," see 63 N.C.L. Rev. 1296 (1985).

CASE NOTES

Applied in *City of Lexington v. Summit Communications, Inc.*, 76 N.C. App. 333, 332 S.E.2d 519 (1985).

Part 2. Electric Service in Urban Areas.

§ 160A-331. Definitions.

Legal Periodicals. — For 1984 survey of commercial law, "Utilities—Extension of Electric Service: The Municipalities' Power Play," see 63 N.C.L. Rev. 1095 (1985).

§ 160A-332. Electric service within city limits.

Legal Periodicals. — For 1984 survey of commercial law, "Utilities—Extension of Electric Service: The Municipalities' Power Play," see 63 N.C.L. Rev. 1095 (1985).

§ 160A-338. Electric suppliers subject to police power.

Legal Periodicals. — For 1984 survey of commercial law, "Utilities—Extension of Electric Service: The Municipalities' Power Play," see 63 N.C.L. Rev. 1095 (1985).

ARTICLE 19.

Planning and Regulation of Development.

Part 1. General Provisions.

§ 160A-360. Territorial jurisdiction.

Local Modification. — Johnston: 1985 (Reg. Sess., 1986), c. 804.

Part 2. Subdivision Regulation.

§ 160A-372. Contents and requirements of ordinance.

Legal Periodicals. — For comment, "Sunbathers Versus Property Owners: Public Access to North Carolina Beaches," see 64 N.C.L. Rev. 159 (1985).

§ 160A-375. Penalties for transferring lots in unapproved subdivisions.

CASE NOTES

This section and § 160A-389 Compared. — The specific penal and equitable relief set out in this section is relief intended to deter those who violate subdivision ordinances;

§ 160A-389 permits broader, appropriate action and proceedings to prevent or correct the violation of a zoning ordinance. *Town of Nags Head v. Tillett*, 314 N.C. 627, 336 S.E.2d 394 (1985).

Enforcement of Subdivision Ordinances. — Although the Town of Nags Head may deny a building permit to applicants whose property

violates zoning ordinances, as authorized by § 3.08 of the Nags Head Code of Ordinances and by § 160A-389, its enforcement of subdivision ordinances is restricted to the penal and injunctive relief of this section and § 17.10 of the Code of Ordinances. *Town of Nags Head v. Tillett*, 314 N.C. 627, 336 S.E.2d 394 (1985).

Part 3. Zoning.

§ 160A-381. Grant of power.

CASE NOTES

I. IN GENERAL.

Enforcement Provisions. — The broad enforcement provisions of § 160A-389, a zoning statute, could not serve as the statutory basis for denying a building permit to one whose lot violated the subdivision requirements of Chapter 17 of the Nags Head Code of Ordinances. However, insofar as the Town of Nags Head rested its denial of a building permit upon the violation of zoning laws, the broader enforcement license of this section would apply and would sustain such a remedy. *Town of Nags Head v. Tillett*, 314 N.C. 627, 336 S.E.2d 394 (1985).

Concrete mixing facility did not forfeit its nonconforming use under ordinance providing for forfeiture in the event that such use ceased for six months, although the plant was not operated for more than six months due to a slump in business, where the owner maintained the plant, equipment, inventories, and utilities as before, and could have resumed operations within two hours after deciding to do so. *Southern Equip. Co. v. Winstead*, — N.C. App. —, 342 S.E.2d 524 (1986).

V. CONDITIONAL OR SPECIAL USE PERMITS.

Concerns about the adverse effect of a proposed development upon traffic congestion and safety are valid. Such concerns support the denial of a special use permit. *Ghidorzi Constr., Inc. v. Town of Chapel Hill*, — N.C. —, 342 S.E.2d 545 (1986).

Denial of a special use permit should be based on findings which are supported by competent, material, and substantial evidence appearing in the record. *Ghidorzi Constr., Inc. v. Town of Chapel Hill*, — N.C. App. —, 342 S.E.2d 545 (1986).

Scope of Review of Denial of Permit. — In reviewing a municipality's decision on an application for a special use permit, the court's scope of review includes: (1) Reviewing the record for errors in law, (2) insuring that procedures specified by law in both statute and ordinance are followed, (3) insuring that appropriate due process rights of a petitioner are protected including the right to offer evidence, cross-examine witnesses, and inspect documents, (4) insuring that decisions of town boards are supported by competent, material and substantial evidence in the whole record, and (5) insuring that decisions are not arbitrary and capricious. *Ghidorzi Constr., Inc. v. Town of Chapel Hill*, — N.C. App. —, 342 S.E.2d 545 (1986).

The question before the Court of Appeals is not whether the evidence before the superior court supported that court's order as to the special use application, but whether the evidence before the town council supported the council's action. The superior court is not the trier of fact. That is the function of the town council. *Ghidorzi Constr., Inc. v. Town of Chapel Hill*, — N.C. App. —, 342 S.E.2d 545 (1986).

Whole Record Test. — In determining the sufficiency of the evidence supporting the town council's decision to deny an application for a special use permit, the whole record test is applied, considering not only the evidence which justifies the council's decision, but also that which fairly detracts from it. The whole record test does not allow the Court of Appeals or the superior court to replace the council's judgment as between two reasonably conflicting views. *Ghidorzi Constr., Inc. v. Town of Chapel Hill*, — N.C. App. —, 342 S.E.2d 545 (1986).

§ 160A-383. Purposes in view.

CASE NOTES

Cited in *Sherrill v. Town of Wrightsville Beach*, 76 N.C. App. 646, 334 S.E.2d 103 (1985).

§ 160A-384. Method of procedure.

Local Modification. — City of Henderson: 1985 (Reg. Sess., 1986), c. 879; city of Murfreesboro: 1985 (Reg. Sess., 1986), c. 879.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 950 provides that Session Laws 1985, c. 595, which added the last two sen-

tences of this section, as set out in the 1985 Cumulative Supplement, does not apply to the City of Asheboro or the Counties of Scotland, Stanly, Union, and Richmond, and incorporated cities or towns located wholly within those countries.

§ 160A-388. Board of adjustment.

CASE NOTES

I. IN GENERAL.

Quasi-Judicial Capacity of Board. —

A board of adjustment has a quasi-judicial power under subsection (d) of this section to vary or modify zoning regulations only so long as the spirit of the ordinance continues to be observed. *Sherrill v. Town of Wrightsville Beach*, 76 N.C. App. 646, 334 S.E.2d 103 (1985).

Nonconforming building or use that conflicts with general purpose or spirit of zoning ordinance can only be authorized by the board of aldermen acting in their legislative capacity to rezone, not under the guise of a variance permit. *Sherrill v. Town of Wrightsville Beach*, 76 N.C. App. 646, 334 S.E.2d 103 (1985).

No Authority to Permit Duplexes by Variance in R-1 Area. — As the purpose of an R-1 designation is to limit density, while the purpose and effect of a duplex is to increase density, variance requested by petitioners, who sought to build duplexes in R-1 areas, was directly contrary to the zoning ordinance; in these circumstances the board of adjustment had no legal authority under subsection (d) of

this section to grant the requested variance, and thus there was no need for it to make findings on the merits of the request. *Sherrill v. Town of Wrightsville Beach*, 76 N.C. App. 646, 334 S.E.2d 103 (1985).

II. JUDICIAL REVIEW.

Review Limited to Whether Variance Properly Denied Absent Challenge to Validity of Ordinance. — Upon denial of a variance by the board of aldermen, sitting in their quasi-judicial capacity as the board of adjustment, the superior court, and hence the Court of Appeals through its derivative appellate jurisdiction, had the statutory power to review only the issue of whether the variance was properly denied. The constitutionality of the zoning ordinance was a separate issue not properly a part of these proceedings, since the denial of the variance request never addressed the validity of the zoning ordinance, and since the superior court sat in the posture of an appellate court, so that it was not in a position to address constitutional issues that were not before the board. *Sherrill v. Town of Wrightsville Beach*, 76 N.C. App. 646, 334 S.E.2d 103 (1985).

§ 160A-389. Remedies.

CASE NOTES

Enforcement Provisions. — The broad enforcement provisions of this section, a zoning statute, could not serve as the statutory basis for denying a building permit to one whose lot violated the subdivision requirements of Chapter 17 of the Nags Head Code of Ordinances. However, insofar as the Town of Nags Head rested its denial of a building permit upon the violation of zoning laws, the broader enforcement license of § 160A-381 would apply and

would sustain such a remedy. *Town of Nags Head v. Tillett*, 314 N.C. 627, 336 S.E.2d 394 (1985).

The specific penal and equitable relief set out in § 160A-375 is relief intended to deter those who violate subdivision ordinances; this section permits broader, appropriate action and proceedings to prevent or correct the violation of a zoning ordinance. *Town of Nags Head v. Tillett*, 314 N.C. 627, 336 S.E.2d 394 (1985).

Part 5. Building Inspection.

§ 160A-411. Inspection department.

CASE NOTES

Stated in *First Am. Fed. Sav. & Loan Ass'n v. Royall*, 77 N.C. App. 131, 334 S.E.2d 792 (1985).

§ 160A-412. Duties and responsibilities.

CASE NOTES

Stated in *First Am. Fed. Sav. & Loan Ass'n v. Royall*, 77 N.C. App. 131, 334 S.E.2d 792 (1985).

§ 160A-423. Certificates of compliance.

CASE NOTES

Stated in *First Am. Fed. Sav. & Loan Ass'n v. Royall*, 77 N.C. App. 131, 334 S.E.2d 792 (1985).

Part 6. Minimum Housing Standards.

§ 160A-443. Ordinance authorized as to repair, closing and demolition; order of public officer.

Local Modification. — *City of New Bern*: 1985 (Reg. Sess., 1986), c. 876.

CASE NOTES

Stated in *Yates v. Jamison*, 782 F.2d 1182 (4th Cir. 1986).

§ 160A-445. Service of complaints and orders.

CASE NOTES

Stated in *Yates v. Jamison*, 782 F.2d 1182 (4th Cir. 1986).

ARTICLE 21.

*Miscellaneous.***§ 160A-485. Waiver of immunity through insurance purchase.**

(a) Any city is authorized to waive its immunity from civil liability in tort by the act of purchasing liability insurance. Participation in a local government risk pool pursuant to Article 39 of General Statute Chapter 58 shall be deemed to be the purchase of insurance for the purposes of this section. Immunity shall be waived only to the extent that the city is indemnified by the insurance contract from tort liability. No formal action other than the purchase of liability insurance shall be required to waive tort immunity, and no city shall be deemed to have waived its tort immunity by any action other than the purchase of liability insurance.

(1951, c. 1015, ss. 1-5; 1971, c. 698, s. 1; 1975, c. 723; 1985 (Reg. Sess., 1986), c. 1027, s. 27.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1027, s. 57, contains a severability clause.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 16, 1986, added the present second sentence of subsection (a).

CASE NOTES

Cited in *Jackson v. Housing Auth.*, — N.C. —, 341 S.E.2d 523 (1986).

§ 160A-496. Incorporation of local acts into charter.

(b) After considering the recommendations of the attorney, the council may by ordinance direct the incorporation of any such local acts into the charter. The city clerk shall file a certified true copy of the ordinance with the Secretary of State, Supreme Court Library, and with the Legislative Library.

(1975, c. 156; 1985 (Reg. Sess., 1986), c. 935, s. 3.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, applicable with re-

spect to resolutions approved, and amendments and ordinances adopted, on or after September 1, 1986, added the second sentence of subsection (b).

Chapter 161.

Register of Deeds.

ARTICLE 2.

The Duties.

§ 161-22. Index of registered instruments.

CASE NOTES

Recorded deed of trust dated August 5, 1982, did not have priority over warranty deed recorded on May 5, 1983, where it was not indexed until after plaintiff's deed was duly registered. The priority of instruments affecting an interest in real property which are required to be recorded is established by the priority of their registration, and an instrument is not deemed registered until it has been properly indexed. *Badger v. Benfield*, 78 N.C. App. 427, 337 S.E.2d 596 (1985).

Where Failure Is Proximate Cause,
etc. —

A register of deeds will not be held liable for failure to properly index an instrument unless the default of the register of deeds was the proximate cause of pecuniary injury to the claimant. *Badger v. Benfield*, 78 N.C. App. 427, 337 S.E.2d 596 (1985).

Liability will not be imposed on the register of deeds if claimant's negligence caused or concurred in causing the injury. *Badger v. Benfield*, 78 N.C. App. 427, 337 S.E.2d 596 (1985).

Chapter 162.

Sheriff.

Article 4.

County Prisoners.

for safety and security; application of section to municipalities.

Sec.

162-39. Transfer of prisoners when necessary

ARTICLE 4.

County Prisoners.

§ 162-39. Transfer of prisoners when necessary for safety and security; application of section to municipalities.

Whenever necessary for the safety of a prisoner held in any county jail or to avoid a breach of the peace in any county or whenever prisoners are arrested in such numbers that county jail facilities are insufficient and inadequate for the housing of such prisoners, the resident judge of the superior court or any judge holding superior court in the district or any district court judge may order the prisoner transferred to a fit and secure jail in some other county, or to a unit of the State prison system designated by the Secretary of Correction or his authorized representative, where the prisoner shall be held for such length of time as the judge may direct. The sheriff of the county from which the prisoner is removed shall be responsible for conveying the prisoner to the jail or prison unit where he is to be held, and for returning him to the common jail of the county from which he was transferred. The return shall be made at the expiration of the time designated in the court order directing the transfer unless the judge, by appropriate order, shall direct otherwise. The sheriff or keeper of the jail of the county designated in the court order, or the officer in charge of the prison unit designated by the Secretary of Correction, shall receive and release custody of the prisoner in accordance with the terms of the court order. If a prisoner is transferred to a unit of the State prison system, the county from which the prisoner is transferred shall pay the Department of Correction for maintaining the prisoner for the time designated by the court at the per day, per inmate rate at which the Department of Correction pays a local jail for maintaining a prisoner, provided, however, that a county is not required to reimburse the State for maintaining a prisoner who was a resident of another state or county at the time he committed the crime for which he is imprisoned. If the prisoner is transferred to a jail in some other county, the county from which the prisoner is transferred shall pay to the county receiving the prisoner in its jail the actual cost of maintaining the prisoner for the time designated by the court. Counties are hereby authorized to enter into contractual agreements with other counties to provide jail facilities to which prisoners may be transferred as deemed necessary under this section.

Whenever prisoners are arrested in such numbers that county jail facilities are insufficient and inadequate for the safekeeping of such prisoners, the resident judge of the superior court or any superior or district court judge holding court in the district may order the prisoners transferred to a unit of the State Department of Correction designated by the Secretary of Correction or his authorized representative, where the prisoners may be held for such

length of time as the judge may direct, such detention to be in cell separate from that used for imprisonment of persons already convicted of crimes. The sheriff of the county from which the prisoners are removed shall be responsible for conveying the prisoners to the prison unit or units where they are to be held, and for returning them to the common jail of the county from which they were transferred. However, if due to the number of prisoners to be conveyed the sheriff is unable to provide adequate transportation, he may request the assistance of the Department of Correction, and the Department of Correction is hereby authorized and directed to cooperate with the sheriff and provide whatever assistance is available, both in vehicles and manpower, to accomplish the conveying of the prisoners to and from the county to the designated prison unit or units. The officer in charge of the prison unit designated by the Secretary of Correction or his authorized representative shall receive and release the custody of the prisoners in accordance with the terms of the court order. The county from which the prisoners are transferred shall pay to the Department of Correction the actual cost of transporting the prisoners and the cost of maintaining the prisoners at the per day, per inmate rate at which the Department of Correction pays a local jail for maintaining a prisoner, provided, however, that a county is not required to reimburse the State for transporting or maintaining a prisoner who was a resident of another state or county at the time he was arrested. However, if the county commissioners shall certify to the Governor that the county is unable to pay the bill submitted by the State Department of Correction to the county for the services rendered, either in whole or in part, the Governor may recommend to the Council of State that the State of North Carolina assume and pay, in whole or in part, the obligation of the county to the Department of Correction, and upon approval of the Council of State the amount so approved shall be paid from Contingency and Emergency Fund to the Department of Correction.

When, due to an emergency, it is not feasible to obtain from a judge of the superior or district court a prior order of transfer, the sheriff of the county and the Department of Correction may exercise the authority hereinafter conferred; provided, however, that the sheriff shall, as soon as possible after the emergency, obtain an order from the judge authorizing the prisoners to be held in the designated place of confinement for such period as the judge may direct. All provisions of this section shall be applicable to municipalities whenever prisoners are arrested in such numbers that the municipal jail facilities and the county jail facilities are insufficient and inadequate for the safekeeping of the prisoners. The chief of police is hereby authorized to exercise the authority herein conferred upon the sheriff, and the municipality shall be liable for the cost of transporting and maintaining the prisoners to the same extent as a county would be unless action is taken by the Governor and Council of State as herein provided for counties which are unable to pay such costs. (1957, c. 1265; 1967, c. 996, ss. 13, 15; 1969, cc. 462, 1130; 1973, c. 822, s. 3; c. 1262, s. 10; 1983, c. 165, ss. 1-4; 1985 (Reg. Sess., 1986), c. 1014, s. 198(a)-(c).)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 243, contains a severability clause.

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective July 1, 1986, substituted the present fifth and sixth sentences of the first paragraph for the former fifth sentence thereof, which pertained to payment by the county from which the prisoner is transferred for the cost of

maintaining the prisoner, rewrote the fifth sentence of the second paragraph, and substituted "and the municipality shall be liable for the cost of transporting and maintaining the prisoners to the same extent as a county would be" for "and the cost of transporting and maintaining the prisoners shall be paid by the municipality" in the last sentence of the third paragraph.

Chapter 162A.

Water and Sewer Systems.

ARTICLE 1.

Water and Sewer Authorities.

§ 162A-2. Definitions.

CASE NOTES

Cited in *In re Environmental Mgt. Comm'n*,
— N.C. App. —, 341 S.E.2d 588 (1986).

§ 162A-6. Powers of authority generally.

CASE NOTES

Water quality is not only a permissible consideration for the Environmental Management Commission, but also one that is important if not essential to the responsible exercise of the police power. *In re Environmental*

Mgt. Comm'n, — N.C. App. —, 341 S.E.2d 588 (1986).

Cited in *In re Environmental Mgt. Comm'n*,
— N.C. App. —, 341 S.E.2d 588 (1986).

§ 162A-7. Prerequisites to acquisition of water, etc., by eminent domain.

CASE NOTES

Factors to be Specifically Considered. — Subsection (c) of this section requires only that the Environmental Management Commission “specifically consider” the listed factors. It does not require the Environmental Management Commission to make findings regarding each factor. *In re Environmental Mgt. Comm'n*, — N.C. App. —, 341 S.E.2d 588 (1986), endorsing the making of findings as a means of insuring that each factor is specifically considered.

The seventh listed factor in this section is a “catch all” provision that allows the Environmental Management Commission to consider all other factors as will, in the board’s opinion, produce the maximum beneficial use of water for affected areas of the estate. *In re Environmental Mgt. Comm'n*, — N.C. App. —, 341 S.E.2d 588 (1986).

Not Limited to Listed Factors. — While directing that the Environmental Management Commission shall specifically consider the listed factors, this section contains no language limiting the Environmental Management Commission’s consideration to those factors. Clearly, the Environmental Management

Commission has some latitude and discretion as to the factors to consider in each situation and the weight to be given them in reaching a decision. The only limitation is that the Environmental Management Commission’s consideration of any factor relate to the maximum beneficial use of the State’s water resources. *In re Environmental Mgt. Comm'n*, — N.C. App. —, 341 S.E.2d 588 (1986).

Water quality is not only a permissible consideration for the Environmental Management Commission, but also one that is important if not essential to the responsible exercise of the police power. *In re Environmental Mgt. Comm'n*, — N.C. App. —, 341 S.E.2d 588 (1986).

Local or Regional Factors. — The Environmental Management Commission is required to give paramount consideration to the statewide effect of the proposed project. However, this does not preclude consideration by the Environmental Management Commission of local or regional factors. On the contrary, the language of the statute assumes that some consideration will be given to local and re-

gional concerns, but requires that the larger interest of the State be of "paramount" concern. In re Environmental Mgt. Comm'n, — N.C. App. —, 341 S.E.2d 588 (1986).

Alternatives to Proposed Projects. — This section contemplates the consideration of one or more alternatives to the project for which the certificate of authority is sought. In re Environmental Mgt. Comm'n, — N.C. App. —, 341 S.E.2d 588 (1986).

Proceedings Governed by Administrative Procedure Act. — The Environmental Management Commission's proceedings under this section are governed by the Administrative Procedure Act. The evidentiary standards set forth therein apply equally to any findings made by the agency. In re Environmental Mgt. Comm'n, N.C. — App. —, 341 S.E.2d 588 (1986).

ARTICLE 2.

Regional Water Supply Planning.

§ 162A-20. Title.

CASE NOTES

Cited in In re Environmental Mgt. Comm'n, — N.C. App. —, 341 S.E.2d 588 (1986).

§ 162A-21. Preamble.

CASE NOTES

Cited in In re Environmental Mgt. Comm'n, — N.C. App. —, 341 S.E.2d 588 (1986).

Chapter 163.

Elections and Election Laws.

SUBCHAPTER I. TIME OF PRIMARIES AND ELECTIONS.

Article 2.

Time of Elections to Fill Vacancies.

Sec.

- 163-8. (Effective January 1, 1987, contingent on passage of constitutional amendments) Filling vacancies in State executive offices.
- 163-9. (Effective January 1, 1987, contingent on passage of constitutional amendments) Filling vacancies in State and district judicial offices.
- 163-10. (Effective January 1, 1987, contingent on passage of constitutional amendments) Filling vacancy in office of district attorney.

SUBCHAPTER II. ELECTION OFFICERS.

Article 3.

State Board of Elections.

- 163-22. Powers and duties of State Board of Elections.
- 163-22.2. Power of State Board to promulgate temporary rules and regulations.

SUBCHAPTER V. NOMINATION OF CANDIDATES.

Article 10.

Primary Elections.

- 163-106. Notices of candidacy; pledge; with whom filed; date for filing; withdrawal.

SUBCHAPTER VI. CONDUCT OF PRIMARIES AND ELECTIONS.

Article 13.

General Instructions.

- 163-152. Assistance to voters in primaries and general elections.
- 163-156. (For effective date see note) Rules when two or more vacancies for superior court judge of different term length are to be voted on in the same year, or when two or more elections for less than a full term are to be voted on in the same year.

Sec.

- 163-156. (For effective date see note) Rules when two or more vacancies for superior court judge of different term length are to be voted on in the same year, or when two or more elections for less than a full term are to be voted on in the same year.
- 163-157 to 163-159. [Reserved.]

Article 18A.

Presidential Preference Primary Act.

- 163-213.2. Primary to be held; date; qualifications and registration of voters.
- 163-213.11. Costs of presidential preference primary.

SUBCHAPTER VII. ABSENTEE VOTING.

Article 20.

Absentee Ballot.

- 163-227. State Board to prescribe forms of applications for absentee ballots; county to secure.
- 163-227.3. Date by which absentee ballots must be available for voting.
- 163-229. Absentee ballots, container-return envelopes, and instruction sheets.
- 163-230. Consideration and approval of applications and issuance of absentee ballots.

Article 21.

Military Absentee Registration and Voting in Primary and General Elections.

- 163-248. Register, ballots, container-return envelopes, and instruction sheets.

SUBCHAPTER VIII. REGULATION OF ELECTION CAMPAIGNS.

Article 22B.

Appropriations from the North Carolina Election Campaign Fund.

- 163-278.42. Distribution of campaign funds; legitimate expenses permitted.

SUBCHAPTER I. TIME OF PRIMARIES AND ELECTIONS.

ARTICLE 1.

Time of Primaries and Elections.

Editor's Note. — Session Laws 1986, Ex. Sess., c. 4, as amended by Session Laws 1985 (Reg. Sess., 1986), c. 1032, s. 4.1, provides: "Whereas, the Voting Accessibility for the Elderly and Handicapped Act became effective January 1, 1986, and requires changes in election procedures, such as elimination of notarization of absentee ballots for handicapped voters in federal elections and accessibility of polling places; and

"Whereas, that act does not apply to State elections, which will cause confusion; Now, therefore, The General Assembly of North Carolina enacts:

"Section 1. Any procedures established under Section 3(b)(2)(B) of P.L. 98-435 shall apply to all elections.

"Sec. 2. Any rules to comply with Section 5(b) of P.L. 98-435 shall apply to all elections.

"Sec. 3. Rules to implement this act shall become effective on the date prescribed by the State Board of Elections, and shall not be subject to Chapter 150B of the General Statutes except for Article 5.

"Sec. 4. This act is effective upon ratification, but expires as to elections held after July 1, 1987."

Session Laws 1986, Ex. Sess., c. 4 was ratified on February 18, 1986.

§ 163-1. Time of regular elections and primaries.

Editor's Note. — The amendments of this section by Session Laws 1985, c. 768 (see both versions of this section in the 1985 Cumulative Supplement) were made contingent on approval by the voters of the constitutional amendments proposed by c. 768. Since the pro-

posed constitutional amendments were defeated by a vote of the People on May 6, 1986, the amendments to this section by Session Laws 1985, c. 768 will not become effective, and therefore, this section as it appears in the main volume remains in effect.

ARTICLE 2.

Time of Elections to Fill Vacancies.

§ 163-8. (Effective January 1, 1987, contingent on passage of constitutional amendments) Filling vacancies in State executive offices.

If the office of Governor or Lieutenant Governor shall become vacant, the provisions of G.S. 147-11.1 shall apply. If the office of any of the following officers shall be vacated by death, resignation, or otherwise than by expiration of term, it shall be the duty of the Governor to appoint another to serve until his successor is elected and qualified: Secretary of State, Auditor, Treasurer, Superintendent of Public Instruction, Attorney General, Commissioner of Agriculture, Commissioner of Labor, and Commissioner of Insurance. Each such vacancy shall be filled by election at the first election for members of the General Assembly that occurs more than 60 days after the vacancy has taken place, and the person chosen shall hold the office for the remainder of the unexpired four-year term: Provided, that when a vacancy occurs in any of the offices named in this section and the term expires on the first day of January succeeding the next election for members of the General Assembly, the Governor shall appoint to fill the vacancy for the unexpired term of the office.

Upon the occurrence of a vacancy in the office of any one of these officers for any of the causes stated in the preceding paragraph, the Governor may appoint an acting officer to perform the duties of that office until a person is appointed or elected pursuant to this section and Article III, Section 7 of the State Constitution, to fill the vacancy and is qualified. (1901, c. 89, ss. 4, 73; Rev., s. 4299; C.S., s. 5920; 1967, c. 775, s. 1; 1981, c. 504, s. 14; 1983, c. 324, s. 1; 1985 (Reg. Sess., 1986), c. 920, s. 5.)

For this section as in effect until January 1, 1987, and until approval by the voters of constitutional amendments set forth in Session Laws 1985 (Reg. Sess., 1986), c. 920, ss. 1 and 2, see the 1985 Cumulative Supplement.

Cross References. — As to the constitutional amendments proposed by Session Laws 1985 (Reg. Sess., 1986), c. 920, ss. 1 and 2, see the Proposed Amendments notes under N.C. Const., Art. III, § 7(3) and Art. IV, § 19.

Effect of Amendments.

The 1985 (Reg. Sess., 1986) amendment, effective January 1, 1987, but only upon approval by the voters of the constitutional amendments set forth in Session Laws 1985 (Reg. Sess., 1986), c. 920, ss. 1 and 2, substituted "60 days" for "30 days" in the third sentence.

§ 163-9. (Effective January 1, 1987, contingent on passage of constitutional amendments) Filling vacancies in State and district judicial offices.

Vacancies occurring in the offices of Justice of the Supreme Court, judge of the Court of Appeals, and judge of the superior court for causes other than expiration of term shall be filled by appointment of the Governor. An appointee shall hold his place until the next election for members of the General Assembly that is held more than 60 days after the vacancy occurs, at which time an election shall be held to fill the unexpired term of the office: Provided, that when the unexpired term of the office in which the vacancy has occurred expires on the first day of January succeeding the next election for members of the General Assembly, the Governor shall appoint to fill that vacancy for the unexpired term of the office.

Vacancies in the office of district judge which occur before the expiration of a term shall not be filled by election. Vacancies in the office of district judge shall be filled in accordance with G.S. 7A-142. (1901, c. 89, ss. 4, 73; Rev. s. 4299; C.S., s. 5920; 1967, c. 775, s. 1; 1969, c. 44, s. 81; 1979, c. 494; 1981, c. 504, s. 15; c. 763, s. 3; 1985 (Reg. Sess., 1986), c. 920, s. 6.)

For this section as in effect until January 1, 1987, and until approval by the voters of constitutional amendments set forth in Session Laws 1985 (Reg. Sess., 1986), c. 920, ss. 1 and 2, see the main volume.

Cross References. — As to the constitutional amendments proposed by Session Laws 1985 (Reg. Sess., 1986), c. 920, ss. 1 and 2, see the Proposed Amendments notes under N.C. Const., Art. III, § 7(3) and Art. IV, § 19.

Effect of Amendments.

The 1985 (Reg. Sess., 1986) amendment, effective January 1, 1987, but only upon approval by the voters of the constitutional amendments set forth in Session Laws 1985 (Reg. Sess., 1986), c. 920, ss. 1 and 2, substituted "60 days" for "30 days" in the second sentence of the first paragraph.

§ 163-10. (Effective January 1, 1987, contingent on passage of constitutional amendments) Filling vacancy in office of district attorney.

Any vacancy occurring in the office of district attorney for causes other than expiration of term shall be filled by appointment of the Governor. An appointee shall hold his place until the next election for members of the General Assembly that is held more than 60 days after the vacancy occurs, at which time an election shall be held to fill the unexpired term of the office: Provided, that when the unexpired term of the office in which the vacancy has occurred expires on the first day of January succeeding the next election for members of the General Assembly, the Governor shall appoint to fill that vacancy for the unexpired term of the office. (1901, c. 89, ss. 4, 73; Rev., s. 4299; C.S., s. 5920; 1967, c. 775, s. 1; 1973, c. 47, s. 2; 1977, c. 265, s. 2; 1981, c. 504, s. 16; 1985 (Reg. Sess., 1986), c. 920, s. 7.)

For this section as in effect until January 1, 1987, and until approval by the voters of constitutional amendments set forth in Session Laws 1985 (Reg. Sess., 1986), c. 920, ss. 1 and 2, see the main volume.

Cross References. — As to the constitutional amendments proposed by Session Laws 1985 (Reg. Sess., 1986), c. 920, ss. 1 and 2, see the Proposed Amendments notes under N.C. Const., Art. III, § 7(3) and Art. IV, § 19.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective January 1, 1987, but only upon approval by the voters of the constitutional amendments set forth in Session Laws 1985 (Reg. Sess., 1986), c. 920, ss. 1 and 2, substituted "60 days" for "30 days" in the second sentence.

§ 163-12. Filling vacancy in United States Senate.

Editor's Note. — The amendment of this section by Session Laws 1985, c. 768 (see the 1985 Cumulative Supplement) was made contingent on approval by the voters of the constitutional amendments proposed by c. 768. Since the proposed constitutional amendments were

defeated by a vote of the People on May 6, 1986, the amendment to this section by Session Laws 1985, c. 768 will not become effective. Therefore, the first version of this section appearing in the 1985 Cumulative Supplement remains in effect.

SUBCHAPTER II. ELECTION OFFICERS.

ARTICLE 3.

State Board of Elections.

§ 163-22. Powers and duties of State Board of Elections.

(k) (Effective until December 31, 1986) Notwithstanding the provisions contained in Article 20 or Article 21 of Chapter 163 the State Board of Elections shall be authorized, by resolution adopted prior to the printing of the primary ballots, to reduce the time by which absentee ballots are required to be printed and distributed for the primary election from 50 days to 30 days. This authority shall not be authorized for absentee ballots to be voted in the general election.

(1901, c. 89, ss. 7, 11; Rev., ss. 4302, 4305; 1913, c. 138; C.S., ss. 5923, 5926; 1921, c. 181, s. 1; 1923, c. 196; 1933, c. 165, ss. 1, 2; 1945, c. 982; 1953, c. 410, s. 2; 1967, c. 775, s. 1; 1973, c. 47, s. 2; c. 793, s. 2; 1975, c. 19, s. 65; 1977, c. 661,

s. 6; 1979, c. 411, s. 1; 1981, c. 556; 1985 (Reg. Sess., 1986), c. 986, ss. 2, 3; c. 987, ss. 2, 3.)

For subsection (k) of this section as in effect after December 31, 1986, see the main volume.

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Section 4 of Session Laws 1985 (Reg. Sess., 1986), c. 986, provides that ss. 2 and 3 thereof, which amend subsection (k), shall expire with respect to primaries and elections held on or after December 31, 1986.

Section 4 of Session Laws 1985 (Reg. Sess., 1986), c. 987, provides: "This act shall only become effective if the Attorney General of the United States interposes objection to Senate Bill 892, 1985 Session [Session Laws 1985 (Reg. Sess., 1986), c. 986] as to the fact that such bill provides for designating vacancies for all unexpired terms separately from full terms.

If such objection is made, then this act is effective on the date of such objection, and shall be submitted immediately under Section 5 of the Voting Rights Act of 1965. Sections 2 and 3 of this act shall expire with respect to primaries and elections held on or after December 31, 1986."

Effect of Amendments. —

Session Laws 1985 (Reg. Sess., 1986), c. 986, ss. 2 and 3, effective July 11, 1986, substituted "50 days" for "60 days" and "30 days" for "45 days" in the first sentence of subsection (k).

Session Laws 1985 (Reg. Sess., 1986), c. 987 made the same amendment as c. 986. As to the effective date of the amendment by c. 987, see the Editor's note above.

As to the expiration date of the amendments by cc. 986 and 987, also see the Editor's note.

§ 163-22.2. Power of State Board to promulgate temporary rules and regulations.

In the event any portion of Chapter 163 of the General Statutes or any State election law or form of election of any county board of commissioners, local board of education, or city officer is held unconstitutional or invalid by a State or federal court or is unenforceable because of objection interposed by the United States Justice Department under the Voting Rights Act of 1965 and such ruling adversely affects the conduct and holding of any pending primary or election, the State Board of Elections shall have authority to make reasonable interim rules and regulations with respect to the pending primary or election as it deems advisable so long as they do not conflict with any provisions of Chapter 163 of the General Statutes and such rules and regulations shall become null and void 60 days after the convening of the next regular session of the General Assembly. The State Board of Elections shall also be authorized, upon recommendation of the Attorney General, to enter into agreement with the courts in lieu of protracted litigation until such time as the General Assembly convenes. (1981, c. 741; 1982, 2nd Ex. Sess., c. 3, s. 19.1; 1985, c. 563, s. 15; 1986, Ex. Sess., c. 3, s. 1.)

Editor's Note. — Session Laws 1986, Extra Session, c. 3, s. 2 provides: "Notwithstanding G.S. 163-22.2 as it existed immediately prior to the effective date of Section 1 of this act, any rules lawfully adopted under G.S. 163-22.2 and in effect on the convening of the 1986 Extra Session shall not expire 60 days after the convening of the 1986 Extra Session of the General Assembly, but 60 days after convening of

the 1987 Regular Session of the General Assembly, unless earlier amended or repealed by the General Assembly or under Chapter 150B of the General Statutes."

Effect of Amendments. — The 1986 Extra Session amendment, effective February 18, 1986, substituted "next regular session" for "next session" near the end of the first sentence.

SUBCHAPTER V. NOMINATION OF CANDIDATES.

ARTICLE 10.

*Primary Elections.***§ 163-106. Notices of candidacy; pledge; with whom filed; date for filing; withdrawal.**

(d) Notice of Candidacy for Certain Offices to Indicate Vacancy. — In any primary in which there are two or more vacancies for Chief Justice and associate justices of the Supreme Court, two or more vacancies for judge of the Court of Appeals, or two vacancies for United States Senator from North Carolina or two or more vacancies for the office of district court judge to be filled by nominations, each candidate shall, at the time of filing notice of candidacy, file with the State Board of Elections a written statement designating the vacancy to which he seeks nomination. Votes cast for a candidate shall be effective only for his nomination to the vacancy for which he has given notice of candidacy as provided in this subsection.

A person seeking party nomination for a specialized district judgeship established under G.S. 7A-147 shall, at the time of filing notice of candidacy, file with the State Board of Elections a written statement designating the specialized judgeship to which he seeks nomination.

(1915, c. 101, ss. 6, 15; 1917, c. 218; C.S., ss. 6022, 6035; 1921, c. 217; 1923, c. 111, s. 13; C.S., s. 6055(a); 1927, c. 260, s. 19; 1929, c. 26, s. 1; 1933, c. 165, s. 12; 1937, c. 364; 1947, c. 505, s. 7; 1949, c. 672, s. 4; c. 932; 1951, c. 1009, s. 3; 1955, c. 755; c. 871, s. 1; 1959, c. 1203, s. 4; 1965, c. 262; 1967, c. 775, s. 1; c. 1063, s. 2; 1969, c. 44, s. 83; c. 1190, s. 56; 1971, cc. 189, 675, 798; 1973, c. 47, s. 2; c. 793, s. 36; c. 862; 1975, c. 844, s. 2; 1977, c. 265, ss. 4, 5; c. 408, s. 2; c. 661, ss. 2, 3; 1979, c. 24; c. 411, s. 5; 1981, c. 32, ss. 1, 2; 1983, c. 330, s. 1; 1985, c. 472, s. 2; c. 558, s. 1; c. 759, s. 6; 1985 (Reg. Sess., 1986), c. 957, s. 1.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Section 2 of Session Laws 1985 (Reg. Sess., 1986), c. 957, effective July 9, 1986, provides: "Notwithstanding the provisions of Article 6A.1 of Chapter 120 of the General Statutes, the Administrative Officer of the Court shall immediately submit this act to the

Attorney General of the United States under Section 5 of the Voting Rights Act of 1965."

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective July 9, 1986, deleted "or two or more vacancies for the office of superior court judge" following "United States Senator from North Carolina" in the first sentence of the first paragraph of subsection (d).

CASE NOTES

Failure to Preclear Acts. — Where superior court judges were elected pursuant to Session Laws 1965, c. 262, Session Laws 1967, c. 997, Session Laws 1977, cc. 1119, 1130 and 1238, and Session Laws 1983, c. 1109, and such legislative acts had not been precleared by the Attorney General as required by section 5 of the Voting Rights Act of 1965, 42 U.S.C.

§ 1973c, the federal district court would enjoin such elections retroactively in those counties subject to section 5 of the Voting Rights Act; the fact that an election law deals with the election of members of the judiciary does not remove it from the ambit of section 5 of the Voting Rights Act. *Haith v. Martin*, 618 F. Supp. 410 (E.D.N.C. 1985).

SUBCHAPTER VI. CONDUCT OF PRIMARIES AND ELECTIONS.

ARTICLE 12.

Precincts and Voting Places.

§ 163-128. Election precincts and voting places established or altered.

Local Modification. — Randolph: 1985
(Reg. Sess., 1986), c. 827.

ARTICLE 13.

General Instructions.

§ 163-151. Marking ballots in primary and election.

CASE NOTES

Cited in Hendon v. North Carolina State Bd.
of Elections, 633 F. Supp. 454 (W.D.N.C. 1986).

§ 163-152. Assistance to voters in primaries and general elections.

(a) In Primaries or General Elections. —

- (1) Who Is Entitled to Assistance: In a primary or general election, a registered voter qualified to vote in the primary or general election shall be entitled to assistance in getting to and from the voting booth and in preparing his ballots in accordance with the following rules:
 - a. Any voter shall be entitled to assistance from a near relative of his choice.
 - b. Any voter in any of the following four categories shall be entitled to assistance from a person of the voter's choice, other than the voter's employer or agent of that employer or officer or agent of the voter's union:
 1. One who, on account of physical disability, is unable to enter the voting booth without assistance;
 2. One who, on account of physical disability, is unable to mark his ballots without assistance;
 3. One who, on account of illiteracy, is unable to mark his ballots without assistance;
 4. One who, on account of blindness, is unable to enter the voting booth or mark his ballots without assistance.
- (2) Procedure for Obtaining Assistance: A person seeking assistance in a primary or general election shall, upon arriving at the voting place, first request the registrar to permit him to have assistance, stating his reasons. If the registrar determines that the voter is entitled to assistance, he shall ask the voter to point out and identify the person

he desires to help him and to whose assistance he is entitled under this section. The registrar shall thereupon request the person indicated to render the requested aid. The registrar, one of the judges, or one of the assistants may provide aid to the voter if so requested, if the election official is not prohibited by sub-subdivision (a)(1)b. of this section. Under no circumstances shall any precinct official be assigned to assist a voter who qualifies for assistance under this section, who was not specified by the voter.

(d) **Meaning of "Near Relative".** — As used in this section, the words "near relative" shall include the voter's husband, wife, brother, sister, parent, child, grandparent, and grandchild, but no other relative.

(1929, c. 164, ss. 26, 27; 1933, c. 165, s. 24; 1939, c. 352, ss. 1, 2; 1953, c. 843; 1955, c. 800; 1957, c. 784, s. 6; 1959, c. 616, s. 1; 1963, c. 303, s. 1; 1967, c. 775, s. 1; 1973, c. 793, s. 63; 1977, c. 345, ss. 1, 2; 1985, c. 563, ss. 16-16.4; 1985 (Reg. Sess., 1986), c. 900, s. 1.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective with respect to all elections occurring

on or after October 1, 1986, repealed Session Laws 1985, c. 563, s. 16, which had deleted paragraph (a)(1)a, and reenacted that paragraph, and repealed Session Laws 1985, c. 563, s. 16.3, which had repealed subsection (d), and reenacted that subsection.

§ 163-156. (For effective date see note) Rules when two or more vacancies for superior court judge of different term length are to be voted on in the same year, or where two or more elections for less than a full term are to be voted on in the same year.

(a) The General Assembly finds that:

- (1) The provisions of law requiring candidates for superior court judge to designate the vacancy they are seeking are unenforceable under Section 5 of the Voting Rights Act of 1965;
- (2) In some judicial districts, where such staggered terms have been approved under Section 5 of the Voting Rights Act, not all the terms of the superior court judges expire at the same time, and the provisions of Article IV, Section 19 of the North Carolina Constitution dealing with filling of unexpired terms in an election could result in an election being held simultaneously in a judicial district for one or more full eight-year terms, and one or more unexpired terms of two, four, or six years.
- (3) The senior resident superior court judge is given additional responsibilities by North Carolina law, and applying a rule whereby a full term and an unexpired term are voted on at the same time without designation as to vacancy could result in a senior judge running for reelection for a full eight-year term instead being elected to a two-year unexpired term merely because that judge finished second in statewide voting for two seats, which would be disruptive of the process of retaining career judges;
- (4) Article IV, Section 19 of the North Carolina Constitution requires that vacancies in superior court judgeships occurring as late as 31 days before the general election be filled for the remainder of the

unexpired term, which is long after the main part of the judicial ballot has been printed, and while absentee voting is already going on. In the past, when an unexpired term has occurred soon before the election, a supplemental ballot has been issued for use along with the regular judicial ballot. If the State were required to conduct elections for last-minute unexpired terms without designation as to vacancy with the already scheduled full terms, it would require scrapping ballots already printed and would greatly disrupt the election process.

(b) When there is an election in a judicial district for one or more offices of superior court judge for full terms, and there is also to be an election for one or more unexpired terms in the same district at that same election in accordance with Article IV, Section 19 of the North Carolina Constitution, the nomination and election shall be determined by the following special rules in addition to any other provisions of law:

- (1) If the unexpired term occurs prior to the tenth day before the filing period ends under G.S. 163-106(c), nominations shall be made by primary election as provided by Article 10 of this Chapter, with designation as to the vacancy for the unexpired term as against any full term, but without designation as to vacancy between unexpired terms if there is more than one unexpired term;
- (2) If the unexpired term occurs beginning on the tenth day before the filing period ends under G.S. 163-106(c), and ending on the sixtieth day before the general election, a nomination shall be made by the appropriate district executive committee of each political party and the names of the nominees shall be printed on the general election ballots, with designation as to the vacancy for the unexpired term as against any full term, but without designation as to vacancy between unexpired terms if there is more than one unexpired term;
- (3) Beginning on the fifty-ninth day before the general election and ending on the thirtieth day before the general election, a nomination shall be made by the appropriate district executive committee of each political party and the names of the nominees shall be printed on the general election ballots, with designation as to the vacancy;
- (4) The general election ballot shall contain, without designation as to vacancy between full terms, spaces for the election of all full terms. The general election ballot shall contain, without designation as to vacancy between unexpired terms, spaces for the election of all unexpired terms where nominations were made under subdivisions (1) or (2) of this subsection;
- (5) In the general election, the persons receiving the highest numbers of votes equal to the number of full terms to be elected shall be elected to those full terms;
- (6) In the general election, the persons receiving the highest numbers of votes shall be elected to the unexpired term or terms, in order of length of the unexpired terms (longest first), until all those terms have been filled. If unexpired terms of different lengths are to be filled, and two or more persons receive an equal number of votes, and all are to be elected, then the provisions of the last sentence of G.S. 163-191 shall not apply, and the State Board of Elections by lot shall determine which term each candidate elected is to receive;
- (7) In addition, the general election ballot shall contain, with designation of vacancy, spaces for the election of all unexpired terms where nominations are made under subdivision (3) of this subsection.

(c) When there is no election in a judicial district for any offices of superior court judge for full terms, and there is to be an election for one or more

unexpired terms in that district at that same election in accordance with Article VI, Section 19 of the North Carolina Constitution, the nomination and election shall be determined by the following special rules in addition to any other provisions of law:

- (1) If the unexpired term occurs prior to the tenth day before the filing period ends under G.S. 163-106(c), nominations shall be made by primary election as provided by Article 10 of this Chapter, without designation as to the vacancy;
- (2) If the unexpired term occurs beginning on the tenth day before the filing period ends under G.S. 163-106(c), and ending on the sixtieth day before the general election, a nomination shall be made by the appropriate district executive committee of each political party and the names of the nominees shall be printed on the general election ballots, without designation as to the vacancy;
- (3) Beginning on the fifty-ninth day before the general election and ending on the thirtieth day before the general election, a nomination shall be made by the appropriate district executive committee of each political party and the names of the nominees shall be printed on the general election ballots, with designation as to the vacancy;
- (4) The general election ballot shall contain, without designation as to vacancy, spaces for the election of all unexpired terms where nominations were made under subdivisions (1) or (2) of this subsection. The persons receiving the highest numbers of votes equal to the unexpired term or terms, shall be elected to the unexpired term or terms, in order of length of the unexpired terms (longest first), until all those terms have been filled. If unexpired terms of different lengths are to be filled, and two or more persons receive an equal number of votes, and all are to be elected, then the provisions of the last sentence of G.S. 163-191 shall not apply, and if the terms are of unequal length, the State Board of Elections by lot shall determine which term each candidate elected is to receive;
- (5) In addition, the general election ballot shall contain, with designation of vacancy, spaces for the election of all unexpired terms where nominations are made under subdivision (3) of this subsection. (1985 (Reg. Sess., 1986), c. 986, s. 1)

Section Set Out Twice. — The section above is effective until Session Laws 1985 (Reg. Sess., 1986), c. 987, becomes effective. For this section as amended by c. 987, and the effective date thereof, see the following section,

also numbered § 163-156, and the notes thereunder.

Editor's Note. — Section 4 of Session Laws 1985 (Reg. Sess., 1986), c. 986, makes this section effective July 11, 1986.

§ 163-156. (For effective date see note) Rules when two or more vacancies for superior court judge of different term length are to be voted on in the same year, or where two or more elections for less than a full term are to be voted on in the same year.

(a) The General Assembly finds that:

- (1) The provisions of law requiring candidates for superior court judge to designate the vacancy they are seeking are unenforceable under Section 5 of the Voting Rights Act of 1965;

- (2) In some judicial districts, where such staggered terms have been approved under Section 5 of the Voting Rights Act, not all the terms of the superior court judges expire at the same time, and the provisions of Article IV, Section 19 of the North Carolina Constitution dealing with filling of unexpired terms in an election could result in an election being held simultaneously in a judicial district for one or more full eight-year terms, and one or more unexpired terms of two, four, or six years.
- (3) Article IV, Section 19 of the North Carolina Constitution requires that vacancies in superior court judgeships occurring as late as 31 days before the general election be filled for the remainder of the unexpired term, which is long after the main part of the judicial ballot has been printed, and while absentee voting is already going on. In the past, when an unexpired term has occurred soon before the election, a supplemental ballot has been issued for use along with the regular judicial ballot. If the State were required to conduct elections for last-minute unexpired terms without designation as to vacancy with the already scheduled full terms, it would require scrapping ballots already printed and would greatly disrupt the election process.
- (b) When there is an election in a judicial district for one or more offices of superior court judge for full terms, and there is also to be an election for one or more unexpired terms in the same district at that same election in accordance with Article IV, Section 19 of the North Carolina Constitution, the nomination and election shall be determined by the following special rules in addition to any other provisions of law:
 - (1) If the unexpired term occurs prior to the tenth day before the filing period ends under G.S. 163-106(c), nominations shall be made by primary election as provided by Article 10 of this Chapter, without designation as to the vacancy;
 - (2) If the unexpired term occurs beginning on the tenth day before the filing period ends under G.S. 163-106(c), and ending on the sixtieth day before the general election, a nomination shall be made by the appropriate district executive committee of each political party and the names of the nominees shall be printed on the general election ballots, without designation as to the vacancy;
 - (3) Beginning on the fifty-ninth day before the general election and ending on the thirtieth day before the general election, a nomination shall be made by the appropriate district executive committee of each political party and the names of the nominees shall be printed on the general election ballots, with designation as to the vacancy;
 - (4) The general election ballot shall contain, without designation as to vacancy, spaces for the election of all full terms and all unexpired terms where nominations were made under subdivisions (1) or (2) of this subsection. The persons receiving the highest numbers of votes equal to the number of full terms to be elected shall be elected to those full terms. The persons receiving the next highest numbers of votes shall be elected to the unexpired term or terms, in order of length of the unexpired terms (longest first), until all those terms have been filled. If two or more persons receive an equal number of votes, and all are to be elected, then the provisions of the last sentence of G.S. 163-191 shall not apply, and if the terms are of unequal length, the State Board of Elections by lot shall determine which term each candidate elected is to receive;
 - (5) In addition, the general election ballot shall contain, with designation of vacancy, spaces for the election of all unexpired terms where nominations are made under subdivision (3) of this subsection.

(c) When there is no election in a judicial district for any offices of superior court judge for full terms, and there is to be an election for one or more unexpired terms in the that district at that same election in accordance with Article IV, Section 19 of the North Carolina Constitution, the nomination and election shall be determined by the following special rules in addition to any other provisions of law:

- (1) If the unexpired term occurs prior to the tenth day before the filing period ends under G.S. 163-106(c), nominations shall be made by primary election as provided by Article 10 of this Chapter, without designation as to the vacancy;
- (2) If the unexpired term occurs beginning on the tenth day before the filing period ends under G.S. 163-106(c), and ending on the sixtieth day before the general election, a nomination shall be made by the appropriate district executive committee of each political party and the names of the nominees shall be printed on the general election ballots, without designation as to the vacancy;
- (3) Beginning on the fifty-ninth day before the general election and ending on the thirtieth day before the general election, a nomination shall be made by the appropriate district executive committee of each political party and the names of the nominees shall be printed on the general election ballots, with designation as to the vacancy;
- (4) The general election ballot shall contain, without designation as to vacancy, spaces for the election of all unexpired terms where nominations were made under subdivision (1) or (2) of this subsection. The persons receiving the highest numbers of votes equal to the unexpired term or terms, in order of length of the unexpired terms (longest first), shall be elected to the unexpired term or terms, until all those terms have been filled. If two or more persons receive an equal number of notes, and all are to be elected, then the provisions of the last sentence of G.S. 163-191 shall not apply, and if the terms are of unequal length, the State Board of Elections by lot shall determine which term each candidate elected is to receive.
- (5) In addition, the general election ballot shall contain, with designation of vacancy, spaces for the election of all unexpired terms where nominations are made under subdivision (3) of this subsection. (1985 (Reg. Sess., 1986), c. 986, s. 1; c. 987, s. 1.)

Section Set Out Twice. — The section above becomes effective as provided in Section 4 of Session Laws 1985 (Reg. Sess., 1986), c. 987, which is set out in the Editor's note below. For this section as in effect until c. 987 becomes effective, see the preceding section, also numbered § 163-156.

Editor's Note. — Section 4 of Session Laws 1985 (Reg. Sess., 1986); c. 986, moves this section effective July 11, 1986.

Section 4 of Session Laws 1985 (Reg. Sess., 1986), c. 987, provides: "This act shall only become effective if the Attorney General of the

United States interposes objection to Senate Bill 892, 1985 Session [Session Laws 1985 (Reg. Sess., 1986), c. 986] as to the fact that such bill provides for designating vacancies for all unexpired terms separately from full terms. If such objection is made, then this act is effective on the date of such objection, and shall be submitted immediately under Section 5 of the Voting Rights Act of 1965. Sections 2 and 3 of this act shall expire with respect to primaries and elections held on or after December 31, 1986."

§§ 163-157 to 163-159: Reserved for future codification purposes.

ARTICLE 15.

Counting Ballots, Canvassing Votes, and Certifying Results in Precinct and County.

§ 163-170. Rules for counting ballots.

CASE NOTES

Cited in *Hendon v. North Carolina State Bd. of Elections*, 633 F. Supp. 454 (W.D.N.C. 1986).

ARTICLE 18A.

Presidential Preference Primary Act.

§ 163-213.2. Primary to be held; date; qualifications and registration of voters.

On the second Tuesday in March, 1988, and every four years thereafter, the voters of this State shall be given an opportunity to express their preference for the person to be the presidential candidate of their political party.

Any person otherwise qualified who will become qualified by age to vote in the general election held in the same year of the presidential preference primary shall be entitled to register and vote in the presidential preference primary. Such persons may register not earlier than 60 days nor later than the 21st day prior to the said primary. (1971, c. 225; 1975, c. 744; c. 844, s. 18; 1977, c. 19; c. 661, s. 7; 1983, c. 331, s. 5; 1985 (Reg. Sess., 1986), c. 927, s. 1.)

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective July 8, 1986, substituted "On the second Tuesday in March, 1988, and every four

years thereafter" for "Beginning with the Tuesday after the first Monday in May, 1980, and every four years thereafter" at the beginning of the first paragraph.

§ 163-213.11. Costs of presidential preference primary.

The State Board of Elections shall reimburse the county boards of elections for their reasonable costs in conducting the Presidential Preference Primary, in accordance with rules adopted by the State Board of Elections. (1985 (Reg. Sess., 1986), c. 927, s. 2.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 927, s. 3 makes this section ef-

fective upon ratification. The act was ratified July 8, 1986.

SUBCHAPTER VII. ABSENTEE VOTING.

ARTICLE 20.

*Absentee Ballot.***§ 163-227. State Board to prescribe forms of applications for absentee ballots; county to secure.**

(a) (Effective until December 31, 1986) Applications for Absentee Ballots Generally. — A voter falling in any one of the categories defined in G.S. 163-226, 163-226.1 or 163-226.2 may apply for absentee ballots not earlier than 50 days prior to the statewide, county or municipal election in which he seeks to vote and not later than 5:00 P.M. on the Tuesday before that election. Subject to all other provisions contained in this Article, a voter applying for an absentee ballot shall complete the appropriate application to be secured by the county board of elections, lettered A, B, C, or OS, as designed and prescribed by the State Board of Elections and specified below:

Application A shall be completed by a voter expecting to be absent from the county of his residence all day on the day of the specified election. (G.S. 163-226(a)(1)).

Application B shall be completed by a voter who is unable to be present at the voting place to vote in person on the day of the specified election because of his sickness or other physical disability occurring before 5:00 P.M. on the Tuesday prior to the date of the specified election. (G.S. 163-226(a)(2)). Application B shall be printed on the reverse side of Application A.

Application C shall be completed by a voter who is unable to be present at the voting place to vote in person on the day of the specified election because of his sickness or other physical disability occurring since 5:00 P.M. on the Tuesday prior to the date of the specified election. (G.S. 163-226(a)(2)).

Application OS shall be completed by a voter expecting to be absent from the county, or due to emergency disability will be unable to vote in person, or a person who qualifies under G.S. 163-226(a)(4), and who, in lieu of making application by mail, wishes to apply in person and receive a ballot which he may immediately vote in the office of the county board of elections.

(1939, c. 159, s. 2; 1943, c. 751, s. 1; 1963, c. 457, s. 2; 1967, c. 775, s. 1; c. 952, s. 3; 1971, c. 947, ss. 1-5; 1973, c. 536, s. 1; c. 1075, ss. 1-3; 1975, c. 19, s. 69; c. 844, s. 11; 1977, c. 469, s. 1; c. 626, s. 1; c. 680; 1981, c. 155, s. 3; c. 305, s. 1; 1983, c. 331, s. 3; 1985, c. 563, s. 2; c. 600, ss. 1, 2; 1985 (Reg. Sess., 1986), c. 986, s. 2; c. 987, s. 2.)

For subsection (a) of this section as in effect after December 31, 1986, see the 1985 Cumulative Supplement.

Only Part of Section Set Out. — As the rest of the section was not affected by the amendments, it is not set out.

Editor's Note. — Section 4 of Session Laws 1985 (Reg. Sess., 1986), c. 986, provides that s. 2 thereof, which amends subsection (a), shall expire with respect to primaries and elections held on or after December 31, 1986.

Section 4 of Session Laws 1985 (Reg. Sess., 1986), c. 987, provides: "This act shall only be-

come effective if the Attorney General of the United States interposes objection to Senate Bill 892, 1985 Session [Session Laws 1985 (Reg. Sess., 1986), c. 986] as to the fact that such bill provides for designating vacancies for all unexpired terms separately from full terms. If such objection is made, then this act is effective on the date of such objection, and shall be submitted immediately under Section 5 of the Voting Rights Act of 1965. Sections 2 and 3 of this act shall expire with respect to primaries and elections held on or after December 31, 1986."

Effect of Amendments. —

Session Laws 1985 (Reg. Sess., 1986), c. 986, effective July 11, 1986, substituted "50 days" for "60 days" in the first sentence of the first paragraph of subsection (a).

Session Laws 1985 (Reg. Sess., 1986), c. 987,

made the same amendment as c. 986. As to the effective date of the amendment by c. 987, see the Editor's note above.

As to the expiration date of the amendments by cc. 986 and 987, see also the Editor's note.

§ 163-227.3. Date by which absentee ballots must be available for voting.

(a) **(Effective until December 31, 1986)** The State Board of Elections shall provide absentee ballots of the kinds to be furnished by the State Board, to the county boards of elections 50 days prior to the date on which the election shall be conducted unless there shall exist an appeal before the State Board or the courts not concluded, in which case the State Board shall provide the ballots as quickly as possible upon the conclusion of such an appeal. In every instance the State Board shall exert every effort to provide absentee ballots, of the kinds to be furnished by the State Board, to each county by the date on which absentee voting is authorized to commence.

(1973, c. 1275; 1977, c. 469, s. 1; 1985 (Reg. Sess., 1986), c. 986, s. 2; c. 987, s. 2.)

For subsection (a) of this section as in effect after December 31, 1986, see the main volume.

Only Part of Section Set Out. — As the rest of the section was not affected by the amendments, it is not set out.

Editor's Note. — Section 4 of Session Laws 1985 (Reg. Sess., 1986), c. 986, provides that s. 2 thereof, which amends subsection (a), shall expire with respect to primaries and elections held on or after December 31, 1986.

Section 4 of Session Laws 1985 (Reg. Sess., 1986), c. 987, provides: "This act shall only become effective if the Attorney General of the United States interposes objection to Senate Bill 892, 1985 Session [Session Laws 1985 (Reg. Sess., 1986), c. 986] as to the fact that such bill provides for designating vacancies for all unexpired terms separately from full terms.

If such objection is made, then this act is effective on the date of such objection, and shall be submitted immediately under Section 5 of the Voting Rights Act of 1965. Sections 2 and 3 of this act shall expire with respect to primaries and elections held on or after December 31, 1986."

Effect of Amendments. —

Session Laws 1985 (Reg. Sess., 1986), c. 986, effective July 11, 1986, substituted "50 days" for "60 days" in the first sentence of subsection (a).

Session Laws 1985 (Reg. Sess., 1986), c. 987, made the same amendment as c. 986. As to the effective date of the amendment by c. 987, see the Editor's note above.

As to the expiration date of the amendments by cc. 986 and 987, also see the Editor's note.

§ 163-229. Absentee ballots, container-return envelopes, and instruction sheets.

(b) **(Effective until December 31, 1986)** Container-Return Envelope. — In time for use not later than 50 days before a statewide primary, general election or county bond election, the county board of elections shall print a sufficient number of envelopes in which persons casting absentee ballots may transmit their marked ballots to the chairman of the county board of elections. Each container-return envelope shall be printed in accordance with the following instructions:

- (1) On one side shall be printed an identified space in which shall be inserted the application number of the voter and the following statement which shall be certified by one member of the county board of elections:

“Certification of Election Official

The undersigned election official does by his hand and seal certify that is a registered and qualified voter of County, Precinct # and has made proper application to vote under the Absentee Ballot Law of North Carolina.

..... (Seal)
Chairman-Member”

- (2) On the other side shall be printed the return address of the chairman of the county board of elections and the following affidavit:

“Affidavit or Certificate of Absentee or Sick Voter

State of
County of

I,, do solemnly swear that I am a resident and registered voter in precinct, County, North Carolina; that on the day of an election,, 19... (check whichever of the following statements is correct.)

() I will be absent from the county in which I reside.

() Due to sickness or physical disability, or incarceration as a misdemeanor, I will be unable to travel to the voting place in the precinct in which I reside.

I further swear that I made application for absentee ballots, and that I marked the ballots enclosed herein, or that they were marked for me in my presence and according to my instructions.

.....
(Signature of voter)

Sworn to and subscribed before me this day of, 19

.....
(Signature and seal of officer
administering oath)

My commission (if any) expires

.....
(Title of officer)

If you are a resident of North Carolina who is residing temporarily outside the United States, you do not have to have this affidavit or certificate signed by an officer administering an oath. Instead, check the box below and sign the following certification.

☐ I am a resident of North Carolina but residing temporarily outside the United States. I certify that I made application for absentee ballots, and that I marked the ballots enclosed herein. I understand it is a felony to falsely sign this certificate.

.....
(Signature of voter)”

(c) (Effective until December 31, 1986) Instruction Sheets. — In time for use not later than 50 days before a statewide primary, general or county bond election, the county board of elections shall prepare and print a sufficient number of sheets of instructions on how voters are to prepare absentee ballots and return them to the chairman of the county board of elections. (1929, c. 164, s. 39; 1939, c. 159, ss. 3, 4; 1943, c. 751, s. 2; 1963, c. 457, ss. 3, 4; 1965, c. 1208; 1967, c. 775, s. 1; c. 851, s. 1; c. 952, s. 5; 1973, c. 536, s. 1; 1975, c. 844, s. 13; 1977, c. 469, s. 1; 1985, c. 562, ss. 3, 4; 1985 (Reg. Sess., 1986), c. 986, s. 2; c. 987, s. 2.)

For subsection (b) of this section as in effect after December 31, 1986, see the 1985 Cumulative Supplement.

For subsection (c) of this section as in effect after December 31, 1986, see the main volume.

Only Part of Section Set Out. — As the rest of the section was not affected by the amendments, it is not set out.

Editor's Note. — Section 4 of Session Laws 1985 (Reg. Sess., 1986), c. 986, provides that s. 2 thereof, which amends subsections (b) and (c), shall expire with respect to primaries and elections held on or after December 31, 1986.

Section 4 of Session Laws 1985 (Reg. Sess., 1986), c. 987, provides: "This act shall only become effective if the Attorney General of the United States interposes objection to Senate Bill 892, 1985 Session [Session Laws 1985 (Reg. Sess., 1986), c. 986] as to the fact that such bill provides for designating vacancies for

all unexpired terms separately from full terms. If such objection is made, then this act is effective on the date of such objection, and shall be submitted immediately under Section 5 of the Voting Rights Act of 1965. Sections 2 and 3 of this act shall expire with respect to primaries and elections held on or after December 31, 1986."

Effect of Amendments. —

Session Laws 1985 (Reg. Sess., 1986), c. 986, effective July 11, 1986, substituted "50 days" for "60 days" in the first sentence of the introductory language of subsection (b) and in subsection (c).

Session Laws 1985 (Reg. Sess., 1986), c. 987, made the same amendment as c. 986. As to the effective date of the amendment by c. 987, see the Editor's note above.

As to the expiration date of the amendments by cc. 986 and 987, also see the Editor's note.

§ 163-230. Consideration and approval of applications and issuance of absentee ballots.

The procedure to be followed in receiving applications for absentee ballots, passing upon their validity, and issuing absentee ballots shall be governed by the provisions of this section.

(2) **(Effective until December 31, 1986)** Determination of Validity of Applications for Absentee Ballots. — The county board of election shall constitute the proper official body to pass upon the validity of all applications for absentee ballots received in the county; this function shall not be performed by the chairman or any other member of the board individually.

a. **Required Meeting of County Board of Elections.** — During the period commencing 50 days before an election, and until 30 days before the election, in which absentee ballots are authorized, the county board of elections shall hold one or more public meetings each week on a day and at an hour to be determined by the board for the purpose of action on applications for absentee ballots. Each member of the board shall be notified in writing of the day and hour such meetings shall be conducted. During the period opening 30 days before an election in which absentee ballots are authorized and closing at 5:00 P.M. on the Thursday before the election, the county board of elections shall hold public meetings at 10:00 A.M. on Tuesday and Friday of each week, and it shall also hold public meetings at 10:00 A.M. on the eighth, sixth, third and first days immediately preceding election day. These meetings shall be held at the county courthouse or at the elections board's office at the hour fixed by law. At these meetings the county board of elections shall pass upon applications for absentee ballots.

Upon a majority vote, the county board of elections may hold the required public meetings at an hour other than 10:00 A.M., and it may hold more than one session on each Tuesday and Friday it is required to meet and may set the hours of any additional sessions. If the board desires to exercise either or both of the options granted by the preceding sentence, it shall do so prior

to the date on which it is required to hold its first public meeting under the provisions of this subdivision and in time to give the notice required by the fourth paragraph of this lettered portion of this subdivision; thereafter, no change shall be made in the hours fixed for the board's public meetings on absentee ballot applications.

It shall not be necessary for the chairman of the county board of elections to give notice to other board members of weekly meetings of the board which are fixed as to time and place by this section.

If the county board of elections changes the time of holding its Tuesday and Friday meetings or provides for additional meetings on Tuesdays and Fridays in accordance with the terms of this subdivision, notice of the change in hour and notice of the schedule of additional meetings, if any, shall be published in a newspaper circulated in the county, and a notice thereof shall be posted at the courthouse door of the county, at least one week prior to the time fixed for holding the first meeting under this subdivision.

The county board of elections shall not be required to hold any of the meetings prescribed by this subdivision unless, since its last preceding meeting, it actually has received one or more applications for absentee ballots which it has not passed upon. When no meeting is to be held for this reason, the chairman shall notify each of the other members of the county board of elections that the scheduled public meeting will be held and state the reasons for its cancellation.

- b. Procedure at Required Meeting; Making Determination. — At each public meeting of the county board of elections the chairman shall present for consideration, and the board shall pass upon, the validity of all applications for absentee ballots received since its last preceding public meeting held for that purpose. At each such meeting any registered voter of the county shall be heard and allowed to present evidence in opposition to, or in favor of, the issuance of absentee ballots to any voter making application for them.

The county board of elections may consider the registration records as evidence of the voter's signature, if available, and as any other evidence that may be necessary to pass upon such an application, including the party affiliation of a voter seeking to vote in a primary.

If the board finds that the applicant is a qualified voter of the county, that he is registered in the precinct stated in his application, that the assertions in his application are true, and that his application is in proper form, it shall approve his application for absentee ballots.

- c. Record of Board's Determination; Decision Final. — At the time the county board of elections makes its decision on an application for absentee ballots, the chairman shall enter in the appropriate column in the register of absentee ballot applications and ballots issued opposite the name of the applicant a notation of whether his application was "Approved" or "Disapproved".

The decision of the board on the validity of an application for absentee ballots shall be final subject only to such review as may be necessary in the event of an election contest.

(1939, c. 159, s. 3; 1963, c. 457, s. 3; 1965, c. 1208; 1967, c. 775, s. 1; c. 952, s. 6; 1973, c. 536, s. 1; c. 1075, s. 4; 1975, c. 844, ss. 14, 19; 1977, c. 469, s. 1; 1981, c. 305, s. 3; 1985, c. 563, s. 6; c. 600, ss. 5, 6; 1985 (Reg. Sess., 1986), c. 986, s. 2; c. 987, s. 2.)

For subsection (2) of this section as in effect after December 31, 1986, see the 1985 Cumulative Supplement.

Only Part of Section Set Out. — As the rest of the section was not affected by the amendments, it is not set out.

Editor's Note. — Section 4 of Session Laws 1985 (Reg. Sess., 1986), c. 986, provides that s. 2 thereof, which amends subdivision (2)a, shall expire with respect to primaries and elections held on or after December 31, 1986.

Section 4 of Session Laws 1985 (Reg. Sess., 1986), c. 987, provides: "This act shall only become effective if the Attorney General of the United States interposes objection to Senate Bill 892, 1985 Session [Session Laws 1985 (Reg. Sess., 1986), c. 986] as to the fact that such bill provides for designating vacancies for all unexpired terms separately from full terms.

If such objection is made, then this act is effective on the date of such objection, and shall be submitted immediately under Section 5 of the Voting Rights Act of 1965. Sections 2 and 3 of this act shall expire with respect to primaries and elections held on or after December 31, 1986."

Effect of Amendments. —

Session Laws 1985 (Reg. Sess., 1986), c. 986, effective July 11, 1986, substituted "50 days" for "60 days" in the first sentence of the first paragraph of subdivision (2)a.

Session Laws 1985 (Reg. Sess., 1986), c. 987, made the same amendment as c. 986. As to the effective date of the amendment by c. 987, see the Editor's note above.

As to the expiration date of the amendments by cc. 986 and 987, also see the Editor's note.

ARTICLE 21.

Military Absentee Registration and Voting in Primary and General Elections.

§ 163-248. Register, ballots, container-return envelopes, and instruction sheets.

(b) **(Effective until December 31, 1986)** Absentee Ballot Form. — Persons entitled to vote by absentee ballot under the terms of this Article shall be furnished with regular official ballots; separate or distinctly marked absentee ballots shall not be used. The State Board of Elections and the county boards of elections shall have all necessary absentee ballots printed and in the hands of the proper election officials not later than 50 days before the primary or election.

(c) **(Effective until December 31, 1986)** Container-Return Envelope. — The county board of elections shall print a sufficient number of envelopes in which persons casting military absentee ballots may transmit their marked ballots to the chairman of the county board of elections. The container-return envelopes shall be printed and available for use not later than 50 days before the primary or election. Each container-return envelope shall be printed in accordance with the following instructions:

- (1) On one side shall be arranged identified spaces in which the chairman of the county board of elections may insert the name of the applicant, the number assigned his application, and the designation of the precinct in which his ballots are to be voted.
- (2) On the other side shall be printed the return address of the chairman of the county board of elections and the following certificate:

"Certificate of Absentee Voter

I,, do hereby certify that I am a resident and qualified voter in precinct, County, North Carolina, and that I am [check whichever of the following statements is correct]

- [] Serving in the armed forces of the United States
- [] The spouse of a member of the armed forces of the United States residing outside the county of my spouse's residence
- [] A disabled war veteran in a United States government hospital
- [] A civilian attached to and serving outside the United States with the armed forces of the United States
- [] A member of the Peace Corps

I further certify that I am affiliated with the. Party.
[To be completed only if applicant seeks to vote in the primary of the political party to which he belongs.]

I further certify that the following is my official address:

.....
[Unit (Co., Sq., Trp., Bn., etc.), Governmental Agency, or Office]
.....
[Military Base, Station, Camp, Fort, Ship, Airfield, etc.]
.....
[Street number, APO, or FPO number]
.....
[City, postal zone, State, and zip code]

I further certify that I made application for absentee ballots and that I marked the ballots enclosed herein, or that they were marked for me in my presence and according to my instruction.

Witness my hand in the presence of [Insert name and rank of witnessing officer] this day of, 19

(Signature of voter)

Witness:

(Signature of witnessing officer)

Rank or title of witnessing officer:

Unit to which witnessing officer is assigned:

Note: This certificate may be witnessed by any commissioned officer or any noncommissioned officer of the rank of sergeant in the Army, petty officer in the Navy, or equivalent rank in other branches of the armed forces of the United States."

(1929, c. 164, s. 39; 1941, c. 346, ss. 2, 3, 4, 5, 6; 1943, c. 503, s. 3; 1963, c. 457, ss. 12, 13, 14; 1967, c. 775, s. 1; 1973, c. 793, s. 72; 1975, c. 844, ss. 15-17; 1979, c. 411, s. 7; 1985 (Reg. Sess., 1986), c. 986, s. 2; c. 987, s. 2.)

For subsections (b) and (c) of this section as in effect after December 31, 1986, see the main volume.

Only Part of Section Set Out. — As the rest of the section was not affected by the amendments, it is not set out.

Editor's Note. — Section 4 of Session Laws 1985 (Reg. Sess., 1986), c. 986, provides that s. 2 thereof, which amends subsections (b) and (c), shall expire with respect to primaries and elections held on or after December 31, 1986.

Section 4 of Session Laws 1985 (Reg. Sess., 1986), c. 987, provides: "This act shall only become effective if the Attorney General of the United States interposes objection to Senate Bill 892, 1985 Session [Session Laws 1985 (Reg. Sess., 1986), c. 986] as to the fact that such bill provides for designating vacancies for all unexpired terms separately from full terms. If such objection is made, then this act is effective on the date of such objection, and shall be

submitted immediately under Section 5 of the Voting Rights Act of 1965. Sections 2 and 3 of this act shall expire with respect to primaries and elections held on or after December 31, 1986."

Effect of Amendments. —

Session Laws 1985 (Reg. Sess., 1986), c. 986, effective July 11, 1986, substituted "50 days" for "60 days" in the second sentence of subsec-

tion (b) and in the second sentence of the introductory language of subsection (c).

Session Laws 1985 (Reg. Sess., 1986), c. 987, made the same amendment as c. 986. As to the effective date of the amendment by c. 987, see the Editor's note above.

As to the expiration date of the amendments by cc. 986 and 987, also see the Editor's note.

SUBCHAPTER VIII. REGULATION OF ELECTION CAMPAIGNS.

ARTICLE 22B.

Appropriations from the North Carolina Election Campaign Fund.

§ 163-278.41. Appropriations in general election years and other years.

Editor's Note. — The amendment of this section by Session Laws 1985, c. 768 (see the 1985 Cumulative Supplement) was made contingent on approval by the voters of the constitutional amendments proposed by c. 768. Since the proposed constitutional amendments were

defeated by a vote of the People on May 6, 1986, the amendment to this section by Session Laws 1985, c. 768 will not become effective. Therefore, the first version of this section appearing in the 1985 Cumulative Supplement remains in effect.

§ 163-278.42. Distribution of campaign funds; legitimate expenses permitted.

(a) In a general election year in which a presidential election is held, every State chairman of a political party shall disburse fifty percent (50%) of all funds received from the North Carolina Campaign Election Fund to that political party. The remaining fifty percent (50%) of such funds shall be allocated by the special committee established by subsection (d) of this section and used for one or more of the purposes permitted by subsection (e) of this section. Any candidate may elect to decline in whole or in part any funds that the party chooses to distribute to the candidate.

(b) In a general election year in which there is not a presidential election, every State chairman of a political party shall disburse fifty percent (50%) of all funds received from the North Carolina Campaign Election Fund to that political party. The remaining fifty percent (50%) of such funds shall be allocated by the special committee established in subsection (d) of this section and used for one or more of the purposes permitted by subsection (e) of this section. Any candidate may elect to decline in whole or in part any funds that the party chooses to distribute to the candidate.

(c) In each year in which no general election is held, every State chairman of a political party shall disburse all funds received from the North Carolina Campaign Election Fund to that political party.

(d) The allocation of the remaining fifty percent (50%) of the funds under subsections (a) or (b) of this section shall be made by a committee composed of the State Chairman of that political party, the Treasurer of that party, the

Congressional District Chairmen of that party, and two persons appointed by the State Chairman of that party, and the State Chairman shall serve as Chairman of this committee. The allocation of funds shall be in the sole discretion of the committee, but must be for a purpose permitted by section (e) of this section and if allocated to a candidate, shall be disbursed by the State Chairman of that party only to the Treasurer of that candidate or committee appointed under Article 22A of this Chapter or under the Federal Election Campaign Act of 1971, Chapter 14 of Title 2, United States Code.

(e) Funds distributed from the North Carolina Campaign Election Fund or from the "Presidential Election Year Candidates Fund" of a political party shall only be expended for legitimate campaign expenses. By way of illustration but not by way of limitation, the following are examples of legitimate campaign expenses:

- (1) Radio, television, newspaper, and billboard advertising for and on behalf of a political party or candidate;
- (2) Leaflets, fliers, buttons, and stickers;
- (3) Campaign staff salaries, provided each staff member is listed by name and by the amount paid as salary and the amount paid as campaign expense reimbursement;
- (4) Travel expenses, lodging and food for candidate and staff;
- (4a) Expenses to ensure compliance with federal and State campaign finance and reporting laws;
- (4b) Contributions to or expenses on behalf of candidates of that political party;
- (5) Party headquarters operations related to upcoming general elections, including the purchase, maintenance and programming of computers to provide lists of voters, party workers, officers, committee members and participants in party functions, patterns of voting and other data for use in general election campaigns and party activities and functions prior thereto, the establishment and updating computer file systems of voter registration lists, State, district, county and precinct officers and committee member lists, party clubs or organization lists, the organizing of voter registration, fund raising and get-out-the-vote programs at the county level when conducted by State party personnel, and the preparation of reports required to be filed by State and federal laws and systems needed to prepare the same and keep records incident thereto.

(f) All moneys and funds previously designated by taxpayers being held by the North Carolina Secretary of Revenue and being held by the North Carolina State Treasurer which moneys and funds have not been disbursed or delivered to a political party as of June 16, 1978, when disbursed shall be allocated by the State Chairman of the political party as follows: sixty-two and one-half percent (62½%) of such funds to the political party for legitimate general election campaign expenditures; thirty-seven and one-half percent (37½%) to the eligible candidates as determined by the committee established under this Article.

(g) It shall be unlawful for any person, candidate, political committee or political party to use either directly or indirectly any part of funds distributed from the North Carolina Campaign Election Fund or the Presidential Election Year Candidates Fund of any political party for the support or assistance either directly or indirectly of any candidate in a primary election, for support or assistance relating to the selection of a candidate at a political convention or by the executive committee of a party, for the payment or repayment of any debt or obligation of whatsoever kind or nature incurred by any person, candidate or political committee in a primary election, the selection of a candidate at a political convention or by the executive committee of a party, or for the

support, promotion or opposition of a national, State or local referendum, bond election or constitutional amendment. (1977, 2nd Sess., c. 1298, s. 2; 1983, c. 700, ss. 1-4; 1985 (Reg. Sess., 1986), c. 866.)

Editor's Note. — The amendment of this section by Session Laws 1985, c. 768 (see the 1985 Cumulative Supplement) was made contingent on approval by the voters of the constitutional amendments proposed by c. 768. Since the proposed constitutional amendments were defeated by a vote of the People on May 6, 1986, the amendment to this section by Session Laws 1985, c. 768 will not become effective.

Effect of Amendments. —
The 1985 (Reg. Sess., 1986) amendment, effective July 6, 1983, added "or under the Federal Election Campaign Act of 1971, Chapter 14 of Title 2, United States Code" at the end of subsection (d).

SUBCHAPTER IX. MUNICIPAL ELECTIONS.

ARTICLE 23.

Municipal Election Procedure.

§ 163-279. Time of municipal primaries and elections.

Editor's Note. — The amendment of this section by Session Laws 1985, c. 768 (see the 1985 Cumulative Supplement) was made contingent on approval by the voters of the constitutional amendments proposed by c. 768. Since the proposed constitutional amendments were

defeated by a vote of the People on May 6, 1986, the amendment to this section by Session Laws 1985, c. 768 will not become effective. Therefore, this section as it appears in the main volume remains in effect.

§ 163-280. Municipal boards of elections.

Editor's Note. — The repeal of this section by Session Laws 1985, c. 768 (see the 1985 Cumulative Supplement) was made contingent on approval by the voters of the constitutional amendments proposed by c. 768. Since the proposed constitutional amendments were defeated by a vote of the People on May 6, 1986, the repeal of this section by Session Laws 1985,

c. 768 will not become effective. Therefore, the first version of this section appearing in the 1985 Cumulative Supplement remains in effect until January 1, 1987, at which time the second version of this section appearing in the 1985 Cumulative Supplement becomes effective.

§ 163-281. Municipal precinct election officials.

Editor's Note. — The repeal of this section by Session Laws 1985, c. 768 (see the 1985 Cumulative Supplement) was made contingent on approval by the voters of the constitutional amendments proposed by c. 768. Since the pro-

posed constitutional amendments were defeated by a vote of the People on May 6, 1986, the repeal of this section by Session Laws 1985, c. 768 will not become effective.

§ 163-284. Mandatory administration by county boards of elections.

Editor's Note. — The amendment of this section by Session Laws 1985, c. 768 (see the 1985 Cumulative Supplement) was made contingent on approval by the voters of the constitutional amendments proposed by c. 768. Since the proposed constitutional amendments were

defeated by a vote of the People on May 6, 1986, the amendment to this section by Session Laws 1985, c. 768 will not become effective. Therefore, this section as it appears in the main volume remains in effect.

§ 163-285. Administration by county board of elections; optional by municipality.

Local Modification. — Edgecombe, Nash, Wilson: 1985 (Reg. Sess., 1986), c. 988.

Editor's Note. — The repeal of this section by Session Laws 1985, c. 768 (see the 1985 Cumulative Supplement) was made contingent on approval by the voters of the constitutional

amendments proposed by c. 768. Since the proposed constitutional amendments were defeated by a vote of the People on May 6, 1986, the repeal of this section by Session Laws 1985, c. 768 will not become effective.

§ 163-286. Conduct of municipal and special district elections; application of Chapter 163.

Editor's Note. — The amendment of this section by Session Laws 1985, c. 768 (see the 1985 Cumulative Supplement) was made contingent on approval by the voters of the constitutional amendments proposed by c. 768. Since

the proposed constitutional amendments were defeated by a vote of the People on May 6, 1986, the amendment to this section by Session Laws 1985, c. 768 will not become effective.

§ 163-287. Special elections; procedure for calling.

Editor's Note. — The amendment of this section by Session Laws 1985, c. 768 (see the 1985 Cumulative Supplement) was made contingent on approval by the voters of the constitutional amendments proposed by c. 768. Since

the proposed constitutional amendments were defeated by a vote of the People on May 6, 1986, the amendment to this section by Session Laws 1985, c. 768 will not become effective.

§ 163-288. Registration for city elections; county and municipal boards of elections.

Editor's Note. — The amendment of this section by Session Laws 1985, c. 768 (see the 1985 Cumulative Supplement) was made contingent on approval by the voters of the constitutional amendments proposed by c. 768. Since

the proposed constitutional amendments were defeated by a vote of the People on May 6, 1986, the amendment to this section by Session Laws 1985, c. 768 will not become effective.

§ 163-288.1. Activating voters for newly annexed or incorporated areas.

Editor's Note. — The amendment of this section by Session Laws 1985, c. 768 (see the 1985 Cumulative Supplement) was made contingent on approval by the voters of the constitutional amendments proposed by c. 768. Since

the proposed constitutional amendments were defeated by a vote of the People on May 6, 1986, the amendment to this section by Session Laws 1985, c. 768 will not become effective.

§ 163-289. Right to challenge; challenge procedure.

Editor's Note. — The amendment of this section by Session Laws 1985, c. 768 (see the 1985 Cumulative Supplement) was made contingent on approval by the voters of the constitutional amendments proposed by c. 768. Since

the proposed constitutional amendments were defeated by a vote of the People on May 6, 1986, the amendment to this section by Session Laws 1985, c. 768 will not become effective.

ARTICLE 24.

Conduct of Municipal Elections.

§ 163-291. Partisan primaries and elections.

Editor's Note. — The amendment of this section by Session Laws 1985, c. 768 (see the 1985 Cumulative Supplement) was made contingent on approval by the voters of the constitutional amendments proposed by c. 768. Since the proposed constitutional amendments were defeated by a vote of the People on May 6, 1986, the amendment to this section by Session Laws 1985, c. 768, which appears in the 1985

Cumulative Supplement as the third version of this section, will not become effective. Therefore, the first version of this section appearing in the 1985 Cumulative Supplement remains in effect until January 1, 1987, at which time the second version of this section appearing in the 1985 Cumulative Supplement becomes effective.

§ 163-294.2. Notice of candidacy and filing fee in nonpartisan municipal elections.

Editor's Note. — The amendment of this section by Session Laws 1985, c. 768 (see the 1985 Cumulative Supplement) was made contingent on approval by the voters of the constitutional amendments proposed by c. 768. Since the proposed constitutional amendments were defeated by a vote of the People on May 6, 1986, the amendment to this section by Session Laws 1985, c. 768, which appears in the 1985

Cumulative Supplement as the third version of this section, will not become effective. Therefore, the first version of this section appearing in the 1985 Cumulative Supplement remains in effect until January 1, 1987, at which time the second version of this section appearing in the 1985 Cumulative Supplement becomes effective.

§ 163-296. Nomination by petition.

Editor's Note. — The amendment of this section by Session Laws 1985, c. 768 (see the 1985 Cumulative Supplement) was made contingent on approval by the voters of the constitutional amendments proposed by c. 768. Since

the proposed constitutional amendments were defeated by a vote of the People on May 6, 1986, the amendment to this section by Session Laws 1985, c. 768 will not become effective.

§ 163-298. Municipal primaries and elections.

Editor's Note. — The amendment of this section by Session Laws 1985, c. 768 (see the 1985 Cumulative Supplement) was made contingent on approval by the voters of the constitutional amendments proposed by c. 768. Since

the proposed constitutional amendments were defeated by a vote of the People on May 6, 1986, the amendment to this section by Session Laws 1985, c. 768 will not become effective.

§ 163-299. Ballots; municipal primaries and elections.

Editor's Note. — The amendment of this section by Session Laws 1985, c. 768 (see the 1985 Cumulative Supplement) was made contingent on approval by the voters of the constitutional amendments proposed by c. 768. Since

the proposed constitutional amendments were defeated by a vote of the People on May 6, 1986, the amendment to this section by Session Laws 1985, c. 768 will not become effective.

§ 163-301. Chairman of election board to furnish certificate of elections.

Editor's Note. — The amendment of this section by Session Laws 1985, c. 768 (see the 1985 Cumulative Supplement) was made contingent on approval by the voters of the constitutional amendments proposed by c. 768. Since

the proposed constitutional amendments were defeated by a vote of the People on May 6, 1986, the amendment to this section by Session Laws 1985, c. 768 will not become effective.

§ 163-302. Absentee voting.

Editor's Note. — The amendment of this section by Session Laws 1985, c. 768 (see the 1985 Cumulative Supplement) was made contingent on approval by the voters of the constitutional amendments proposed by c. 768. Since the proposed constitutional amendments were

defeated by a vote of the People on May 6, 1986, the amendment to this section by Session Laws 1985, c. 768 will not become effective. Therefore, the first version of this section appearing in the 1985 Cumulative Supplement remains in effect.

§ 163-304. State Board of Elections to have jurisdiction over municipal elections and election officials, and to advise.

Editor's Note. — The amendment of this section by Session Laws 1985, c. 768 (see the 1985 Cumulative Supplement) was made contingent on approval by the voters of the constitutional amendments proposed by c. 768. Since

the proposed constitutional amendments were defeated by a vote of the People on May 6, 1986, the amendment to this section by Session Laws 1985, c. 768 will not become effective.

Chapter 168.
Handicapped Persons.

ARTICLE 1.

Rights.

§ 168-1. Purpose and definition.

CASE NOTES

Disability, in the context of Chapter 168, is a present, noncorrectable loss of function which substantially impairs a person's ability to function normally. *Pressman v. UNC*, 78 N.C. App. 296, 337 S.E.2d 644 (1985).

A person suffering from occasional epi-

sodes of stress, depression and mental exhaustion is not a "handicapped person," as defined by Chapter 168, suffering from a mental disability. *Pressman v. UNC*, 78 N.C. App. 296, 337 S.E.2d 644 (1985).

ARTICLE 3.

Family Care Homes.

§ 168-22. Zoning; family care home.

CASE NOTES

A group health care facility for five nonrelated mentally handicapped individuals was a "residential" use of the dwelling.

Smith v. Association for Retarded Citizens for Hous. Dev. Servs., Inc., 75 N.C. App. 435, 331 S.E.2d 324 (1985).

Constitution of North Carolina

ARTICLE I

DECLARATION OF RIGHTS

Sec. 1. The equality and rights of persons.

CASE NOTES

Cited in *DiDonato v. Wortman*, — N.C. App. —, 341 S.E.2d 58 (1986).

Sec. 6. Separation of powers.

CASE NOTES

II. DELEGATION OF LEGISLATIVE POWER.

Necessity for Adequate Standards, etc. —

The General Assembly must prescribe the standard for an administrative board with sufficient definiteness so that the board is bound by legislative policy and cannot, under the name of finding facts, actually set policy. *Farlow v. North Carolina State Bd. of Chiropractic Exmrs.*, 76 N.C. App. 202, 332 S.E.2d 696, cert. denied and appeal dismissed, 314

N.C. 664, 336 S.E.2d 621, — N.C. —, 337 S.E.2d 582 (1985).

Delegation of Power Upheld. —

The proscription of "unethical conduct" in § 90-154 is a sufficiently definite standard so that the Board of Chiropractic Examiners may set policies within it without exercising a legislative function. *Farlow v. North Carolina State Bd. of Chiropractic Exmrs.*, 76 N.C. App. 202, 332 S.E.2d 696, cert. denied and appeal dismissed, 314 N.C. 664, 336 S.E.2d 621, — N.C. —, 337 S.E.2d 582 (1985).

Sec. 18. Courts shall be open.

Legal Periodicals. —

For note, "*Wilder v. Amatex Corp.: A First Step Toward Ameliorating the Effect of Statutes of Repose on Plaintiffs with Delayed Manifestation Diseases*," see 64 N.C.L. Rev. 416 (1986).

For article, "The American Medical Association vs. The American Tort System," see 8 Campbell L. Rev. 241 (1986).

CASE NOTES

I. IN GENERAL.

Cited in *DeSoto Trail, Inc., v. Covington Diesel, Inc.*, 77 N.C. App. 637, 335 S.E.2d 794 (1985).

II. ACCESS TO THE COURTS.

Statutes of Limitations. — Section 1-50 does not violate the "open courts" provision of the North Carolina Constitution. *Tetterton v. Long Mfg. Co.*, 314 N.C. 44, 332 S.E.2d 67 (1985).

Sections 1-50(5) and 1-15(c) are not unconstitutional as being violative of the open courts

provision of the North Carolina Constitution and the equal protection clauses of the state and federal Constitutions. *Square D Co. v. C.J. Kern Contractors*, 314 N.C. 44, 423 S.E.2d 63 (1985).

V. SPEEDY CRIMINAL TRIALS.

Unless some fixed time limit is prescribed, etc. —

In accord with the main volume. See *State v. Bare*, 77 N.C. App. 516, 335 S.E.2d 748 (1985), cert. denied, 315 N.C. 392, 338 S.E.2d 881 (1986).

Undue delay which is arbitrary and op-

pressive or the result of deliberate prosecution efforts to hamper the defense violates the constitutional right to a speedy trial. *State v. Bare*, 77 N.C. App. 516, 335 S.E.2d 748 (1985), cert. denied, 315 N.C. 392, 338 S.E.2d 881 (1986).

Burden on Defendant. — The length of a delay is not determinative of whether a viola-

tion has occurred; the issue must be resolved on the facts of each case, and the defendant has the burden of establishing that the delay was purposeful or oppressive or by reasonable effort could have been avoided by the State. *State v. Bare*, 77 N.C. App. 516, 335 S.E.2d 748 (1985), cert. denied, 315 N.C. 392, 338 S.E.2d 881 (1986).

Sec. 19. Law of the land; equal protection of the laws.

Legal Periodicals. —

For 1984 survey, "Double Jeopardy and Substantial Rights in North Carolina Appeals," see 63 N.C.L. Rev. 1061 (1985).

For note, "Wilder v. Amatex Corp.: A First Step Toward Ameliorating the Effect of Statutes of Repose on Plaintiffs with Delayed Man-

ifestation Diseases," see 64 N.C.L. Rev. 416 (1986).

For article, "The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislation, Private Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

CASE NOTES

I. GENERAL CONSIDERATION.

Cited in *State v. Avery*, 315 N.C. 1, 337 S.E.2d 786 (1985); *Town of Emerald Isle v. State*, 78 N.C. App. 736, 338 S.E.2d 581 (1986); *United Va. Bank v. Air-Lift Assocs.*, — N.C. App. —, 339 S.E.2d 90 (1986); *State v. Perry*, — N.C. App. —, 340 S.E.2d 450 (1986); *Yates v. Jamison*, 782 F.2d 1182 (4th Cir. 1986). *DiDonato v. Wortman*, — N.C. App. —, 341 S.E. 2d 58 (1986).

II. DUE PROCESS AND THE "LAW OF THE LAND".

The North Carolina Supreme Court would employ a different method for deciding what procedural safeguards are due under the "law of the land" clause to a person deprived of a protected interest than the United States Supreme Court has proposed for deciding similar questions under the due process clause. *Henry v. Edmisten*, — N.C. App. —, 340 S.E.2d 720 (1986).

When the furtherance of a legitimate state interest requires the State to engage in prompt remedial action adverse to an individual interest protected by law, and the action proposed by the State is reasonably related to furthering the state's interest, the law of the land ordinarily requires no more than that before such action is undertaken, a judicial officer determine that there is probable cause to believe that the conditions which would justify the action exist. *Henry v. Edmisten*, — N.C. —, 340 S.E.2d 720 (1986).

III. EQUAL PROTECTION.

To withstand an equal protection claim, etc. —

This section requires that if a class is created there must be a reasonable basis for such classification and the consequent difference in treatment under the law. This means that the creation of the class must be reasonably related to the accomplishment of some purpose which the legislature has the power to reach. *Durham Council of Blind v. Edmisten*, — N.C. App. —, 339 S.E.2d 84 (1986).

Test Is Reasonableness, etc. —

In the area of economics and social welfare, a statute containing a legislative classification which is rationally related to a legitimate state objective does not violate this section or the equal protection clause of the Fourteenth Amendment to the United States Constitution. The traditional equal-protection test does not require the very best classification in the light of a legislative or regulatory purpose, but does require that such classification in relation to such purpose attain a minimum (undefined and undefinable) level of rationality. *State v. Stanley*, — N.C. App. —, 339 S.E.2d 668 (1986).

The ban on the use or possession of tobacco products by students at school is a valid exercise of the authority delegated to the various boards of education by the legislature, and does not violate the guarantee of equal protection contained in the Fourteenth Amendment to the U.S. Const. and this section. *Craig v. Buncombe County Bd. of Educ.*, — N.C. App. —, 343 S.E.2d 222 (1986).

IV. RIGHTS OF DEFENDANTS IN CRIMINAL CASES.

C. Double Jeopardy.

Where multiple punishment is involved,

the double jeopardy clause acts as a restraint on the prosecutor and the courts, not the legislature. *State v. Gardner* — N.C. App. —, 340 S.E.2d 701 (1986).

And Courts May Not Impose More Punishment Than Intended by Legislature. — The double jeopardy clauses of both the United States and North Carolina Constitutions prohibit a court from imposing more punishment than that intended by the legislature. *State v. Gardner* — N.C. —, 340 S.E.2d 701 (1986).

But Legislature May Authorize Cumulative Punishment. — Where the legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those who statutes proscribe the "same" conduct, a court's task of statutory construction is at an end, and the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial. *State v. Gardner* — N.C. —, 340 S.E.2d 701 (1986).

Intent of Legislature Determines Punishment. — When a defendant is tried in a single trial for violations of two statutes that punish the same conduct, the amount of punishment allowable under the double jeopardy clause of the Federal Constitution and the law of the land clause of our state Constitution is determined by the intent of the legislature. *State v. Freeland*, — N.C. App. —, 340 S.E.2d 35 (1986).

Reinstatement of a guilty plea following correction of an error of law did not violate the principles of double jeopardy. *State v. Oakley*, 75 N.C. App. 99, 330 S.E.2d 59 (1985).

In this State a defendant may not be punished both for felony murder and for the underlying "predicate" felony, even in a single prosecution. Whether in other situations multiple punishments may be imposed when a defendant, in a single trial, is convicted of multiple offenses when some are fully, factually embraced within others is to be determined on the basis of legislative intent. *State v. Gardner* — N.C. —, 340 S.E.2d 701 (1986).

Convictions May Be Had for Breaking or Entering and Larceny. — The prohibitions in the United States and North Carolina Constitutions against placing a person twice in jeopardy do not prohibit, in a single trial, convictions and punishment for both breaking or entering and felony larceny based upon that breaking or entering. *State v. Gardner* — N.C. App. —, 340 S.E.2d 701 (1986).

Conviction and punishment for both felony breaking or entering and felonious larceny based upon the same breaking or entering in a single trial is not prohibited by the provisions of either the Constitution of the United States or the Constitution of North Carolina. *State v. Edmondson*, — N.C. —, 340 S.E.2d 110 (1986).

Because the crimes of larceny and obtaining property by false pretenses are separate and distinguishable offenses, the issuance of a second indictment for false pretenses, after the dismissal of larceny charges at the close of the state's evidence, did not constitute double jeopardy. *State v. Kelly*, 75 N.C. App. 461, 331 S.E.2d 227, cert. granted, — N.C. —, 339 S.E.2d 409 (1985).

J. Punishment.

Imposition of a 30 year sentence for a habitual felon who under the facts could have received a maximum sentence of life imprisonment under § 14-1.1 is within constitutional limits and does not constitute cruel and unusual punishment. *State v. Aldridge*, 76 N.C. App. 638, 334 S.E.2d 107 (1985).

VII. TAKING OF PRIVATE PROPERTY FOR PUBLIC USE.

A. In General.

Riparian rights are vested property rights that cannot be taken for private purposes or taken for public purposes without compensating the owner, and they arise out of ownership of land bounded or traversed by navigable water. In re *Mason ex rel. Huber*, 78 N.C. App. 16, 337 S.E.2d 99 (1985).

Lease for shellfish cultivation issued under § 113-202 did not infringe upon riparian rights of landowner. In re *Mason ex rel. Huber*, 78 N.C. App. 16, 337 S.E.2d 99 (1985).

IX. MISCELLANEOUS RIGHTS.

Vested Rights in Pre-1983 Estates by the Entirety. — The claim of a vested property right may not rest upon state enforcement of common law which is unconstitutionally discriminatory. Thus, to the extent that defendant husband's claims to the exclusive right to the control and income of pre-1983 estates by the entirety were based solely upon common-law incidents of the tenancy, they would fail, as the right recognized by the common law could not be said to be a "vested property right." *Perry v. Perry*, — N.C. App. —, 341 S.E.2d 53 (1986). See § 39-13.6.

XI. ILLUSTRATIVE CASES.

A. Statutes, Proceedings, etc., Upheld.

Statutes of Limitations. — Sections 1-50(5) and 1-15(c) are not unconstitutional as being violative of the open courts provision of the North Carolina Constitution and the equal protection clauses of the state and federal Constitutions. *Square D Co. v. C.J. Kern Contractors*, 314 N.C. 423, 334 S.E.2d 63 (1985).

Section 1-50 does not distinguish between manufacturers and retail sellers of products

who are protected from liability beyond the six-year period of repose and does not violate the equal protection clauses or the state or federal Constitutions. *Tetterton v. Long Mfg. Co.*, 314 N.C. 44, 332 S.E.2d 67 (1985).

Section 24-5, etc. —

Section 24-5, relating to the imposition of interest, does not violate Art. I, Sections 19 and 32 of the North Carolina Constitution and the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution. *Harris v. Scotland Neck Rescue Squad, Inc.*, 75 N.C. App. 444, 331 S.E.2d 695, cert. denied, 314 N.C. 329, 333 S.E.2d 486 (1985).

Section 53-229, relating to the acquisition

Sec. 20. General warrants.

CASE NOTES

I. GENERAL CONSIDERATION.

This section does not require more particularity in subpoenas than does the Fourth Amendment as applied to the states through the Fourteenth Amendment. In *re Computer Technology Corp.*, 78 N.C. App. 402, 337 S.E.2d 165 (1985).

An *ex parte* order from the superior court, directing officials of a certain corporation to make available certain records pertaining to its transactions with two other corporations and with the City of Charlotte, incident to an investigation into possible fraud and irregularities in the purchasing of parts, equipment and services by the city, was not an administrative search warrant to which the strictness of the Fourth Amendment to the United States Constitution, this section and § 15-27.2 would apply; and where such order was neither unreasonably broad nor indefinite, its issuance would be affirmed. In *re Computer Technology Corp.*, 78 N.C. App. 402, 337 S.E.2d 165 (1985).

II. WARRANTLESS SEARCHES.

Blood Test on Unconscious Defendant.

— In a prosecution for involuntary manslaughter

and control of certain nonbank banking institutions, does not violate the commerce clause of the U.S. Constitution, nor the equal protection, exclusion emoluments and antimonopoly provisions of the state Constitution (Art. I, §§ 19, 32 and 34). *Citicorp v. Currie*, 75 N.C. App. 312, 330 S.E.2d 635, cert. denied and appeal dismissed, 314 N.C. 537, 538, 335 S.E.2d 15, 16 (1985).

Conditions for licenses to operate bingo games set out in §§ 14-309.7 and 14-309.8 are reasonably related to a legitimate interest that bingo games not be operated by full-time professionals for profit. *Durham Council of Blind v. Edmisten*, — N.C. App. —, 339 S.E.2d 84 (1986).

ter and driving under the influence, the performance of a blood alcohol test on blood seized from an unconscious defendant pursuant to § 20-16.2(b) did not violate defendant's rights under the U.S. Constitution and this section, because of (1) the existence of probable cause to arrest; (2) the limited nature of the intrusion upon the person; and (3) the destructibility of the evidence. *State v. Hollingsworth*, 77 N.C. App. 36, 334 S.E.2d 463 (1985).

Warrantless Search Held Improper. — Warrantless search of defendant's automobile some 20 hours after officer, who knew defendant and was familiar with her vehicle, received information that the automobile contained several one-fourth ounce packages of marijuana was illegal, and the evidence seized would be suppressed. *State v. Isleib*, — N.C. App. —, 343 S.E.2d 234 (1986).

III. SEARCH WARRANTS.

Totality of Circumstances, etc. —

The North Carolina Supreme Court has adopted the "totality of the circumstances" test to determine the sufficiency of probable cause to issue a warrant under this section. *State v. Isleib*, — N.C. App. —, 343 S.E.2d 234 (1986).

Sec. 22. Modes of prosecution.

CASE NOTES

A valid indictment is a condition precedent, etc.

In accord with 3rd paragraph in the main volume. See *State v. Johnson*, 77 N.C. App. 583, 335 S.E.2d 770 (1985).

All Essential Elements of Offense, etc. —

In accord with 2nd paragraph in the main volume. See *State v. Johnson*, 77 N.C. App. 583, 335 S.E.2d 770 (1985).

Sec. 23. Rights of accused.

Legal Periodicals. —

For 1984 survey, "When Is a Confession

Coerced and When Is It Voluntary," see 63 N.C.L. Rev. 1214 (1985).

CASE NOTES

I. GENERAL CONSIDERATION.

Cited in State v. Abney. — N.C. App. —, 339 S.E.2d 841 (1986).

II. RIGHT TO BE INFORMED OF ACCUSATION.

Form of Bill for Homicide. — This section and § 15A-924(a)(5) did not specifically repeal § 15-144, relating to essentials of a bill for homicide, nor did they repeal it by implication. *State v. Avery*, 315 N.C. 1, 337 S.E.2d 786 (1985).

III. RIGHT OF CONFRONTATION.

A. In General.

Use of Hearsay in Criminal Trial. — A prosecutor is prohibited by U.S. Const., Amend. 6 and this section from introducing any hearsay evidence in a criminal trial unless two requirements are met. The prosecution must show both the necessity for using the hearsay testimony and the inherent trustworthiness of the original declaration. *State v. Gregory*, 78 N.C. App. 565, 338 S.E.2d 110 (1985).

IV. RIGHT TO COUNSEL.

A. In General.

Test of effective assistance, etc. —

The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial could not be relied on as having produced a just result. *State v. Dockery*, 78 N.C. App. 190, 336 S.E.2d 719 (1985).

Breach of Attorney's Duty Does Not Automatically Require Reversal. — The duties of an attorney representing a criminal defendant include the duty of loyalty, a duty to advocate defendant's cause, and the duty to consult with defendant, investigate defendant's case and keep defendant informed. However, a breach of one of these duties does not automatically require reversal of defendant's conviction. Defendant must also demonstrate that the professionally unreasonable conduct of his counsel resulted in prejudice to defendant. *State v. Dockery*, 78 N.C. App. 190, 336 S.E.2d 719 (1985).

Burden on Defendant to Show Supportable Defense. — In bringing an ineffective assistance claim based on the failure to adequately present a defense, the central question is whether a supportable defense could have been developed. The burden of showing the probability that this defense existed is on the defendant. *State v. Dockery*, 78 N.C. App. 190, 336 S.E.2d 719 (1985).

V. SELF-INCRIMINATION.

A. In General.

Privilege Protects against Only Real Dangers. —

In accord with main volume. See *Shaw v. Williamson*, 75 N.C. App. 604, 331 S.E.2d 203, cert. denied, 314 N.C. 669, 335 S.E.2d 496 (1985).

Civil Actions Involving Arrest, Imprisonment or Execution against the Person. — The constitutional protection against self-incrimination extends to civil actions that subject one to arrest, imprisonment or execution against the person. *Shaw v. Williamson*, 75 N.C. App. 604, 331 S.E.2d 203, cert. denied, 314 N.C. 669, 335 S.E.2d 496 (1985).

Refusal to Answer Interrogatories in Civil Action for Punitive Damages. —

In a wrongful death action, defendant faced no peril of being subject to execution against the person for not satisfying a judgment for punitive damages, as there was no allegation in the complaint that would support the required statutory findings for execution against the person. Therefore, there was no basis for defendant declining to answer interrogatories on the grounds of self-incrimination. *Shaw v. Williamson*, 75 N.C. App. 604, 331 S.E.2d 203, cert. denied, 314 N.C. 669, 335 S.E.2d 496 (1985).

In a wrongful death action, defendant could not have incriminated himself criminally by answering certain interrogatories, because, based on the same incident referred to in the complaint, he was charged with death by vehicle and driving while intoxicated, pled guilty, and complied with the judgments entered on the convictions. *Shaw v. Williamson*, 75 N.C. App. 604, 331 S.E.2d 203, cert. denied, 314 N.C. 669, 335 S.E.2d 496 (1985).

Sec. 24. Right of jury trial in criminal cases.

CASE NOTES

I. IN GENERAL.

Trial as to Each Essential Element. —

It is fundamental that one charged with a crime in this state is entitled, as a matter of right, under both the federal and state Constitutions, to a jury trial as to every essential element of the crime charged. However, the punishment imposed is generally not an element of the crime. *State v. Field*, 75 N.C. App. 647, 331 S.E.2d 221, cert. denied and appeal dismissed, 315 N.C. 186, 337 S.E.2d 582 (1985).

The bifurcated procedure that the legislature has established for impaired driving cases, with the jury determining whether § 20-138.1 has been violated and the judge determining the length of punishment required under § 20-179, is constitutional. *State v. Field*, 75 N.C. App. 647, 331 S.E.2d 221, cert. denied and appeal dismissed, 315 N.C. 186, 337 S.E.2d 582 (1985).

Because the factors before the trial judge in determining sentencing are not elements of the offense, their consideration for purposes of sentencing is a function of the judge and is not susceptible to constitutional challenge based

upon either the Sixth Amendment right to a jury trial or this section. *State v. Denning*, — N.C. —, 342 S.E.2d 855 (1986), involving sentencing under § 20-179 for impaired driving.

Increase in Punishment Based on Aggravating Factor. — Trial judge's increasing of defendant's punishment under the Safe Roads Act of 1983 after a finding of a grossly aggravating factor, namely, that defendant had a prior conviction for a similar offense within seven years, did not in any way deprive defendant of his right to jury trial. *State v. Denning*, 76 N.C. App. 156, 332 S.E.2d 203 (1985).

Jury Request to Review Testimony. — Both this section and § 15A-1233 require the trial court to summon all jurors into the courtroom before hearing and addressing a jury request to review testimony, and to exercise its discretion in denying or granting the request. Failure of the trial court to comply with these mandates entitles defendant to press these points on appeal, notwithstanding his failure to object at trial. *State v. Ashe*, 314 N.C. 28, 331 S.E.2d 652 (1985).

Cited in *State v. Avery*, 315 N.C. 1, 337 S.E.2d 786 (1985).

Sec. 25. Right of jury trial in civil cases.

CASE NOTES

I. IN GENERAL.

Compulsory Reference. —

Although when a court orders a compulsory reference, a party preserves his right to trial by complying with the procedural steps out-

lined in § 1A-1, Rule 53, the party is entitled to trial by jury only if the evidence before the reference was sufficient to raise an issue of fact. *Fauchette v. Zimmerman*, — N.C. App. —, 338 S.E.2d 804 (1986).

Sec. 32. Exclusive emoluments.

CASE NOTES

Statutes of Limitations. — Section 1-50(6) does not grant "exclusive or separate emoluments or privileges" to the persons it protects in violation of this section. *Tetterton v. Long Mfg. Co.*, 314 N.C. 44, 332 S.E.2d 67 (1985).

Validity of § 24-5. —

Section 24-5 does not violate Art. I, Sections 19 and 32 of the North Carolina Constitution or the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution. *Harris v. Scotland Neck Rescue Squad, Inc.*, 75 N.C. App. 444, 331

S.E.2d 695, cert. denied, 314 N.C. 329, 333 S.E.2d 486 (1985).

Section 53-229, relating to the acquisition and control of certain nonbank banking institutions, does not violate the commerce clause of the U.S. Constitution, nor the equal protection, exclusion emoluments and antimonopoly provisions of the state Constitution (Art. I, §§ 19, 32 and 34). *Citicorp v. Currie*, 75 N.C. App. 312, 330 S.E.2d 635, cert. denied and appeal dismissed, 314 N.C. 537, 538, 335 S.E.2d 15, 16 (1985).

Applied in *State v. Stanley*, — N.C. App. —, 339 S.E.2d 668 (1986).

Cited in *Town of Emerald Isle v. State*, 78 N.C. App. 736, 338 S.E.2d 581 (1986).

Sec. 34. Perpetuities and monopolies.

CASE NOTES

Section 53-229, relating to the acquisition and control of certain nonbank banking institutions, does not violate the commerce clause of the U.S. Constitution, nor the equal protection, exclusion emoluments and antimo-

nopoly provisions of the state Constitution (Arts. 1, 19, 32 and 34). *Citicorp v. Currie*, 75 N.C. App. 312, 330 S.E.2d 635, cert. denied and appeal dismissed, 314 N.C. 537, 538, 335 S.E.2d 15, 16 (1985).

Sec. 35. Recurrence to fundamental principles.

CASE NOTES

Cited in *State v. Avery*, 315 N.C. 1, 337 S.E.2d 786 (1985).

ARTICLE II

LEGISLATIVE

Sec. 2. Number of Senators.

Defeated Amendment Proposal. — An amendment proposed by Session Laws 1985, c. 768, s. 11, and defeated at the primary election held on May 6, 1986, would have added

"Except that there shall be no election in 1988, and elections shall be conducted in 1989 and biennially thereafter" at the end of the section.

Sec. 4. Number of Representatives.

Defeated Amendment Proposal. — An amendment proposed by Session Laws 1985, c. 768, s. 11, and defeated at the primary election held on May 6, 1986, would have added

"Except that there shall be no election in 1988, and elections shall be conducted in 1989 and biennially thereafter" at the end of the section.

Sec. 8. Elections.

Defeated Amendment Proposal. — An amendment proposed by Session Laws 1985, c. 768, s. 1, and defeated at the primary election held on May 6, 1986, would have amended this

section by deleting "1972 and every two years thereafter" and substituting "1986, and in 1989 and every two years thereafter."

Sec. 11. Sessions.

Defeated Amendment Proposal. — An amendment proposed by Session Laws 1985, c. 768, s. 12, and defeated at the primary election held on May 6, 1986, would have amended this

section by substituting "1987, and in 1990 and every two years thereafter" for "1973 and every two years thereafter" in subsection (1).

Sec. 23. Revenue bills.

CASE NOTES

I. GENERAL CONSIDERATION.

A bailment surcharge imposed on each case of distilled spirits shipped from ABC warehouse to ABC stores is not a tax; the cost of liquor enforcement is a burden incident to the privilege of buying spirituous liquors in the

state and such a surcharge is not unconstitutional as a tax imposed in violation of this section or of N.C. Const., Art. V, § 2. *North Carolina Ass'n of ABC Bds. v. Hunt*, 76 N.C. App. 290, 332 S.E.2d 693, cert. denied, 314 N.C. 667, 336 S.E.2d 400 (1985).

Sec. 24. Limitations on local, private, and special legislation.

Legal Periodicals. —

As to comment discussing beach access legislation as unconstitutional local legislation, see 64 N.C.L. Rev. 159 (1985).

For article, "The Battle to Preserve North

Carolina's Estuarine Marshes: The 1985 Legislation, Private Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

CASE NOTES

IV. HIGHWAYS, STREETS AND ALLEYS.

Limitation of Vehicular Access on Public Street in Town. — Chapter 539 of Session Laws 1983 violated this section in providing, among other things, that "vehicular access,"

with the exception of "public service, police, fire, rescue or other emergency vehicles," was excluded from the Inlet Drive right-of-way, Inlet Drive being a public street within the Town of Emerald Isle. *Town of Emerald Isle v. State*, 78 N.C. App. 736, 338 S.E.2d 581 (1986).

ARTICLE III

EXECUTIVE

Sec. 2. Governor and Lieutenant Governor: election, term, and qualifications.

Defeated Amendment Proposal. — An amendment proposed by Session Laws 1985, c. 768, ss. 2, 3 and 9.1(1), and defeated at the primary election held on May 6, 1986, would have amended this section by substituting "1988, and in 1993 and every four years thereafter" for "1972 and every four years thereafter" in the first sentence of subsection (1), by adding "except in 1988 at the same time and places as members of the United States House of Representatives are elected" at the end of

the first sentence of subsection (1), and by adding "except that the term of office of those elected in 1988 shall be for five years" at the end of subsection (1).

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1010, repealed Session Laws 1985, c. 61, which, as noted in the 1985 Cumulative Supplement, had proposed to amend this section by rewriting the last sentence of subsection (2).

Sec. 7. Other elective officers.

Proposed Amendments. — Session Laws 1985 (Reg. Sess., 1986), c. 920, s. 1 proposes to amend this section by substituting "60 days" for "30 days" in the second sentence of subsection (3).

Session Laws 1985 (Reg. Sess., 1986), c. 920, s. 3 provides that the amendment in c. 920 shall be submitted to the qualified voters of the State at the general election in November, 1986, and that the election shall be conducted under the laws then governing general elections in the State. Section 3 further provides for the form of the ballot and for the use of voting machines.

Session Laws 1985 (Reg. Sess., 1986), c. 920, s. 4 provides that if a majority of the votes cast are in favor of the amendment, the State Board of Elections shall certify the amendment to the Secretary of State, who shall enroll the amend-

ment so certified among the permanent records at his office, and that the amendment shall become effective January 1, 1987.

Defeated Amendment Proposal. — An amendment proposed by Session Laws 1985, c. 768, ss. 4, 5 and 9.1(1), and defeated at the primary election held on May 6, 1986, would have amended this section by substituting "1988, and in 1993 and every four years thereafter" for "1972 and every four years thereafter" in the first sentence of subsection (1), by adding "except in 1988 at the same time and places as members of the United States House of Representatives are elected" at the end of the first sentence of subsection (1), and by adding "except that the term of office of those elected in 1988 shall be for five years" at the end of subsection (1).

CASE NOTES

Duty of Attorney General. —

The Attorney General of North Carolina is a constitutional officer, and he is required to take an oath which among other things binds him to "support, maintain and defend the Constitution of North Carolina not inconsistent with the Constitution of the United States"

It is but a small step from the language of this oath to the proposition asserted by the Attorney General, that his duty includes the defense of statutes of this State against charges of unconstitutionality. *Hendon v. North Carolina State Bd. of Elections*, 633 F. Supp. 454 (W.D.N.C. 1986).

ARTICLE IV

JUDICIAL

Sec. 1. Judicial power.

CASE NOTES

When the jurisdiction of a particular court, etc. —

In accord with 2nd paragraph in main volume. See *Hogan v. Cone Mills Corp.*, 315 N.C. 127, 337 S.E.2d 477 (1985).

Limitation on Power of Legislature to Alter Judicial Result. — The doctrine of separation of powers precludes the Legislature from enacting a statute which alters a result obtained by a final judicial decision before the date of the statute's enactment. *Hogan v. Cone Mills Corp.*, 315 N.C. 127, 337 S.E.2d 477 (1985).

Assessment of Penalty Held Unconstitu-

tional. — Where the DMV assessed a penalty for operating a vehicle on the highways with a gross weight in excess of that allowed under the license obtained pursuant to § 20-96, but not in excess of the maximum axle weight limits, and such penalty was not authorized by § 20-118, such penalty violated this section and Const., Art. IV, § 3 since there was no reasonable necessity for conferring absolute judicial discretion in the DMV. *Young's Sheet Metal & Roofing, Inc. v. Wilkins*, 77 N.C. App. 180, 334 S.E.2d 419 (1985), decided prior to the 1985 amendment to § 20-96.

Sec. 3. Judicial powers of administrative agencies.

CASE NOTES

Limitation on Power of Legislature to Alter Judicial Result. — The doctrine of separation of powers precludes the Legislature from enacting a statute which alters a result obtained by final judicial decision before the date of the statute's enactment. *Hogan v. Cone Mills Corp.*, 315 N.C. 127, 337 S.E.2d 477 (1985).

Assessment of Penalty Held Unconstitutional. — Where the DMV assessed a penalty for operating a vehicle on the highways with a

gross weight in excess of that allowed under the license obtained pursuant to § 20-96, but not in excess of the maximum axle weight limits, and such penalty was not authorized by § 20-118, such penalty violated Const., Art. IV, § 1 and this section since there was no reasonable necessity for conferring absolute judicial discretion in the DMV. *Young's Sheet Metal & Roofing, Inc. v. Wilkins*, 77 N.C. App. 180, 334 S.E.2d 419 (1985), decided prior to the 1985 amendment to § 20-96.

Sec. 9. Superior Courts.

Defeated Amendment Proposals. — An amendment proposed by Session Laws 1985, c. 768, s. 9, and defeated at the primary election held on May 6, 1986, would have amended this section by adding "except that those elected in 1986 and 1988 shall serve for a term of five years" at the end of the first sentence of subsection (3).

An amendment proposed by Session Laws 1985, c. 768, s. 9.1(1), and defeated at the primary election held on May 6, 1986, would have amended this section by adding "except in 1988 at the same time and place as members of the United States House of Representatives are elected" at the end of the first sentence of subsection (3).

Sec. 10. District Courts.

Defeated Amendment Proposal. — An amendment proposed by Session Laws 1985, c. 768, s. 8, and defeated at the primary election held on May 6, 1986, would have amended this

section by adding "except that those elected in 1986 and 1988 shall serve for a term of five years" at the end of the second sentence.

Sec. 12. Jurisdiction of the General Court of Justice.

CASE NOTES

I. GENERAL CONSIDERATION.

ferred by statute. In *re Locklear*, 314 N.C. 412, 334 S.E.2d 46 (1985).

Cited in *L. Harvey & Son Co. v. Harman*, 76 N.C. App. 191, 333 S.E.2d 47 (1985).

The subject matter jurisdiction of the clerks of the superior court can only be con-

Sec. 13. Forms of action; rules of procedure.

CASE NOTES

IV. RULES OF PROCEDURE.

In accord with the main volume. See *State v. O'Neal*, 77 N.C. App. 600, 335 S.E.2d 920 (1985).

The General Assembly was without authority, etc. —

Sec. 16. Terms of office and election of Justices of the Supreme Court, Judges of the Court of Appeals, and Judges of the Superior Court.

Defeated Amendment Proposal. — An amendment proposed by Session Laws 1985, c. 768, s. 6 and defeated at the primary election held on May 6, 1986, would have amended this

section by adding "except that those elected in 1982, 1984, 1986, and 1988 shall hold office for terms of nine years" at the end of the first sentence.

Sec. 18. District Attorney and prosecutorial districts.

Defeated Amendment Proposals. — An amendment proposed by Session Laws 1985, c. 768, s. 7, and defeated at the primary election held on May 6, 1986, would have amended this section by adding "except that those elected in 1986 and 1988 shall serve for a term of five years" at the end of the first sentence of subsection (1).

An amendment proposed by Session Laws 1985, c. 768, s. 9.1(1), and defeated at the primary election held on May 6, 1986, would have amended this section by adding "except in 1988 at the same time and places as members of the United States House of Representatives are elected" at the end of the first sentence of subsection (1).

Sec. 19. Vacancies.

Proposed Amendment. — Session Laws 1985 (Reg. Sess., 1986), c. 920, s. 2 proposes to amend this section by substituting "60 days" for "30 days" in the second sentence.

Session Laws 1985 (Reg. Sess., 1986), c. 920, s. 3 provides that the amendment in c. 920 shall be submitted to the qualified voters of the State at the general election in November, 1986, and that the election shall be conducted under the laws then governing general elections in the State. Section 3 further provides

for the form of the ballot and for the use of voting machines.

Session Laws 1985 (Reg. Sess., 1986), c. 920, s. 4 provides that if a majority of the votes cast are in favor of the amendment, the State Board of Elections shall certify the amendment to the Secretary of State, who shall enroll the amendment so certified among the permanent records at his office, and that the amendment shall become effective January 1, 1987.

ARTICLE V

FINANCE

Sec. 2. State and local taxation.

CASE NOTES

I. GENERAL CONSIDERATION.

A bailment surcharge imposed on each case of distilled spirits shipped from ABC warehouse to ABC stores is not a tax; the cost of liquor enforcement is a burden incident to the privilege of buying spirituous liquors in the state and such a surcharge is not unconstitutional as a tax imposed in violation of N.C. Const., Art. II, § 23 or of this section. *North Carolina Ass'n of ABC Bds. v. Hunt*, 76 N.C. App. 290, 332 S.E.2d 693, cert. denied, 314 N.C. 667, 336 S.E.2d 400 (1985).

IV. CLASSIFICATION.

A. In General.

Requirement of Uniformity Extends, etc. —

Although the uniformity requirement is literally confined to taxes on property, it extends to license, franchise and other taxes. *First Carolina Investors v. Lynch*, 78 N.C. App. 583, 337 S.E.2d 691 (1985).

Reasonableness of Classification. —

A classification will be upheld if it is reason-

able and not arbitrary and rests upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced will be treated alike. *First Carolina Investors v. Lynch*, 78 N.C. App. 583, 337 S.E.2d 691 (1985).

On review, wide latitude is accorded the General Assembly; the only limitation on its power is that the classification must be founded upon reasonable, and not arbitrary, distinctions. *State v. Rippy*, — N.C. App. —, 341 S.E.2d 98 (1986).

Courts to Determine Validity of Classifications. — The uniformity rule of this section requires the courts, when the validity of a tax statute is challenged on the ground of discrimination, to ascertain if in fact there is a difference in the classes taxed. *First Carolina Investors v. Lynch*, 78 N.C. App. 583, 337 S.E.2d 691 (1985).

B. Illustrative Cases.

Assessment of tax under § 105-114 against a business trust did not violate the uniformity requirement of this section on grounds that it was similar to a limited partnership, which is not subject to the franchise tax. *First Carolina Investors v. Lynch*, 78 N.C. App. 583, 337 S.E.2d 691 (1985).

Section 113-156.1, requiring managers of ocean fishing piers to obtain a license, satisfies the requirements of uniformity, equal protection and due process under both the state and federal Constitutions, as the opportunity to establish an exclusive zone around ocean piers, pursuant to § 113-185(a), and the cost to the State of enforcing this zone, distinguishes ocean piers from other piers and provides reasonable grounds for their separate license tax classification. *State v. Rippy*, — N.C. App. —, 341 S.E.2d 98 (1986).

Sec. 5. Acts levying taxes to state objects.

CASE NOTES

Section 113-156.1 does not violate this section, which provides that every act of the General Assembly levying a tax shall state the special object to which it is to be applied and that it shall be applied to no other purpose, as it is part of Subchapter IV of Chapter 113, the

special purpose of which is the conservation of marine and estuarine and wildlife resources, and it is evident that the license tax is levied and applied for this purpose. *State v. Rippy*, — N.C. App. —, 341 S.E.2d 98 (1986).

Sec. 10. Joint ownership of generation and transmission facilities.

CASE NOTES

Cited in State ex rel. Utilities Comm'n v. Carolina Util. Customers Ass'n, 314 N.C. 171, 333 S.E.2d 259 (1985).

Sec. 11. Capital projects for agriculture.

Proposed Amendments. — Session Laws 1985 (Reg. Sess., 1986), c. 814, s. 1 proposes to add a new section to this Article to read as follows: "Sec. 11[12]. Higher Education Facilities. Notwithstanding any other provisions of this Constitution, the General Assembly may enact general laws to authorize the State or any State entity to issue revenue bonds to finance and refinance the cost of acquiring, constructing, and financing higher education facilities to be operated to serve and benefit the public for any nonprofit private corporation, regardless of any church or religious relation-

ship provided no cost incurred earlier than five years prior to the effective date of this section shall be refinanced. Such bonds shall be payable from any revenues or assets of any such nonprofit private corporation pledged therefor, shall not be secured by a pledge of the full faith and credit of the State or such State entity or deemed to create an indebtedness requiring voter approval of the State or such entity, and, where the title to such facilities is vested in the State or any State entity, may be secured by an agreement which may provide for the conveyance of title to, with or without consideration,

such facilities to the nonprofit private corporation. The power of eminent domain shall not be used pursuant hereto."

Session Laws 1985 (Reg. Sess., 1986), c. 814, s. 2 provides that the proposed amendment set forth in section 1 of the act shall be submitted to the qualified voters of the State at the general election to be held in November, 1986, and shall be conducted under the laws then governing election in the State. Section 2 further provides for the form of the ballot and the use of voting machines.

Session Laws 1985 (Reg. Sess., 1986), c. 814, s. 3 provides that if a majority of votes cast thereon are in favor of the amendment, the State Board of Elections shall certify the amendment to the Secretary of State, who shall enroll the amendment so certified among the permanent records of his office, and that the amendment shall become effective upon such certification.

For the Higher Educational Facilities Finance Act, effective on approval of a constitutional amendment authorizing enactment of general laws dealing with transactions of the type contemplated by the act, see § 115E-1 et seq.

Session Laws 1985 (Reg. Sess., 1986), c. 933, s. 1 proposes to add a new section 12[13] to Article V to read as follows:

"Sec. 12[13]. Seaport and airport facilities.

"(1) Notwithstanding any other provision of this Constitution, the General Assembly may enact general laws to grant to the State, counties, municipalities, and other State and local governmental entities all powers useful in connection with the development of new and existing seaports and airports, and to authorize such public bodies:

"(a) to acquire, construct, own, own jointly with public and private parties, lease as lessee, mortgage, sell, lease as lessor, or otherwise dispose of lands and facilities and improvements, including undivided interests therein;

"(b) to finance and refinance for public and private parties seaport and airport facilities and improvements which relate to, develop or further waterborne or airborne commerce and cargo and passenger traffic, including commercial, industrial, manufacturing, processing, mining, transportation, distribution, storage, marine, aviation and environmental facilities and improvements; and

"(c) to secure any such financing or refinancing by all or any portion of their revenues, income or assets or other available monies associated with any of their seaport or airport facilities and with the facilities and improvements to be financed or refinanced, and by foreclosable liens on all or any part of their properties associated with any of their seaport or airport facilities and with the facilities and improvements to be financed or refinanced, but in no event to create a debt secured by a pledge of the faith and credit of the State or any other public body in the State."

Session Laws 1985 (Reg. Sess., 1986), c. 933, s. 2 provides that the amendment in s. 1 shall be submitted to the qualified voters of the State at the general election in November, 1986, and that the election shall be conducted under the laws then governing elections in the State. Section 2 also provides for the form of the ballot and for the use of voting machines.

Session Laws 1985 (Reg. Sess., 1986), c. 933, s. 3 provides that if a majority of the votes cast are in favor of the amendment set out in s. 1, the State Board of Elections shall certify the amendment to the Secretary of State, who shall enroll the amendment so certified among the permanent records of his office, and that the amendment shall become effective upon such certification.

ARTICLE VII

LOCAL GOVERNMENT

Sec. 1. General Assembly to provide for local government.

Legal Periodicals. —

For 1984 survey, "Competitive Annexation Among Municipalities: North Carolina Adopts

the Prior Jurisdiction Rule," see 63 N.C.L. Rev. 1260 (1985).

Sec. 2. Sheriffs.

Defeated Amendment Proposal. — An amendment proposed by Session Laws 1985, c. 768, ss. 9.1(2) and (10), and defeated at the primary election held on May 6, 1986, would have amended this section by inserting "except in 1988 at the same time and places as mem-

bers of the United States House of Representatives are elected" following "General Assembly are enacted," and by adding "except that those elected in 1986 or 1988 shall serve for terms of five years" at the end of the section.

ARTICLE IX
EDUCATION

Sec. 7. County school fund.

Cross References. — As to allocation of revenues to local school administrative units,

and definition of "clear proceeds," as referred to in this section, see § 115C-437.

CASE NOTES

The 1985 amendment to § 115C-437, defining "clear proceeds," could only be effective as to monies collected because of traffic violations occurring on and after July 17, 1985. *Cauble v. City of Asheville*, 314 N.C. 598, 336 S.E.2d 59 (1985).

Disposition of Parking Fines. — The money penalty collected by a city from a motorist who violates its ordinance prohibiting overtime parking constitutes a penalty or fine collected for the breach of a state penal law, even if the motorist has not been convicted of violating § 14-4. *Cauble v. City of Asheville*, 314 N.C. 598, 336 S.E.2d 59 (1985).

The "clear proceeds" of a forfeiture. — Reasonable costs of collection constitution-

ally may be deducted from the gross proceeds of the fines collected by a city for overtime parking. *Cauble v. City of Asheville*, 314 N.C. 598, 336 S.E.2d 59 (1985).

The test for determining permissible deductions, etc.

In accord with main volume. See *Harrell v. Harriet & Henderson Yarns*, 314 N.C. 566, 336 S.E.2d 47 (1985), decided prior to 1985 amendment to § 115-437 defining "clear proceeds."

The costs of collection do not include the costs associated with enforcing the ordinance, but are limited to the administrative costs of collecting the funds. *Cauble v. City of Asheville*, 314 N.C. 598, 336 S.E.2d 59 (1985).

ARTICLE X
HOMESTEADS AND EXEMPTIONS

Sec. 1. Personal property exemption.

CASE NOTES

Cited in *In re Mims*, 49 Bankr. 283 (Bankr. E.D. N.C. 1985).

Sec. 2. Homestead exemptions.

CASE NOTES

I. HOMESTEAD EXEMPTION GENERALLY.

Cited in *In re Mims*, 49 Bankr. 283 (Bankr. E.D. N.C. 1985).

ARTICLE XI

PUNISHMENTS, CORRECTIONS, AND CHARITIES

Sec. 1. Punishments.

CASE NOTES

Quoted in *Henry v. Edmisten*, — N.C. —, 340 S.E.2d 720 (1986).

Sec. 2. Death punishment.

Legal Periodicals. — For symposium address on the death penalty in North Carolina, see 8 Campbell L. Rev. 1 (1985).

For article, "Prosecutorial Abuse of Peremp-

tory Challenges in Death Penalty litigation: Some Constitutional and Ethical Considerations," see 8 Campbell L. Rev. 71 (1985).

Sec. 3. Charitable and correctional institutions and agencies.

CASE NOTES

Obligation of County to Pay for Health Care of Indigent Sick. — A county does not have an obligation, under this section and N.C. Const., Art. XI, § 4, to pay for hospital care for its indigent residents. In the absence of a delegation by the State to the counties of the obli-

gation to pay the costs of medical care of the indigent sick, such obligation is that of the State. *Craven County Hosp. Corp. v. Lenoir County*, 75 N.C. App. 453, 331 S.E.2d 690, cert. denied, 314 N.C. 663, 336 S.E.2d 620 (1985).

Sec. 4. Welfare policy; board of public welfare.

CASE NOTES

Obligation of County to Pay for Health Care of Indigent Sick. — A county does not have an obligation, under N.C. Const., Art. XI, § 3 and this section, to pay for hospital care to its indigent residents. In the absence of a delegation by the State to the counties of the obli-

gation to pay the costs of medical care of the indigent sick, such obligation is that of the State. *Craven County Hosp. Corp. v. Lenoir County*, 75 N.C. App. 453, 331 S.E.2d 690, cert. denied, 314 N.C. 663, 336 S.E.2d 620 (1985).

ARTICLE XIV
MISCELLANEOUS

Sec. 3. General laws defined.

CASE NOTES

Cited in Town of Emerald Isle v. State, 78
N.C. App. 736, 338 S.E.2d 581 (1986).

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	21	135-40.7	1023	1-5	143-215.1 note
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	5	58-124.32		13	143B-87 note
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	6	58-124.18		15	143B-61.1
	7	58-248.33		16	140-5.3 to 140-5.6 Repealed
	8	58-25.1		17	140-5.17
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	38	120-123 note, 126-4 note, 140-5.3 to 140-5.6 note, 140-5.17 note, 143B-30 note, 143B-58 note, 143B-61.1 note, 143B-66 note, 143B-87 note, 143B-184 note, 143B-185 note, 143B-279 note, 143B-328 to 143B-330 note, 143B-426.2 to 143B-426.7A note, 150B-9 note, 150B-58 note, 150B-59 note, 150B-60 note		3	143-166.84
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Sections Added, Amended or Repealed 1986

This table lists the sections of the General Statutes of North Carolina which were added, amended or repealed during the 1986 Special Session and the 1985 (Regular Session, 1986) Session of the General Assembly.

In instances where the effective date of an act has been postponed beyond January 1, 1987, the effective date of such act is indicated in the right-hand column.

G.S. §		S.L. c.	s.	Postponed Effective Date	G.S. §		S.L. c.	s.	Postponed Effective Date
1-255	Amended	878		2	14-361	Amended	967		1
1A-1,					14-361.1	Amended	967		2
Rule 8	Amended	1027		56	14-362	Amended	967		3
1A-1,					14-362.1	Added	967		5
Rule 11	Amended	1027		55	14-363	Amended	967		1
5A-12	Amended	843		1	14-363.1	Amended	967		4
6-21.1	Amended	976			15A-622	Amended	843		2
7A-65	Amended	1014		224	15A-623	Amended	843		3
7A-69.1	Repealed	998		3	15A-824				
7A-101	Amended	1014		34	to				
7A-102	Amended	1014		35(a)	15A-827	Added	998		1
7A-133	Amended	1014		222	15A-1051	Amended	843		4
7A-142	Amended	1006			15A-1113	Amended	852		12
7A-171.1	Amended	1014		36,	15A-1115	Amended	852		10
				223	15A-1116	Amended	852		1, 2,
				(a)					15
7A-178	Added	993		2	15A-1117	Recodified			
7A-183	Added	993		3	as 20-24.2	852			3
7A-304	Amended	5		1	15A-1342	Amended	960		1
	Amended	1015		1	15A-1343	Amended	859		1, 2
7A-307	Amended	855			15A-1344.1	Amended	949		7
7A-343.1	Amended	1022		2	15A-1351	Amended	1014		201
7A-347	Added	998		2					(a)
7A-348	Added	998		2	15A-1352	Amended	1014		201
7A-517	Amended	852		16					(b)
7A-571	Amended	863		1	15A-1353	Amended	1014		201
7A-647	Amended	863		2					(c)
7A-740	Amended	898			15A-1371	Amended	960		2
7A-752	Amended	1022		3,		Amended	1012		2, 5
				6(2),	15A-1380.2	Amended	859		3
				6(3)		Amended	960		2
7A-753	Amended	1022		4,		Amended	1012		3, 6
				6(2)		Amended	1014		197
7A-754	Amended	1022		6(1),					(b)
				6(3)	18B-600	Amended	919		
7A-755	Amended	1022		6(2)	18B-805	Amended	1014		116
7A-756	Amended	1022		6(1),	20-24.1	Amended	852		4-6,
				6(2)					9
7A-757	Amended	1022		5	20-24.2	Recodified			
8-57	Amended	843		5	from				
14-72.1	Amended	841		1-3	15A-1117	852			3
14-269.6	Added	810		1	20-66	Amended	982		24
14-277	Amended	863		3	20-81.1	Amended	961		
14-360	Amended	967		1	20-88.1	Amended	982		25 7/1/87

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		s.		Date			s.		Date
20-115	Amended	852	8		55A-18	Amended	801	17	
20-127	Amended	997			55A-19	Amended	801	18	
20-130.1	Amended	1027	50		55A-20	Amended	801	19-21	
20-138.3	Amended	852	11		55A-23	Amended	801	22,	
20-176	Amended	852	7					23	
	Amended	1014	202		55A-24	Amended	801	24,	
20-179	Amended	1014	201					25	
			(d)		55A-24.2	Added	801	26	
20-179.2	Amended	1012	1		55A-24.3	Added	801	27	
20-183.7	Amended	1018	8		55A-25	Amended	801	28	
20-189	Amended	955	2, 3		55A-26.1	Added	801	29	
20-279.21	Amended	1027	41,		55A-26.2	Added	801	30	
			42		55A-27	Amended	801	31	
20-384	Amended	1018	13		55A-28	Amended	801	32	
28A-21.2	Amended	822	3		55A-28.1	Added	801	33	
28A-27-1					55A-28.2	Added	801	34	
to					55A-32	Amended	801	35	
28A-27-9	Added	878	1		55A-35	Amended	801	36,	
44-51.8	Amended	936	6					37	
47-36.1	Added	842	1		55A-37	Amended	801	38	
47-108.20	Added	842	2		55A-42.1	Amended	801	39	
47C-1-101					55A-43	Amended	801	40	
to					55A-44	Amended	801	41	
47C-1-109	Added	877	1		55A-53	Amended	801	42	
47C-2-101					55A-57.1	Added	801	43	
to					57-12	Amended	928	4	
47C-2-121	Added	877	1		57B-3	Amended	1027	49	
47C-3-101					57B-13	Amended	928	5	
to					58-16	Amended	1013	2	
47C-3-119	Added	877	1		58-16.3	Amended	1027	52	
47C-4-101					58-18.1	Added	1013	3	
to					58-21	Amended	1013	11	
47C-4-120	Added	877	1		58-21.3	Added	1013	9	
50-11.4	Added	952			58-25.1	Amended	1027	8	
50-13.4	Amended	1016			58-27	Amended	1013	6	
50-13.9	Amended	949	3-6		58-27.22	Amended	1027	30	
50-30					58-40	Amended	1013	12	
to					58-41.1	Amended	928	2, 3	
50-39	Added	993	1		58-44.5	Amended	1013	13,	
52A-30.1	Added	949	8					14	
53-17.1	Added	948	1		58-44.8	Amended	1027	44	
53-210	Amended	862	1-3		58-51.3	Amended	800		
53B-1					58-54.4	Amended	1027	18,	
to								20	
53B-10	Added	1002	1		58-72	Amended	7	2, 3	
54B-44	Amended	948	2		58-75.1	Added	1013	7	
55-19	Amended	1027	35-38		58-75.2	Added	1013	7	
55-20	Amended	1027	39		58-77	Amended	1013	10	
55-21	Amended	1027	40		58-124.17	Amended	1027	5.1	
55-61	Amended	801	44		58-124.18	Amended	1027	6	
55-67	Amended	801	45		58-124.20	Amended	1027	2, 3	
55A-2	Amended	801	1		58-124.22	Amended	1027	3.1,	
55A-4	Amended	801	2					4	
55A-7	Amended	801	3, 4		58-124.28	Amended	1013	10.1	
55A-8.1	Added	801	5		58-124.31	Added	1027	1	
55A-9	Amended	801	6		58-124.32	Added	1027	5	
55A-10	Amended	801	7		58-131.37	Amended	1027	9.1,	
55A-15	Amended	801	8-14					10.11	
55A-17.1	Amended	801	15,						
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58-131.38	Amended	1027		16	59-30.1	Repealed	989		2
58-131.39	Amended	1027		17	59-101				
58-131.42	Amended	1027		12,	to				
				12.1	59-108	Added	989		2
58-131.44	Amended	1027		47	59-201				
58-131.45	Amended	1027		48	to				
58-131.46	Amended	7		9	59-208	Added	989		2
58-131.48	Amended	7		10,	59-301				
				11	to				
58-131.53	Amended	1027		15	59-305	Added	989		2
58-131.56	Repealed	1027		15	59-401				
58-131.59	Repealed	1027		15	to				
58-131.60	Amended	1013	10.1		59-405	Added	989		2
58-131.61	Added	1027		13	59-501				
58-131.62	Added	1027		28	to				
58-131.63	Amended	1013		17	59-504	Added	989		2
	Added	1027		29	59-601				
58-150	Amended	1027		32	to				
58-151	Amended	1027		53	59-608	Added	989		2
58-173.2	Amended	1027		21,	59-701				
				25	to				
58-173.7	Amended	7		8	59-705	Added	989		2
58-173.8	Amended	1027		22	59-801				
58-173.16A	Added	928		10	to				
58-173.17	Amended	7		4	59-804	Added	989		2
	Amended	1027		24	59-901				
58-173.20	Amended	7	5, 6		to				
	Amended	1027		23	59-908	Added	989		2
58-173.21	Amended	7		7	59-1001				
58-173.29	Added	928		10	to				
58-191.4	Amended	955	4, 5		59-1006	Added	989		2
58-194.3	Amended	1013		15	59-1101				
58-248.33	Amended	1027		7,	to				
				19,	59-1106	Added	989		2
				33,	62-48	Amended	1014		233
				43	64-3	Amended	797		1
58-248.34	Amended	1027		34	64-4	Amended	797		2
58-422	Amended	1027		45	64-5	Amended	797		3
58-423	Amended	1013		5	74D-4	Amended	1026		18
58-424	Amended	1027		46	75-56	Amended	802		
58-433	Amended	928		6	75-80				
58-437	Amended	928		11	to				
58-438	Amended	928		7	75-89	Added	972		1
58-450					75D-1				
to					to				
58-460	Added	7		1	75D-14	Added	999		1
58-470					84-4.1	Amended	1022		8
to					88-1	Amended	833		
58-481	Added	1027		14	90-21.5	Amended	863		4
58-490					90C-1				
to					to				
58-498	Added	1027		26	90C-19	Added	966		1
58-505					95-109	Repealed	990		3
to					95-110.1				
58-518	Added	1013		8	to				
58-511	Added	928		8	95-110.15	Added	990		1
59-30.1	Added	989		1	95-111.1				
59-1					to				
to					95-111.18	Added	990		2

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95-135	Amended	955	6, 7		105-278.9	Repealed	982		21
96-12	Amended	918			105-282.1	Amended	982		22
97-94	Amended	1027	54		105-309	Amended	947		9
97-100	Amended	928	13			Amended	982		23
97-130					105-320	Amended	947		6
to					105-431	Amended	937		1
97-142	Added	1013	1		105-432	Amended	937		4
97-133	Amended	928	1(a)		105-433	Amended	937		5
97-138	Added	928	1(b)		105-434	Amended	937		2
105-2.1	Amended	853	1			Amended	982		3
105-22	Amended	822	1		105-435	Amended	982		4
105-23	Amended	822	2		105-440	Amended	982		6
105-24	Amended	822	4		105-441	Amended	937		6
105-33	Amended	826	1, 2		105-446	Amended	982		5
	Amended	934	3		105-446.1	Amended	982		7
105-37	Amended	819	1, 2		105-446.3	Amended	826		10
105-37.1	Amended	819	3			Amended	982		8
105-89	Amended	826	3		105-446.5	Amended	982		9
	Amended	985	1, 2		105-446.6	Amended	937		3
105-99	Amended	985	3			Amended	982		10
105-102.3	Amended	985	4		105-449	Amended	937		9
105-114	Amended	853	1			Amended	982		11
105-120.2	Amended	854	1	3/15/87	105-449.2	Amended	826		12
105-122	Amended	826	6			Amended	937		10,
	Amended	854	1	3/15/87					13,
105-123	Amended	854	2						14,
105-125	Amended	826	4						16
105-130.2	Amended	853	1		105-449.3	Amended	937		15
105-130.5	Amended	825			105-449.5	Amended	937		7
105-130.11	Amended	826	5		105-449.9	Amended	937		11
105-135	Amended	853	1		105-449.10	Amended	937		12
105-144.2	Amended	826	7		105-449.11	Amended	937		21
105-147	Amended	826	8		105-449.14	Amended	937		8
105-149	Amended	909			105-449.16	Amended	982		12
105-163.02	Amended	947	2		105-449.19	Amended	937		17
105-163.06	Amended	947	1			Amended	982		13
105-163.1	Amended	853	1		105-449.22	Amended	826		11
105-163.1A	Amended	826	9		105-449.24	Amended	937		18
105-163.42	Repealed	820				Amended	982		14
105-164.4	Amended	925			105-449.30	Repealed	937		19
	Amended	1005				Repealed	982		15
105-164.12A	Added	901			105-449.31	Repealed	937		19
105-164.13	Amended	953				Repealed	982		15
	Amended	973			105-449.38	Amended	982		16
	Amended	982	2		105-449.39	Amended	982		17
105-164.14	Amended	863	5		105-449.42A	Amended	826		11
105-164.16	Amended	1007			105-449.47	Amended	937		20
105-197	Amended	821			105-455	Amended	955		8
105-212	Amended	853	1		105-472	Amended	934		2
105-228.3	Amended	928	12		105-486	Amended	906		2
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STATE OF NORTH CAROLINA

DEPARTMENT OF JUSTICE

Raleigh, North Carolina

October 1, 1986

I, Lacy H. Thornburg, Attorney General of North Carolina, do hereby certify that the foregoing 1986 Interim Supplement to the General Statutes of North Carolina was prepared and published by The Michie Company under the supervision of the Department of Justice of the State of North Carolina.

LACY H. THORNBURG
Attorney General of North Carolina

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